ASSASSINATION RECORDS REVIEW BOARD
REPLY TO THE
FBI'S AUGUST 8, 1995 APPEAL
UNDER THE JFK ASSASSINATION RECORDS COLLECTION ACT

August 10, 1995

Assassination Records Review Board

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Etc.

INTRODUCTION

The Federal Bureau of Investigation is contesting all but one of the first set of decisions regarding its records made by the Assassination Records Review Board. *See* FBI Appeal to the President, August 8, 1995 (contesting Review Board determinations for 9 of 10 documents). In asking the President to continue to postpone the release of information in records related to the assassination of President Kennedy, the FBI's relies *solely* on generalized arguments and statements of Bureau policy. These general arguments do not satisfy the FBI's obligation under the President John F. Kennedy Assassination Records Collection Act (JFK Act) as adopted by Congress and signed into law by President Bush in 1992.

In failing to offer the particularized evidence required by the JFK Act, the FBI is effectively retreating from a promise made by its own Director to Congress in 1992. In testimony to Congress, Director Sessions assured the Members that the FBI stood ready to satisfy its burden to provide particularized evidence to the Review Board:

> I would stand on the general proposition that has been expressed so openly here this morning that **we in the FBI should be prepared with particularity to defend a particular piece of information and the necessity of it not being divulged.**[1]

As will be shown below, the FBI's August 8 appeal not only makes no attempt to satisfy its prior pledge to Congress, *its arguments here are inconsistent with its own prior releases of information*. This memorandum will examine the FBI's appeal in three sections: Part I will address the basic statutory requirements of the JFK Act; Part II will address the issue of informants; and Part III will address the "foreign relations" issue.

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[1] *Hearing Before the Senate Comm. on Governmental Affairs on S.J. Res. 282 to Provide For the Expeditious Disclosure of Records Relevant to the Assassination of President John F. Kennedy*, 102d Cong., 2d Sess., pp. 64, 66 (1992) (statement of the Hon. William S. Sessions) (emphasis added).

We trust that, after considering the applicable provisions of the JFK Act, the information that the FBI wishes to keep secret, and the absence of "clear and convincing evidence" in support of continued secrecy, the President will agree with the Review Board's decision that the law requires full and immediate release of these records.

PART I: THE STATUTORY PRESUMPTION OF DISCLOSURE OF ASSASSINATION RECORDS AND OVERCLASSIFICATION

A. The JFK Act.

The Bureau's letter and memorandum fail to cite the most pertinent language of the JFK Act: 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***." Section 2(a)(2) (emphasis added). The statute further declares that ***"only in the rarest cases is there any legitimate need for continued protection of such records."*** Section 2(a)(7) (emphasis added).

The FBI's memorandum not only fails to cite the controlling language in the statute, it fails to address the substance of the issue as well. Indeed, nowhere in the FBI's submission is there any discussion of why the records at issue here are among "the rarest of cases" contemplated by the statute or why they differ in any way from the thousands of other records for which the Bureau also has redacted information.

In addition to ignoring the statutory presumption favoring disclosure of records in all but the rarest of cases, the FBI also neglects to discuss the evidentiary standard imposed by the JFK Act on agencies seeking to withhold information from the public. For ***each*** recommended postponement, an agency is required to submit "clear and convincing evidence" that one of the specified grounds for postponement is present.[2] Id., Sections 6, 9(c)(1).[3]

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[2]Congress "carefully selected" this 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, full release. H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 25 (1992).

[3]The Bureau recognizes in passing, and only in relation to the "foreign relations" issue, that the "clear and convincing" standard applies. *See* FBI Memorandum at 4. Significantly, there is no

B. Overclassification of government records.

The Bureau's written submission not only fails to provide the particularized evidence required by the statute, it exemplifies the very harm that comes from overclassification of government records. The Bureau's ten- page memorandum is classified "Secret," although virtually all of the information contained therein should not properly be classified at all. The first two and one half pages discuss the statute. The discussion of informants does not discuss any classified material. Thus the Bureau is hiding behind a facade of secrecy and classification *that is not justified by the specific topics at issue.* [Cite to Executive Order 12958.]

PART II: THE FBI's INFORMANT POSTPONEMENTS

Four of the nine contested documents pertain to informant issues. *See* Exhibits 1-4 (attached).

A. The FBI Ignored its Statutory Obligation to Provide Particularized Evidence.

The FBI postponed the four informant documents on the basis of two statutory provisions: Sections 6(2) and 6(4) (commonly referred to as Postponement 2 and Postponement 4). They will be analyzed in turn.

The Statutory Standard: Postponement 2. Section 6(2) permits postponement ***only if*** there is "clear and convincing evidence" that "public disclosure":

> (1) "would reveal the name or identity ***of a living person*** who provided confidential information;" ***and***
>
> (2) "would pose a ***substantial risk of harm to that person***" (emphasis added).

