Chapter 5
The Standards for Review:
Review Board "Common Law"

A. Introduction and Background

Section 6 of the *President John F. Kennedy Assassination Records Collection Act of 1992,*[i] ("JFK Act"), established a short list of reasons that federal agencies could cite as a basis for requesting postponement of public disclosure of records relating to the assassination of President Kennedy. The JFK Act directed the Review Board to sustain postponements under Section 6 only in the "rarest cases," but beyond the statute's presumption of disclosure,[ii] the Review Board had little guidance from Congress concerning how to apply each of the grounds for postponement. This chapter explains how the Review Board analyzed and applied each of the standards for declassification.

Part A of the chapter begins with an overview of the existing law governing the federal government's release of information. In addition, Part A summarizes the Review Board's analysis and decision-making about the section 6 standards. Part B enumerates the general principles, or "common law," that the Review Board established as it applied the provisions of section 6 to 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.[v] 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 include exemptions for information that relates to the national security, information that is related to law enforcement activities, and information that would invade the personal privacy of individuals. The FOIA also allows agencies to protect information if its release would cause agencies to operate in a fishbowl. For example, agencies can withhold information that relates solely to personnel practices and reveals the deliberative process in its decision making. The FOIA further protects trade secrets, certain information relating to financial institutions, and certain geological and

individual documents. Part B 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

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[iii] ("FOIA") or wait for the records to be released under the terms of the then-current Executive Order on declassification.[iv] As of 1992, some agencies had a five year backlog in responding to FOIA requests, so members of the public waited for long periods of time to receive information that might be heavily redacted. Moreover, the Executive Order in effect in 1992--President Reagan's Executive Order 12356--was aimed more at protecting secrets than releasing information.

geophysical information. Finally, exemption b(3) of the FOIA works to exempt any information from disclosure if the Director of Central Intelligence determines that the material may not be released.

The second set of guidelines that governed the disclosure of records relating to the assassination of President Kennedy before Congress passed the JFK Act is contained in the President's Executive Order. At the time that Congress enacted the JFK Act, President Reagan's Executive Order 12356 was in effect. Executive Order 12356 was not as disclosure-oriented as Executive Order 12958. The Senate Report for the JFK Act notes that it believed that,

> Executive Order 12356, National Security Information, has precluded the release of [assassination] records. . . .
>
> [L]egislation is necessary . . . because E.O. 12356, "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. . . .[vi]

In 1995, President Clinton signed Executive Order 12958.[vii] The current Executive Order regarding declassification is significantly more disclosure-oriented than President Reagan's order. 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 more than 25 years old. The Executive Order gives agencies five years -- until April 2000 -- to declassify all *classified* information that is (1) more than 25 years old, and (2) is of permanent historical value unless the "agency head" determines that release of the information would cause one of the nine enumerated harms. The Executive Order provides for continuing protection for sources and methods where disclosure would damage the national security. It also protects, *inter alia*, information that involves diplomatic relations, U.S. cryptologic systems, war plans that are still in effect, protection of the President.[viii]

The JFK Act guidelines that governed the disclosure of records relating to the assassination of President Kennedy were detailed in section 6 of the JFK Act.[ix] The JFK Act allowed the Review Board to postpone the release of assassination records only where the agencies provided clear and convincing evidence that one of five enumerated harms would occur if the Review Board released the record *and* that the harm outweighed the public interest in disclosure. The statute allowed protection of intelligence agents and intelligence sources and methods if the agency could show that the agent, source, or method currently required protection. The statute further allowed the Board to protect the identity of living persons who provided confidential information to the government if the agency could show that disclosure of the person's identity would pose a substantial risk of harm to the person. The JFK Act allowed the

Review Board to postpone release of information if release would constitute an unwarranted invasion of personal privacy or if release would compromise the existence of an understanding of confidentiality between a government agent and a cooperating individual or foreign government. Finally, the JFK Act allowed the Review Board to protect current information concerning protection of government officials.

2. 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 12356. 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 became law, 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, and thus could not serve as the mechanism for maximum disclosure of assassination records.

First, the FOIA exempts CIA operational files from disclosure.[x] *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.[xi] *Third*, the FOIA does not apply to unpublished Congressional records.[xii] Congress found that the FOIA did not require adequate disclosure in those records that it *did* cover. Thus, Congress believed that the FOIA was not a satisfactory mechanism for guaranteeing disclosure of assassination records.[xiii]

President Clinton did not sign Executive Order 12958 until April 17, 1995--over 2 years after Congress passed the JFK Act. Clearly, the terms of the Executive Order applied to most assassination records since they were of permanent historical value *and* were over 25 years old. Even if President Clinton's Executive Order had been in effect prior to 1992, it could not have achieved the type of disclosure associated with the JFK Act. The problem with the Executive Order is that it allowed "agency heads" to make the decision to exempt records from automatic declassification provided that the "agency head" expected that disclosure of the records would result in one of the nine enumerated categories of harm. As many sections of this Report explain, the Review Board found that "agency heads" tended to be quite reluctant to release their agencies' secrets. The Executive Order, while well-intentioned, failed to provided for any independent review of "agency head's" decisions on declassification. Thus, although the Executive Order's standards for declassification appeared to be disclosure-oriented, the Executive Order failed to hold agency heads accountable for their decision-making.

The JFK Act did require agencies to account for their decisions. To ensure such accountability, Congress included four essential provisions in the JFK Act: *first*, the JFK Act presumed that assassination records may be released; *second*, the JFK Act stated that the only way that an agency can rebut the presumption of disclosure was 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 expressed the goal of obtaining maximum disclosure, the JFK Act ensured that the goal would 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 was 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."* [xiv] The statute further declared that "*only in the rarest cases is there any legitimate need for continued protection of such records."*[xv]

b. JFK Act requires agencies to provide clear and convincing evidence.

> The bill created a strong presumption on releasing documents. The onus will be on those who would withhold documents to prove to the review board and the American people why those documents must be shielded from public scrutiny.

--Senator John Glenn Chairman, Committee on governmental Affairs. (Senate Hearing 102-721, 102 Congress, 2nd Session. p. 1 (1992).

If agencies wished to withhold information in a document, the JFK Act required the agency to submit "clear and convincing evidence" that the information fell within one of the narrow postponement criteria.[xvi]

Congress 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.[xvii] The legislative history of the JFK Act emphasized the statutory requirement that agencies provide "clear and convincing evidence."

> 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.[xviii]

When agencies did present to the Review Board evidence of harm that would result from disclosure, it had to consist of 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.[xix]

The Review Board's application of the clear and convincing evidence standard is covered in more detail in Section B of this chapter. Section B 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.*

Assuming that agencies did provide clear and convincing evidence that information should be protected from disclosure, the terms of section 6 required 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."[xx] The Review Board interpreted the balancing requirement to mean that agencies had to 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 left room for discretion in evaluating the historical significance, or public interest, of particular assassination records, it was the Review Board -- not the agency that originated the document -- that was to exercise this discretion. The burden was on the agencies to make the case for postponement, not to judge the level of public interest in a particular document. 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.[xxi]

d. Segregability and substitute language.