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discussion of the clear and convincing standard with respect to the informant issue. **[correct?]**.

Ignoring its statutory burden, the FBI's memorandum to the President (and its submissions to the Review Board) failed to provide ***any*** evidence whatsoever regarding any of the informants cited in the records. Thus their memorandum does not reveal whether any of the informants is alive. The memorandum similarly provides no evidence that any harm would come to any of the informants or to explain why, thirty years after the fact, any of the informants is possibly at risk.[4]

The Statutory Standard: Postponement 4. Section 6(4) requires "clear and convincing evidence" that:

> (1) "public disclosure would compromise the existence of an understanding of confidentiality . . . between a Government agent and a cooperating individual or a foreign government";
>
> (2) the understanding of confidentiality ***"currently requir[es] protection"; and***
>
> (3) ***"public disclosure would be so harmful that it outweighs the public interest"*** in disclosure.

(emphasis added). Each of these three requirements is briefly discussed below.

[4]Their *only* argument, presented by way of analogy, is that some *CIA* informants in the Soviet Union were identified by Aldrich Ames and subsequently were executed. The FBI does not, however, identify any of the informants at issue as living under any comparable condition that would make them vulnerable to retaliation by any Russian agency.

(1) Compromising Confidentiality: For purposes of the postponements now at issue, the Review Board accepts that the use of informant symbol numbers or the existence of an informant file provides evidence that the informant in question was assured some measure of confidentiality. It does not follow, however, that this confidentiality is, or ever has been, absolute. Indeed, as a matter of historical record, the FBI has been prepared to expose an informant where doing so furthered its own law-enforcement,[5] or even political,[6] objectives. Nor does it follow that release of an informant symbol number or file number, as opposed to the informant's true name, necessarily will compromise confidentiality.

(2) "Currently Requiring Protection":

(3) Harm Weighed Against Public Interest: The JFK Act defines the "public interest" as the "interest in 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.***" Section 3(10) (emphasis added). The statute specifies that this public interest in prompt disclosure is "***compelling.***" Id. (emphasis added).

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[5]For example, the FBI's *Manual of Instructions* admonished FBI agents that they

> "must condition the informant to the fact that someday the knowledge he possesses may be needed as evidence in court to assist the Government . . . . Psychologically prepare the informant for the fact that he may at some future date be called upon to render a still further contribution to his Government by testifying to the information he has furnished . . . . Proper indoctrination of the informant is essential as the Bureau ***must provide witnesses whenever the Department of Justice initiates prosecutions in security cases."***

Manual of Instructions, Section 107, "Security Informants and Confidential Sources," p. 10 (issued June 13, 1962).

[6][best cite we get from Theoharis -- if not compelling, then delete reference to "political" in text]

Nor would it have been unduly taxing for the FBI to have given the Review Board at least *some* information about these informants. Because these informants were assigned symbol numbers, both the FBI's Headquarters and the responsible field office would have had a file for each individual informant, readily retrievable by the corresponding symbol number appearing in the assassination records. At a minimum, these files would reflect true names and last known residences, the years in which the FBI used them as informants, and their (at least approximate) ages if they were still alive. But the FBI did not bother *even to provide such rudimentary information from its own Headquarters files* in support of these postponements. In a real sense, the FBI has not even *tried* to meet its evidentiary burden under the JFK Act.

B. The FBI's Arguments Against Release of Information About Informants Have Already Been Rejected By Congress and the Courts.

Rather than offering the particularlized evidence mandated by law, the Bureau has relied on the general arguments that release of informant information will harm law enforcement. These arguments, advanced in its written submissions to the President and to the Review Board, were rejected by Congress and by Federal Courts -- including the court decisions cited in the Bureau's own memorandum!

Congress rejected the Bureau's argument in passing the JFK Act. The legislative history of the JFK Act reinforces the very requirement that the FBI would disregard: Only those understandings of confidentiality that *currently require* protection should *receive* protection under Section 6(4).

The House Committee on Government Operations concluded in its Report on a predecessor bill (H.J. Res. 454):

> "There is no justification for perpetual secrecy for any class of records. *Nor can the withholding of any individual record be justified on the basis of general confidentiality concerns applicable to an entire class.* Every record must be judged on its own merits, and every record will ultimately be made available for public disclosure."

H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 16 (1992) (emphasis added).