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

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 consider carefully the scope of the term "assassination record" and to issue an interpretive regulation defining this crucial term. [xxiii] 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."

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

possible to avoid the stated harm, or "segregate" the postponed information, and (2) provide substitute language to take the place of the redaction.

3. Federal agency record groups and the standards applied to each.

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" files include FBI files on Lee Harvey Oswald's wife Marina and mother Marguerite, Oswald's friend George DeMohrenschildt, and the Oswalds' Dallas friends Ruth and Michael Paine. The FBI began its processing of the core and related files in 1993. The Review Board applied strict standards to its review of postponements in the core and related files.

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

CIA opens a 201 file on an individual when it has an "operational interest" in that person. The CIA opened its 201 file on Lee Harvey Oswald in December 1960 when it received a request from the Department of State on defectors. After the President Kennedy's assassination, the Oswald 201 file served as a depository for records CIA gathered and created during CIA's wide-ranging investigation of the assassination. Thus, the file provides the most complete record of the CIA's inquiry

in the months and years immediately following the assassination.

c. 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 be relevant to their investigation of the Kennedy assassination. In response to the HSCA investigators gained access to CIA files. Upon completion of the HSCA's work, the CIA kept separate the files that it had made available to the HSCA and retained them as a segregated collection. This collection is divided into two parts: paper records and microfilm. CIA made 63 boxes of paper records available to the HSCA staff. The paper records consist, in many cases, of particular records that CIA culled from various files. The 64th box of the CIA's segregated collection contains 72 reels of microfilm and represents the entire files from the CIA culled the paper files. Thus, in many cases, the microfilmed files contain material well beyond the scope of the HSCA investigation and may, for example, cover an agent's entire career when only a small portion of it intersected with the assassination story.

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

The JFK Act defined "assassination record" to include records relating to the Kennedy assassination that were used by the congressional committees who investigated events surrounding the assassination.[xxiv] 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 its "Segregated Collection" guidelines (explained below) to the HSCA subject files.

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

Before President Clinton appointed the Review Board, the FBI collected and began to process its administrative files relating to its involvement with 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 found records in these files that concerned topics other than the Kennedy assassination, it designated the records not believed relevant (or "NBR" as that acronym is defined *infra*) and removed them from further consideration.

f. Requests for Additional Information.

Congress included in the JFK Act a provision that allowed the Review Board to obtain additional information and records beyond those that were reviewed by previous investigations. Chapter 6 of this report explains the requests that the Review made and the assassination records designated as a result of those requests.

B. Declassification Standards

> I think today a great gulf exists between people and their elected officials. Doubts about this particular matter are a symptom of that, and so I think the purpose of this hearing is to ask some questions. Why does information need to be withheld? At this moment in time, what compelling interests are there for the holding back of information? Are there legitimate needs in this respect? Who and what is being protected? Which individuals, which agencies, which institutions are in the need of protection, and what national security interests still remain?
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> --Senator William S. Cohen. (Senate Hearing 102-721, 102 Congress, 2nd Session. p. 12 (1992).

The Review Board's primary purpose, as outlined in section 7(b) of the JFK Act, was to determine whether an agency's request for information in postponement of disclosure of an assassination record met the criteria for postponement set forth in section 6. Section 6 consisted of an introductory clause, which established the "clear and convincing evidence" standard, and five subsections that set forth the criteria under which the Review Board could 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 [agencies provide] clear and convincing evidence that [the harm from disclosure outweighs the public interest in release.]*

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 exists. [xxv] 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 agencies 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.

The JFK Act clearly required agencies to provide "clear and convincing evidence" in support of their 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

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. For example, with FBI records, the Review Board first 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" summarized the FBI's general policy preferences for 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 for FOIA cases. 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 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 ultimately prevailed.

creates an understanding on each side as to the basis and reasons for their respective recommendations and determinations." [xxvi] The Review Board did consult with government offices to determine fair, efficient, and reasonable procedures for presenting evidence.

1. "Rule of Reason." Of course, some assassination records are of greater interest than others. With regard to records that had a close nexus to the assassination, the Review Board strictly applied 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 HSCA's report on CIA activities in Mexico City--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 amount 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 Warren Commission records. The postponement-by-postponement review proved to be an educational process for the Board members. The Board members were a group of five citizens who were selected not for their familiarity with the subject of the assassination, but for their professional competence in history and law. Thus, 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." 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. (See illustration.) 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 through reviewing individual documents, the board educated itself about the assassination.

While the Review Board did need time to educate itself and to develop its policies, the Board's pace had to increase. 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 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 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. 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. For those documents that were of little or no public interest, the Review Board modified its standards in the two ways described below.

A. "NBR" Guidelines: Records that Review Board judged were "not believed

relevant" to the assassination. 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 rarely did so.

B. Segregated Collection Guidelines: 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." 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. 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 segregated 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." The Review Board adopted revised guidelines on April 23, 1997 in an attempt to streamline the review process of postponements in the segregated collections, and ensure a page-by-page review of all documents in the segregated collections. The guidelines state, "...even with the assumption that our operations may be extended through Fiscal Year 1998, the Review Board cannot hope to complete review of postponements in the Segregated Collections under the current method of review." 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. The Review Board usually protected the names of CIA Officers who are still active or who retired under cover and are now living in potentially risky circumstances. The Review Board usually released names of deceased CIA and the names of CIA officers whose connection to the CIA was public The CIA initially believed that the solution to the above-referenced challenge was for the Review Board to agree with CIA that the names of all CIA officers within the JFK Collection should be postponed until the year 2017. The CIA supported its request for blanket postponements with two arguments: *first*, since many CIA employees are "under cover," CIA argued that its intelligence gathering capability depended on employees maintaining cover, and *second*, even though the majority of CIA officer names in the Collection are names 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.

ii. Commentary. Large numbers of names of CIA officers appeared in the CIA's assassination records. The Review Board and the CIA had to confront the challenge presented by the statute, which requires name specific evidence, but gathering such evidence proved to be time-consuming and burdensome for the CIA and the names of CIA officers in the records were not always relevant to the assassination. The statute, of course, states that the only way that the Review Board could protect names of intelligence agents was if the CIA provided clear and convincing evidence that the CIA officer's identity "currently" required protection knowledge. When the Review Board postponed names, it usually substituted the phrase, "CIA Employee."

Mindful of the JFK Act's requirement that agencies provide name-specific evidence, the Review Board would not agree to CIA's request for blanket postponements of CIA names. Instead, the Review Board requested CIA to provide evidence for each name.

The CIA, however, was reluctant to produce name specific evidence and, on occasion, CIA failed to furnish evidence when it promised to do so. CIA's initial refusal to supply evidence on individual names was met, not with the wholesale release of names by the Board, but with a firm insistence that the Agency meet the requirements of the Act. The Review Board released the names of a few individuals who were of central

importance to the assassination story early in the process, but gave the Agency a number of additional opportunities to provide specific evidence on other names.

For example, in December 1995, the Review Board designated one day of their meeting "name day," and invited CIA to provide evidence for names the Review Board had encountered in CIA records during the previous six to seven months. On that day, CIA again requested the Review Board to sustain the postponement of all CIA names. By May of 1996, the Review Board had decided what evidence it believed would meet the clear and convincing evidence standard. If the CIA provided evidence that the individual retired under cover or abroad or evidence that the individual objects to the release of his or her name when contacted (CIA agreed to attempt to contact former employees), the Review Board would protect the CIA officer's name. Moreover, where the CIA specifically identified an ongoing operation in which the individual was involved or CIA could demonstrate that the person was still active with CIA, the Review Board would protect the name. Because the JFK Act required the Review Board to balance the potential harm from disclosure against the public interest in release, there were cases in which the Review Board determined that, even though the CIA had provided adequate evidence, the Review Board believed that the individual was of sufficiently high public interest that it would require the CIA to provide additional evidence before it would consider protecting the name. In these cases, the Review Board asked CIA to provide information on the employee's current status, his or her location, and the nature of the work he or she did for the CIA.

The Review Board did not want to jeopardize the personal safety of individuals and gave CIA more time to provide evidence. The Board set other name days were set in May 1996 and May 1997. As deadlines for submission of evidence approached, CIA agreed to release some names, but in most cases, continued to offer less than satisfactory evidence on those they wished to protect. Gradually the CIA did begin to provide supporting evidence of the postponement of individual names.

The Review Board determined that names were of high public interest when the CIA officer at issue had a substantive connection to the assassination story or where the CIA officer's name appeared in CIA's Oswald 201 file. By July of 1997, the Review Board had determined that where CIA officer names did not fit within one of the "high public interest" categories, it would require CIA to provide significantly less evidence in support of its requests for postponement. Given the large number of CIA officer names in the CIA records, the Review Board determined that it had to adopt the practical high public interest/low public interest approach, particularly since it had limited time and resources available to complete its own review of CIA records. The Review Board would have preferred to review each name at the same high level of scrutiny that it used to review names of high public interests. On the other hand, the Board's approach compelled CIA to release many more names than they would have desired.

b. "John Scelso" (pseudonym).

i. Review Board guidelines. The Review Board protected the true name of the individual known by the pseudonym of John Scelso until May 1, 2001 or three months after the decease of the individual, whichever comes first.

ii. Commentary. The CIA employee who was head of CIA's division "Western Hemisphere 3" during the period immediately after the assassination of President Kennedy testified before the HSCA under the "throw-away" alias John Scelso. His true name appears on hundreds of documents in the JFK collection, many of which were the product of the Agency's extensive post-assassination investigation that spanned the globe. In reviewing this particular name, the Review Board's desire to satisfy the public's interest in release clashed with the CIA's strong evidence in support of postponement. Initially, the Board was inclined to release Scelso's true name, but the Agency argued convincingly against release. CIA provided evidence on his current status of the individual, shared correspondence sent by him, and even arranged an interview between him and a Review Board staff member. As an interim step, the Review Board inserted his prior alias "Scelso" as substitute language. Then, at its May 1996 meeting, Board members determined to release "Scelso's" true name in five years or upon his death.

c. Information that identifies CIA officers.

i. Review Board guidelines. For specific information that, if released, would reveal the identity of an individual CIA officer that the board had voted to protect, the Review Board protected the information.

ii. Commentary. Whenever the Review Board voted to protect the identity of an individual throughout federal agency assassination records, it had to be realistic enough to realize that some information about individuals is so specific that release of the information would reveal the individual's identity. Examples of specific identifying information include home addresses, birth dates, job titles, names of family members, and other less obvious, but equally revealing pieces of information.

d. Names of National Security Agency employees.

i. Guidelines. The Review Board protected the names of all National Security Agency employees that it encountered. The Review Board would have considered releasing names of National Security Agency employees if it determined that a particular name was extremely relevant to the assassination.

ii. Commentary. Due to the nature of NSA information, few NSA employee names appeared in NSA's assassination records. Even though the Review Board did not often encounter NSA employee names, it did have to vote on those names that it did confront. NSA's policy of not releasing the names of its employees conflicted with section 6(1)(A) of the JFK Act that presumed release of such information unless NSA could prove that individual NSA employee names required

protection. NSA argued that the release of any names, other than those of publicly acknowledged senior officials, jeopardized the potential security of U.S. cryptographic systems and those individuals. As it did with the names of other intelligence agents and officers, the Review Board considered the names of NSA officers on a document by document basis. Given the nature of NSA information, the Review Board members agreed that none of the few names which appear in the documents, and for which NSA requested protection, was of high enough public interest or central to an understanding of the assassination story, thus it protected the names.

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*
>
> *a. CIA Sources.*

i. Review Board guidelines. The Review Board handled CIA sources, assets, informants, and specific identifying information under standards similar to the Board's decisions for CIA officers. Where the Review Board believed names possessed a high level of public interest, either because the name was one that was central to the story or because assassination researchers expressed interest in the name, the Review Board subjected them to close scrutiny. 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;*

Board generally protected the identity of foreign nationals unless they were of high public interest and then the Review Board required CIA to provide specific evidence in support of its claimed postponements. The Review Board protected domestic sources, assets and informants where CIA demonstrated that release would jeopardize ongoing operations or harm individuals. If CIA did not provide evidence of one of the two above-referenced harms, the Review Board released the name at issue. In addition, where the public already knew the

names of individuals who were connected to the CIA, especially if the government had previously released the information, the Review Board released the information.

ii. Commentary. The Review Board addressed the issue of whether to postpone or release source names at the same time that it considered CIA employee names. and encountered the same problems as in the review of CIA employee names. As with CIA employee names, CIA was reluctant to provide name-specific evidence to the Review Board opting instead to offer general principles supporting CIA's request that the Review Board redact all names.

The Review Boards ultimately decided to protect the names of sources, assets, and informants in cases where the identity of the source is of reduced public interest because it understood that most CIA sources live in countries other than the U.S. and were more likely to face harm if the Board disclosed their relationship with CIA. In those records where the source's identity was of possible public interest in relation to the assassination story or was important to understanding information related to the assassination, the Review Board required the CIA to provide additional evidence to support the protection of the source's identity.