The FBI presented to the Committee the same arguments regarding chilling the cooperation of existing informants or impeding recruitment of new ones that the FBI has repeated to the Review Board and now to the Chief Executive. The Committee responded that it

> "recognize[d] that law enforcement agencies must to some degree rely on confidential sources . . . . ***However, the Committee specifically rejects the proposition that such confidentiality exists in perpetuity.*** As with all other government information, ***the government's legitimate interest in keeping such information confidential diminishes with the passage of time."***

Id., p. 30 (emphasis added).[7]

The Committee also specifically rejected "claims that known informants or deceased informants should be protected." Id.[8] Indeed, in testimony before another House Committee, the FBI ***conceded*** that H.J. Res. 454 would ***not*** permit the categorical protection of dead informants:

> "[A]s I read the current resolution [H.J. Res. 454[9]], there would be other judgments

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[7] *See also* S. Rep. 102-328, 102d Cong., 2d Sess. (1992), pp. 28-29 (requiring the Review Board to consider "the exact restrictions regarding the scope and duration of confidentiality" and "whether the agreement [of confidentiality] currently requires protection" -- despite the Government's argument "that ***all*** such confidentiality requires withholding to preserve the integrity [of] the promise of confidentiality") (emphasis added).

[8] *See also* S. Rep. 102-328, 102d Cong., 2d Sess. (1992), p. 29 (in deciding on postponements, the Review Board among other factors "should consider . . . whether a witness or informant or confidential source is deceased").

[9] The JFK Act as passed is ***more*** disclosure-oriented on this issue than the version of H.J. Res. 454 on which the FBI was then commenting. That version of H.J. Res. 454 would have permitted postponement to avoid "a substantial and unjustified violation of confidentiality between a Government agent and a witness or a foreign government," ***without*** any balancing against the compelling public interest in immediate disclosure. *See Hearing Before the Subcommittee on*

> used as to the disclosure of confidential informants.
> . . . .
> For example, ***if the informant was now dead, that information would be released*** [under H.J. Res. 454]. We would not release that under the prior or current processing procedures [under the Freedom of Information Act]."[10]

The Courts have rejected the Bureau's argument as well.

By making no effort to supply any particularlized evidence, the Bureau is effectively admitting that it has no intention of attempting to satisfy the standards imposed by law. Rather, the Bureau is effectively arguing that its general policy against disclosure of informant identities should be sufficient to satisfy its obligation. This argument was, however, decisively rejected by Congress.

It suggests that provision of such evidence -- that is complying with the law -- would be too burdensome. This assertion should be evaluated in light of its unwillingness to take ***any*** steps to provide the particularized evidence required by the statute. At Headquarters, the Bureau maintains a file on ***every*** informant -- presumably including those who are at issue in the four documents. There should be, in addition, a field office file on each informant. By its own admission, the Bureau has not even troubled itself to examine its own files to make any assessment whether their informants are alive or might reasonably be at risk of incurring harm.

C. The FBI's Arguments are Inconsistent with Its Own Prior Releases of Information

insert text from Phil

Economic and Commercial Law, House Committee on the Judiciary, p. 14 (May 20, 1992).

[10]Testimony of Floyd I. Clarke, Deputy Director, FBI *Hearing Before the Subcommittee on Economic and Commercial Law, House Committee on the Judiciary*, p. 130 (May 20, 1992).

PART III: THE FBI's "FOREIGN RELATIONS" POSTPONEMENTS.

Five of the nine documents pertain to "foreign relations" issues. *See* Exhibits 5-9 (attached). In the unclassified portion of its cover letter to the President, the Bureau describes the second set of documents as follows: "[f]ive of the documents reveal cooperation with the United States by the Federal police of a foreign nation with which we have a long-standing and continuing relationship." Letter at 1. The Bureau then employs dramatic language to suggest that release of the information contained in these documents would have a serious effect on law enforcement and on the foreign relations of the United States.

A. The FBI Failed to Satisfy Its Statutory Obligation

For its postponements in the remaining five documents, the FBI relies on Sections 6(4) and 6(1)(B).

The discussion of Section 6(4) set out above applies equally to "an understanding of confidentiality" with "a foreign government" as to one with a "cooperating individual": for a postponement to be sustained, there must be "*clear and convincing evidence*" that:

(1) public disclosure would *compromise the existence of an understanding of confidentiality;*

(2) the understanding of confidentiality *currently requires protection; and*

(3) disclosure would be *so harmful that it outweighs the public interest* in disclosure.

The postponement standards under Section 6(1)(B) are similarly stringent. There must be *"clear and convincing evidence"* that:

(1) "the threat to the *military defense, intelligence operations, or conduct of foreign relations* of the United States is of *such gravity that it outweighs the public interest in disclosure;"*

(2) "disclosure would reveal an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government;"

(3) the source or method in question *"has not been officially disclosed"; and*

(4) disclosure of the source or method *"would interfere with the conduct of intelligence activities."*

B. The FBI's Arguments are Inconsistent with Its Prior Releases of Information

The Bureau elliptically hints that it is "advised that the State Department concurs in this view." Although the Bureau did not present this "evidence" to the Review Board, and although the State Department itself has not documented any such concern, these opinions do not constitute *evidence* -- as opposed to opinions -- of harm.

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