When the Review Board postponed release of source names, it did so for ten years except in cases where a foreign government might accuse the source of committing treason because the source assisted the CIA. In those cases, the Review Board protected the source's name and identifying information until 2017.

b. CIA pseudonyms.

i. Review Board Guidelines. With only a few exceptions, the Review Board released the pseudonyms of individuals. In some instances, the Review Board used pseudonyms as substitute language for the individual's true name.

ii. Commentary. Very early in the review process, the Review Board determined that, since pseudonyms were a sort of "throw away" identity for individuals who were under cover, the Review Board could release the pseudonym without harming the individual. The CIA did not object to the Review Board's policy to release pseudonyms. The CIA did identify several pseudonyms that it believed to be particularly sensitive, and demonstrated to the Review Board with clear and convincing evidence release of those pseudonyms would do irreparable harm.

c. CIA crypts.

i. Review Board guidelines. The Review Board released some CIA "crypts" -- code words for operations and individuals. The Review Board also generally released CIA "digraphs" -- the first two letters of a crypt that link a particular crypt to a particular location. CIA often created crypts to refer to other U.S. government agencies, so, for example, the FBI was "ODENVY." The Review Board made a blanket decision to release all U.S. government crypts. The Review Board nearly always released CIA crypts where those crypts denoted operations or individuals relating to Mexico City or Cuba.

(The digraph for Mexico City was "LI," and for Cuba, it was "AM.") For all other crypts, the Review Board protected the digraph and released the remainder of the crypt. The Review Board established a few exceptions, and where exceptions applied, the Board required CIA to provide crypt-specific evidence of the need to protect.

ii. Commentary. The Review Board had to determine whether it believed that release of CIA crypts would harm CIA operations and individuals. Section 6(1)(B) and (C) of the JFK Act provided the standard for postponement of CIA crypts. The Review Board required the CIA to provide crypt-specific clear and convincing evidence that CIA currently used, or expected to use the crypt and that CIA had not previously released the crypt. Thus, in order to convince the Review Board to sustain postponements, the Board required CIA to research each crypt to determine whether CIA still used the individual or the operation and provide that evidence to the Review Board.

As it did with CIA agent names, CIA initially requested the Review Board to sustain postponements of all CIA crypts -- even "ODENVY" -- the CIA's old crypt for the FBI that CIA had already released in other CIA records. CIA argued that its use of crypts was an operational method that should remain secret, even though CIA had replaced most of the crypts at issue years earlier. CIA believed that if the Review Board released the crypts, researchers would be able to piece together the records and determine the identity of operations and individuals. CIA further argued that the burden of locating evidence on each crypt was too heavy.

The Review Board, conversely, believed that CIA conceived crypts as a code to hide the identity of an operation or an individual, and so the Review Board could release the crypts and not compromise the operation or the individual. As with CIA agent names, the Review Board allowed the CIA ample time to locate evidence on each crypt. Finally, the Review Board released a group of CIA crypts from Mexico City with the "LI" digraph. CIA eventually agreed to release its crypts and digraphs in assassination records, and the Review Board eventually agreed to protect certain sensitive crypts.

The Review Board recognized that it could not conduct a crypt-by-crypt review for every CIA record that it encountered. CIA records contains hundreds of thousands of crypts. Given the need to finish its work, the Review Board decided that, for all crypts *except* the "LI," "AM," and "OD" series crypts, it would agree to postpone the location-specific digraph and release the actual crypts. Thus, the Review Board released most crypts in the collection and the most relevant digraphs. The Review Board did make three exceptions to its general rule: it protected the digraph in non-core files when (a) the crypt appeared next to a true name that had been released, and (b) when the crypt appeared next to specific identifying information, and (c) when CIA provided clear and convincing evidence that the Review Board should protect the digraph.

d. CIA Slugline.

i. Review Board guidelines. "Sluglines" are CIA routing indicators that consist of two or more crypts, that appear above the text in CIA cables. The Review Board released CIA sluglines according to the same criteria it applied to crypts and digraphs.

ii. Commentary. The Review Board released CIA sluglines because the Agency never offered the Review Board any evidence to explain why the board should not release them. An example of a CIA slugline is the slugline "RYBAT GPFLOOR." "RYBAT" is a CIA crypt that meant "secret," and GPFLOOR was the crypt that CIA gave Lee Harvey Oswald during its post-assassination investigation. CIA initially asked the Review Board to postpone the CIA slugline even where CIA had released the individual crypts that made up the slugline elsewhere. For example, in the case of "RYBAT GPFLOOR," the CIA agreed to release the crypt "RYBAT" in two places elsewhere in the document at issue, and the CIA agreed to release the crypt GPFLOOR when it appeared in the text. CIA told the Review Board that it could not, however, release the slugline "RYBAT GPFLOOR." CIA offered no substantive arguments to support its request for postponement of the slugline. Given the statute's demand that CIA provide clear and convincing evidence in support of its requests for postponement, the Review Board voted to release CIA sluglines.

e. CIA surveillance methods.

i. Review Board guidelines. The Review Board generally released CIA surveillance methods, the details of their implementation and the product produced by them where the Review Board believed the methods were relevant to the assassination. The Review Board sustained postponements of CIA surveillance methods where CIA provided convincing evidence that the method still merited protection. Where the Review Board sustained the CIA's requests for postponement of surveillance methods, it substituted the language, "surveillance method," "operational details," or "sensitive operation."

ii. Commentary. As with all of its sources and methods, CIA initially requested the Review Board to postpone all of its surveillance methods across the Board since, CIA argued, CIA currently conducts surveillance operations. The Review Board, on the other hand, believed that it was not a secret that CIA currently conducts surveillance operations. Moreover, the Review Board did not believe that its votes to release CIA surveillance methods in Mexico City in 1963 would jeopardize current CIA surveillance operations. Finally, the Review Board recognized that certain CIA surveillance operations in Mexico City in 1963 were already well-known to the public because the U.S. government had disclosed details about those operations. CIA surveillance, particularly telephone taps and photo operations, was a major element in the story of Oswald's 1963 trip to Mexico City.

CIA surveillance, particularly telephone taps and photo operations, was a major element in the story of Oswald's 1963 trip to Mexico City. The Board, therefore, concluded that the public interest in disclosure far

outweighed any possible risk to national security and directed release of the information. However, in records that CIA proved did contain information about current operations, the Review Board voted to postpone the information.

f. CIA installations.

i. Review Board guidelines. The Review Board used date "windows" within which it released the locations of CIA installations where the location was relevant to the assassination. Specifically, the Review Board released the location of CIA installations relating to Mexico City during the time period 1960-1969. Likewise, the Review Board generally released the location of *all* CIA installations that were relevant to the assassination during the time period between the date of the assassination -- November 22, 1963 -- and the date that the Warren Commission issued its report in October 1964. Finally, the Review Board generally released the location of *all* CIA installations that appeared in Oswald's 201 file during the time period January 1, 1961 through October 1, 1964. The Review Board did grant CIA a few exceptions to its general rule, and except for the specific time When the Review Board began to vote to release the location of additional CIA installation locations, the CIA did object, but did not offer evidence of the harm to national security that it believed would result if the Review Board disclosed the information. The CIA threatened to appeal to the President to overturn the Review Board's votes, but the Review Board's position was that the JFK Act required release of information where CIA did not provide convincing evidence to support their windows described above, the Review Board protected all information that identified CIA installation locations.

The Review Board created substitute language for its postponement of CIA installations that will allow researchers to track a particular CIA installation through the JFK collection without revealing the city or country that is its location. To accomplish this, the Review Board divided the world into five regions: Western Hemisphere, Western Europe, Northern Europe, East Asia/ Pacific, and Africa/ Near East/ South Asia. Then the Board added a number to refer to each different location in the region. Thus, "CIA Installation in Western Hemisphere 1" serves as a place holder for a particular installation in all CIA assassination records.

ii. Commentary. Initially, the Review Board released CIA installation locations in CIA documents relevant to Oswald's visit to Mexico City. CIA did not raise significant objections to the Review Board's release of its installations in these records.

postponements. The Review Board did allow the CIA ample time to gather and present its evidence to support its requests for postponements as both the CIA and the Review Board hoped to avoid a CIA appeal to the President.

Ultimately, the CIA determined that it would trust the Review Board members with the information that Review Board required to sustain the location of a small number of CIA installations. In an effort to balance

high public interest in the location of CIA installations and the need to protect certain installations, the Review Board decided to establish "windows" within which it would release CIA installation locations.

The CIA never did appeal a Review Board vote to the President.

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

i. Review Board guidelines. CIA cable, dispatch, and field report "prefixes" are identifiers that CIA uses on its communications to indicate the installation that generates a particular message. Where the Review Board had voted to release the location of a particular CIA installation, the Review Board also voted to release CIA cable, dispatch, and field report prefixes that the installation generated. Likewise, the Review Board protected cable, dispatch, and field report prefixes where it voted to protect the location of the CIA installation.

The Review Board replaced the prefixes that it voted to protect with similar substitute language that it used for CIA installations. An example of substitute language for CIA prefixes is: "Cable [or 'dispatch' or 'field report] Prefix for CIA Installation in Western Hemisphere 1."

ii. Commentary. Once the Review Board voted to release the location of a particular CIA installation, the Review Board and CIA did not disagree that the Board should release cable, dispatch and field report prefixes.

h. CIA job titles.

i. Review Board guidelines. The Review Board voted to release CIA employee's job titles except when the Board's disclosure of the title might reveal the identity of an individual that CIA stated required protection or where the Board's disclosure of the title might reveal the existence of a CIA installation that the Review Board voted to protect.

ii. Commentary. Although the Review Board did not believe that it should vote to protect CIA job titles, standing alone, it sometimes voted to protect the titles where the title revealed other information that the Review Board had voted to protect.

i. CIA file numbers.

i. Review Board guidelines. CIA organizes many of its files by country and assigns "country identifiers" within particular file numbers. The Review Board released nearly all CIA file numbers that referred to Mexico City. The Review Board protected the "country identifiers" in CIA file numbers for all other countries. The Review Board released country identifiers "15" and "19." The Review Board generally released all CIA "201" or "personality" file numbers where the files related to the assassination.

ii. Commentary. The CIA rarely objected to the Review Board's release of it file numbers.

j. CIA domestic facilities.

i. Review Board guidelines. The Review Board released references to

domestic CIA facilities where the CIA has previously officially released the existence of the facility. The Review Board did not release information that would reveal the location of domestic CIA facilities where the CIA provided evidence that the facility was still in use.

ii. Commentary. The Review Board rarely encountered the issue of whether to release the location of CIA domestic facilities in assassination records, as CIA officially acknowledges most of its domestic facilities. When the Review Board did vote to postpone the location of CIA domestic facilities, they required the CIA to provide extensive evidence as to why the CIA had to keep the location of those facilities secret.

k. CIA official cover.

i. Review Board guidelines. CIA "official cover" is a means by which a CIA officer can operate overseas in the guise of an employee of another government agency. In *Congressional documents*, the Review Board released general information about official cover but protected specific details. With regard to *executive branch documents*, the CIA convinced the Review Board that, while Congress might reveal information about official cover, the executive branch does not generally reveal information about official cover because to do so would damage the national security.

ii. Commentary. The CIA argued that it currently uses alias documentation and that aliases are vital CIA's performance of its intelligence operations. The CIA also argued that the Review Board's release of specific Thus, the Review Board sustained CIA's postponements regarding official cover in executive branch documents unless the U.S. government had previously officially disclosed the information at issue.

The Review Board inserted the phrase "official cover" as substitute language when it postponed such information.

ii. Commentary. The Review Board initially considered the issue of official cover to be an "open secret" that was well-known to the public. Thus, they were loathe to withhold such obvious information. The CIA, however, supported its strong objections in briefings and negotiations with the Board, and eventually convinced the Review Board that the harm in releasing information about official cover outweighed any additional information that assassination researchers might gain from knowing details about official cover.

l. Alias documentation.

i. Review Board guidelines. CIA employees and agents use aliases and the CIA creates documentation to support their employees' and agents' aliases. The Review Board released information that revealed that CIA employees and agents used aliases. The Board protected specific details about how CIA documents particular aliases.

information about alias documentation would not be useful to assassination researchers. The Review Board members accepted CIA's arguments, primarily because they agreed that the public interest in the specific details about alias

documentation was low. The Review Board determined that it did not want the CIA to spend a large amount of time gathering evidence in support of postponements that were of low public interest and thus, it did not require the CIA to provide evidence in support of every postponement relating to alias documentation.

[Bob will include a section on CIA foreign liaison issues.]

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

i. Review Board guidelines. The Review Board evaluated 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 connection with the FBI was 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 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 that explained the particular harm that the FBI expected the asset to face if the Review Board voted to disclose his or her identity. 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 Review Board disclosed his or her relationship with the FBI. 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.

public interest in the name of the asset was high. Where the human source was a *United States citizen interacting with other United States citizens*, the Review Board tended to evaluate the release of the source's name 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, and (2) disclosure of intelligence sources may subject the sources, their friends, and their families to physical harm, ridicule, or ostracism.

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

ii. Commentary and overview of foreign counterintelligence 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 in the records without jeopardizing operations that still require protection.

In spring 1996, the Review Board considered and voted on a group of FBI records relating to the FBI's foreign counterintelligence activities. In response to the Review Board's requests for evidence on the foreign counterintelligence records, the FBI had provided its "position paper" on foreign counterintelligence activities. In its 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 of intelligence activities was that disclosure of specific information describing intelligence activities would reveal to hostile entities the FBI's targets 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.[xxvii]

A. The FBI's May 1996 Appeals to the President. On May 10 and 28, 1996, the FBI appealed to the President to overturn the Board's vote on 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

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 some foreign counterintelligence information. The Board's primary reason for releasing the records was its belief that the FBI's evidence did not enumerate specific harms that would result from disclosure.

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 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 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.

B. Post-appeal decision making. After more negotiations, the Review Board and the FBI agreed to release most information regarding its foreign counterintelligence 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 FBI's proposed redaction did not meaningfully contribute to the understanding of the assassination, the Review Board allowed the FBI to postpone direct discussions of foreign counterintelligence 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 revealed that the FBI had an investigative interest in Communist Bloc countries' diplomatic establishments and personnel. Likewise, 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 1996, appeals to the President, the overriding issue was whether the FBI could, in 1996, keep secret its 1960s 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 usually released nearly all general information and some specific information (or operational details) regarding the FBI's non-current technical sources where the source provided information 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 was

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 was still properly classified pursuant to the current Executive Order. The Review Board released classified symbol and file numbers for technical sources if the number had been previously released in a similar context, or if the source was of significant interest to the public. The Review Board agreed that the phrases, "source symbol number" and "source file number" would provide adequate substitute language.

Even for that material that did not contribute in a meaningful way to the understanding of the assassination, the Review Board still released as much information as possible about the FBI's use of technical sources in its foreign counterintelligence activities against non-communist bloc countries. In these less relevant cases, 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 proved, (1) that the source currently required protection, and (2) that the U.S. government had 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."[xxviii]

The Review Board believed that he 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 was, 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 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 foreign counterintelligence 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 the identity of its electronic surveillance targets were secret. 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.

Although the President did not make a decision, the FBI ultimately agreed to release general information acknowledging that the FBI had technical sources against Communist Bloc targets during the Cold War period.

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 FBI had released a particular classified file number 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 numbers were *not* entitled to protection. In its May 28, 1996, appeal on foreign counterintelligence records, the FBI argued that if the Review Board released classified file numbers for terminated operations, that release would prompt people to file FOIA requests for the underlying files, "resulting inevitably in more and more information from the file being released." [xxix] In its 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."

The President did not decide the issues on appeal, but the FBI ultimately agreed to release some non-current classified file numbers.

r. FBI mail cover in foreign counterintelligence 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 on this issue 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 foreign counterintelligence activities -- mainly that foreign counterintelligence 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 -- in the mid-1970s. 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 during the cold war era.

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

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 the U.S. government had previously disclosed this method to the public, it should not protect the information. 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 President 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.

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 a convincing argument that the method remained a secret. The White House did not make a decision on the appealed records. Ultimately, the Bureau agreed to release the documents at issue.

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 one 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 voted to release the record because the FBI had not offered adequate evidence in support of its redactions and because it was important to the story.

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 response 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."[xxx]

The Review Board 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.

u. Operational details concerning Department of Defense operations.

i. Review Board Guidelines. In many military records, particularly Joint Chief of Staff records and Army records, the Review Board often upheld agency requests for postponements under Section 6(1)(C) of the JFK Act. The Review Board protected details of force deployments (*i.e.*, numbers of ships, aircraft, troops, warheads, etc.), details concerning precise targeting information, details of proposed operational activities or OPLANs, and information that revealed real-world exercise situations or real-world threat environments. The Department of Defense had to provide evidence that disclosure of the information today, because the similarity of some currently proposed combat operations or OPLANs, was so close to those used in the documents in question, would demonstrably impair the national security of the United States.

The Review Board substituted the phrase "operational details" wherever it agreed to the above-referenced postponements.

ii. Commentary. The Review Board encountered operational details when it reviewed the first large groups of military records on Cuba and Vietnam policy.

v. National Security Agency sources and methods.

i. Review Board Guidelines. The Review Board generally protected National Security Agency sources and methods such as targeting, intercept, and transmission indicators, internal production indicators, and routing and dissemination information unless the Review Board determined that the specific source or method was important to an understanding of the assassination or events surrounding the assassination

ii. Commentary. With regard to signals intelligence (SIGINT), NSA informed the Review Board that specific information revealed in raw intercept traffic or intercept reporting can provide a great deal of information to foreign entities on U.S. government targeting, intercept, and cryptographic capabilities which could harm current SIGINT capabilities. To reveal to a foreign government or entity that the U.S. government was capable of targeting and reading some or all of their communications, even in 1963, could provide information to that government or entity as to whether NSA has the targeting, intercept, and cryptographic capabilities to read similar communications today. NSA's position was that it is often not the basic information

contained in the intercept but rather the fact of the intercept or the specific technical details of how and from where the intercept was acquired that requires protection. The Review Board protected NSA information such as specific details like transmission times, transmission methods, geographic locations, and government buildings or military unit numbers
where the Board determined that such information was not important to an understanding of the events surrounding the assassination.

ii. Commentary. NSA's position is that the nature of intercept traffic is such that it picks up a wide variety of information and a significant amount of non-relevant information. NSA summaries of intercept traffic usually examine a wide variety of intercepts on many different subjects worldwide. Thus, the Review Board protected blocks of information where it believed the information did not appear to be relevant to an understanding of the Kennedy assassination story. The Review Board developed substitute language that described NSA information that it voted to postpone.

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

w. National Security Agency intercept traffic.

i. Review Board Guidelines. The Review Board generally protected National Security Agency intercept traffic unless the Review Board determined that the specific source or method was important to an understanding of the assassination or events surrounding the assassination

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 two exceptions to the Review Board's policy to release records with privacy postponements were social security numbers and information about prisoners of war. 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 protected social security numbers throughout assassination records. Likewise, the Board protected significant amounts of information in files of prisoners of war, as explained below.

In the segregated collections, the FBI rarely requested that the Review Board sustain privacy postponements, and so the FBI unilaterally released the information that would fall into the category of "personal privacy" information. In some segregated collection records, the Review Board agreed

to postpone personal privacy information where agencies provided 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 name in question appeared in the file of an organized crime figure who was himself only of marginal relevance to the assassination story.

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 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 about a prominent Warren Commission critic that the FBI requested be postponed on personal privacy grounds. The Review Board carefully considered the privacy concerns involved and requested that the President uphold the Board's decision to release the important information in the record. As of this writing (August 1998), the White House had not resolved the issues on appeal.

b. Prisoner of War Issues

i. Review Board Guidelines. Military records that contained information regarding Korean War prisoners contained issues of personal privacy that the Review Board resolved as follows. The Review Board determined that it would release the name of the POW subject of interest, dates and basic facts of his imprisonment, any documents describing or quoting written or oral statements made by the POW subject of interest for the imprisoning authority during his confinement, and debriefing statements the POW subject of interest made about himself, or any statements others made about him. The Review Board agreed to postpone until the year 2008 personal identifiers of both the subject of interest and all other individuals mentioned in the subject's debriefing file (*e.g.*, date and place of birth and military service number), the names of those who made statements about

the subject of interest during debriefings, and all statements made during debriefings about POWs *other than the subject of interest.*

ii. Commentary. The Review Board was eventually confronted with the challenge of deciding whether, and how, privacy postponements requested under Section 6 (3) of the JFK Act would be applied to Korean War POW records in general, and specifically, to POW debriefing records, in cases where the Review Board deemed the individual at issue to be relevant The Army requested that the Review Board postpone information for 10 years, until 2008, on the basis of its belief that most surviving POWs from the Korean conflict would be deceased by that time. The subject of POW records from the Vietnam war or other conflicts did not come before the Review Board, but the Army informally informed the staff that they were extremely hesitant to apply any acceptable release date to Vietnam-era records. If any Vietnam-era POW records had been declared assassination records, presumably the year 2017 would have been applied as the release date by the board to the postponed portions of each record.

c. Names of individuals in Secret Service "threat sheets."

i. Review Board Guidelines. Because of high public interest in the information, the Review Board voted to release the identities of individuals who threatened President Kennedy even where the Secret Service maintained mental health records and other personal information concerning such individuals.

to the assassination. Initially, the Army and the Defense Prisoner of War/Missing Personnel Management Office (DPMO) requested that the Review Board sustain postponements of *all* prisoner of war debriefing records on privacy grounds. Ultimately, the Review Board and the military came to agreement that the Review Board could release the most relevant information in POW records without causing an unwarranted infringement on personal privacy.

ii. Commentary. The Secret Service kept records on individuals whom the Secret Service's Protective Research Section considered to be potential threats to President Kennedy, Vice President Johnson, and their families, between March and December 1963. HSCA staff member Eileen Dinneen reviewed the Secret Service files and kept detailed notes on the material that she reviewed. Dinneen's documents identified the names of the individuals, and contained condensed information about their personal background and affiliations. In some cases, the documents contained brief information about an individual's mental health history. Although the Secret Service did not oppose the release of the text of these documents, it argued that many of the names should be postponed pursuant to Section 6(3) of the JFK Act as an "unwarranted invasion of personal privacy."

The Review Board afforded the Secret Service the opportunity to present clear and convincing evidence as to why the names in the documents should be postponed. Through written submissions and oral

presentations, the Secret Service primarily offered policy reasons in support of its arguments for postponement of the names. After carefully considering the Secret Service's arguments, the Review Board determined that the Secret Service had not met its statutory burden of proof by "clear and convincing evidence," and voted to release four records, including names, in April 1998.

The Secret Service appealed the Review Board's decision to the President, and included with their appeal numerous letters from mental health professionals. The Secret Service enlisted the assistance of the mental health community in defending its ability to cooperate with that community in performing its duty of protecting government officials. The Secret Service had not provided the Review Board with such letters when it requested that the board protect the names that it provided to the President. In its reply to the Secret Service's appeal, the Review Board argued that the Secret Service failed to meet its statutory burden of proof with respect to the postponement of these names, and urged the President to release these historically significant documents in full.[xxxi] As of this writing (August 1998), the White House had not made a decision as to whether to uphold or overturn the Review Board's votes. The Review Board believes that the records, including the names, should be opened and strongly urges the President to uphold the Review Board's decisions.

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. Review Board 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 a 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

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. The FBI further explained that, whether or not the FBI expressly promised to keep informant names confidential, they had a "moral contract" with people who provided the FBI with 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.

informant postponements. The FBI initially cited sections 6(2) and 6(4) in support of informant postponements. Section 6(2) clearly required that the Bureau prove that the informant was living and that the informant faced a substantial risk of harm if Review Board released the information. Because section 6(2) required 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, referred to both subsections in support of informant 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.

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." 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 Review Board released the name. If an informant symbol number in a particular record had already been released in a context where the same informant symbol number provided the same information as in the record at issue, the Review Board released the symbol number.

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.

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 maintained and checked an informant card file that tracked those informant names and symbol numbers that had 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.

ii. 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 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) required 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 lacked 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) suggested to the Review Board that the individual did not have an ongoing relationship with the FBI. To the extent that the FBI believes that a particular "protect identity" source did have an ongoing relationship with the FBI, it provided evidence to the Review Board of the relationship. Without the benefit of such evidence, the Review Board assumed that "protect identity" sources were not sources with an "understanding of confidentiality currently requiring protection." The Review

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."[xxxii]

Board learned that FBI agents often offered confidentiality as a matter of course to interviewees, whether or not the individual requested or required 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. Review Board 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) 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.

the employee requested confidentiality, or (2) the employee's providing the information involved a breach of trust (*e.g.*, a phone company employee who gave 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 release unilaterally the identities of such individuals.

d. Deceased informants.

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

ii. Commentary. A "Named informant" is an individual whose name appeared in assassination records and who had some type of ongoing confidential 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 fell 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 could have shown 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.

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 asked an informant for information on a particular topic and the informant reported that he or she has no information to provide, the FBI called the contact a "negative contact." Where the FBI adequately identified the "negative contact" informant as still living, 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. An informant was "adequately identified as still living" if the FBI identified him or her 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.)

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.

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."

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.)

ii. Commentary. The Review Board's decision making with regard to "positive contact" informant postponements involved an evaluation of some combination of the following factors:

> (A) the significance of the information that the informant provided to understanding of the assassination;
>
> (B) the importance of the identity of the informant to assessing the accuracy of the reported information; and

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

i. Review Board guidelines. "Positive contact" informants 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.

> (C) the significance of the threat of harm to the informant from disclosure, considering the following:
>
> (1) whether the informant is still living, and if so, whether the informant still lives in the same area;
>
> (2) the amount of time that has passed since the informant last provided information;

(3) the type of information the informant provided;

(4) the level of confidentiality that existed between the FBI and the informant at the time that the informant provided the information; and

(5) 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.

The non-routine exception to the general rule arose in documents in which the unredacted information in the document *unambiguously* identified the informant. Such documents were not routine because the Board did not agree to protect the numeric portions of the informant's symbol and file number in a document that otherwise revealed the informant's identity.

g. FBI informant symbol numbers and file numbers.

i. Review Board guidelines. As a general rule, the Review Board routinely agreed 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 had not already been made public. The Review Board used the phrases "informant symbol number" and "informant file number" as substitute language.

Routine exceptions to this rule occurred 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 considered the symbol number to be specific information that might identify an informant*; Second*, the FBI agreed 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* c. FBI Informants: Negative Contacts.)

ii. Commentary. When the FBI had an informant who provides "valuable and sensitive information to the FBI on a regular basis" quoting FBI position paper, the FBI may have assigned a "symbol number" to the informant. The informant did not know his or her symbol number. Rather, the symbol number was an internal number that allowed 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 consisted of three parts -- the prefix indicated the field office to which the informant reported (*e.g.* "NY" for New York, "DL" for Dallas, "TP" for Tampa), the numeric portion corresponded directly to a particular informant, and the suffix indicated whether the informant usually provided the FBI with information about criminal (C) or security (S) cases. In longer, formal FBI reports from field offices to headquarters, where many informants were used, the FBI added yet another layer of security to the informant's identity by assigning temporary symbol numbers (T-1, T-2, etc. . . .).

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

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.

6. 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;*

a. Foreign liaison postponements in the FBI files.

i. 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 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 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.

ii. 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.

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 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. 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.

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 If the Review Board adopted the same policy on marginally relevant foreign government information in the segregated collections that it followed for records more closely 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.

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 requested the State Department to approach the foreign government directly. Diplomatic channels proved to be a time-consuming way to release records. As of this writing (August 1998), the State Department was still awaiting responses from some foreign government officials as to whether the government could release their information in FBI records. The State Department assured the Review Board that it would continue to pursue release of this information even after the Review Board terminated its operations on September 30, 1998, and provide the information to the JFK Collection when it received decisions from the foreign governments at issue.

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 was 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.

7. 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.*

To date, the Secret Service has not relied on Section 6(5) of the JFK Act to support any requests for postponement of records.

C. JFK Act Exemptions

1. Tax Return Information

The Review Board encountered a wide variety of tax return information in its review of assassination records. Although current federal law prohibits the IRS and other federal agencies from disseminating tax return information, in the 1960s, the IRS often shared its information with law enforcement agencies including the FBI and investigative bodies such as the Warren Commission. The Warren Commission, in particular, collected tax data on many of the individuals that it studied, including Lee Harvey Oswald.

When Congress was considering the JFK Act, the IRS requested that the JFK Act trump current federal law protecting tax return information and allow the IRS to release tax return records relating to the assassination of the President. Congress refused to allow the IRS, or any other federal agency, to disclose tax return information. Thus, section 11(a) of the JFK Act reads, in relevant part,

> When this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law *(except section 6103 of the Internal Revenue Code)* . . .that would otherwise prohibit such transmission or disclosure. . . .

Section 6103 is the section of the Internal Revenue Code prohibits federal government agencies that possess tax return information from disclosing that information.

While the Review Board understands Congressional reluctance to recklessly release the tax return information of American citizens, the Review Board is saddened that it could not make available to the public the tax return records of Lee Harvey Oswald for the years prior to the assassination. The Review Board received a number of inquiries from the public requesting that the Board release the Oswald tax returns so that the public could resolve inconsistencies in the data concerning Oswald's earnings. Although the IRS determined that the Review Board necessarily had to review tax return information in order to complete its work, it could not allow the Review Board to disclose tax return information unless Congress granted a specific exemption to the strictures of section 6103.

Thus, the Review Board recommends that Congress enact legislation exempting Lee Harvey Oswald's tax return information from the protection afforded it by section 6103 of the Internal Revenue Code, and that such legislation direct that the Oswald tax returns be released to the public in the JFK Collection.

2. Records Under Seal

Section 10 of the JFK Act allows the Review Board to identify records under seal of court and request the Attorney General's assistance in petitioning a court to lift its seal on the records. The Review Board only identified one instance where it believed that important assassination records remained under seal of court and it requested and obtained the assistance of the Department of Justice in lifting the seal on the records.

D. Appeals to the President Pending as of September 30, 1998

As of this writing (September 1998), the FBI and Secret Service appeals to the President--both relating to the Review Board's votes to release information that the agencies believed to invade privacy--were pending. The Review Board urges President Clinton to resolve the issues on appeal in a timely manner and to advise the FBI, the Secret Service, and NARA of his decision.

E. Conclusion

When it first assembled, the Review Board faced the daunting task of setting the standard for the declassification of hundreds of thousands of federal records. These records included those under the purview of the CIA's Directorate of Operations (DO), which traditionally has been exempt from declassification review. In addition to the raw intelligence material included in the DO's files, CIA records also included sensitive records from the Counterintelligence Staff, the Office of Personnel, and Security. The Board also confronted the task of reviewing records from the National Security Agency, most of which were classified at the "Sensitive Compartmented Information" (SCI) level and had never previously been subject to any review outside of NSA. The Review Board ultimately reviewed for declassification

some of the most secret records from many other agencies and offices, including FBI source files and Protective Research Section files of the Secret Service.

The Review Board received little guidance either from past governmental experience or from Congress in the legislative history behind the JFK Act. The words of Section 6 proved, however, to be of significant importance to the Review Board and for the accomplishment of its work. As applied by the Review Board, the words of Section 6 established an entirely new standard for the release of governmental information.

CHAPTER 5
ENDNOTES

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

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

iii. 5 U.S.C. § 552 (1988) (hereinafter "FOIA").

iv. President Reagan's Executive Order was in effect at the time that the JFK Act was passed. *See* Exec. Order No. 12,356, 3 C.F.R. 166 (1982-1995) (hereinafter "Executive Order 12356"). The current Executive Order is Exec. Order No. 12,958, 3 C.F.R. 333 (1995-present) (hereinafter "Executive Order 12958").

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

(b) This section does not apply to matters that are --

(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 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

(9) geological and geophysical information and data, including maps, concerning wells.

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

vii. Because the audience for this report presumably will encounter the current Executive Order more often, the standards for release of information under Executive Order 12958 are quoted. We have not quoted the standards for release of information under Executive Order 12356.

viii. *Executive Order 12958, 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.

ix. *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.

x. 5 U.S.C. § 552(b)(3).

xi. 5 U.S.C. § 552(b)(7).

xii. 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).

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

xiv. Section 2(a)(2) (emphasis added).

xv. Section 2(A)(7) (emphasis added).

xvi. *See* Sections 6, 9(c)(1).

xvii. H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 25 (1992).

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

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

xx. JFK Act, Section 3(10).

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

xxii. JFK Act, Section 3(2).

xxiii. 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.

xxiv. JFK Act, section 3(2).

xxv. JFK Act, sections 6, 9(c)(1).

xxvi. S. Rep. No. 328, 102 Cong., 2d Sess. 31 (1992).

xxvii. S. Rep. No. 328, 102 Cong., 2d Sess. 2977 (1992).

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

xxix. FBI's May 28, 1998, Appeal at 8.

xxxi. Review Board's Reply Memorandum to the President, May 22, 1998, and Surreply Memorandum, June 15, 1998.

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