DRAFT

Three years ago, the Director of the Federal Bureau of Investigation testified before Congress regarding FBI records relating to the assassination of President Kennedy. The Director assured his listeners that the FBI stood ready to do what the Congress and the President of the United States were about to require, declaring:

> "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]

Since then, the FBI has had three years to identify -- and marshall evidence regarding -- those few instances where it may still be necessary to withhold from the American public information relating to the assassination of their President. Instead, the FBI has shrunk from the express undertaking of its Director and the unmistakable requirements of The President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. Section 2107 ("the JFK Act") by relying solely on abstract argument and unsupported assumption, rather than any form of particularized proof. During the intervening years, the FBI apparently nurtured the hope that the Assassination Records Review Board ("the Review Board") -- or, failing

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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).

that, the Chief Executive -- would similarly disregard the law. We trust that, after considering the applicable provisions of the JFK Act, the information that the FBI wishes to keep secret, and the FBI's absolute failure to provide the requisite "clear and convincing evidence" in support of continued secrecy, you will agree with the Review Board's decision that the law requires full and immediate release of these records.

The JFK Act speaks clearly and forcefully on the matters at hand:

> "all Government records concerning the assassination of President John F. Kennedy should carry a ***presumption of immediate disclosure***;" and
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> "most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and ***only in the rarest cases is there any legitimate need for continued protection of such records***."

Section 2(a)(2), (7) (emphasis added).

Accordingly, the release of an assassination record or any information within an assassination record may be postponed only if there is "clear and convincing evidence"[2] that one of the specified grounds for postponement is present. Id., Sections 6, 9(c)(1).

It is useful to divide the assassination records now at issue into two groups: those in which the FBI claims continued secrecy is necessary to protect

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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).

confidential relationships with informants, and those in which it claims continued secrecy is necessary to protect a "confidential" liaison relationship with a foreign government. As demonstrated below with regard to each group, the FBI's assertions cannot withstand scrutiny.

## I. THE INFORMANT POSTPONEMENTS

Two provisions of the JFK Act -- Sections 6(2) and 6(4) -- set forth the requirements for postponing confidential informant material.

### A. Section 6(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***
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> (2) "would pose a ***substantial risk of harm to that person***" (emphasis added).

The FBI has not provided ***any*** evidence that the persons in question, each of whom gave information over thirty years ago, are still alive, let alone at "substantial risk of harm" -- conceding, in effect, that Section 6(2) cannot be satisfied. Accordingly, the Review Board rejected Section 6(2) as a basis for these postponements.

### B. Section 6(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.

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,[3]

[3]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 constribution 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).

or even political,[4] 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.

"Currently Requiring Protection": 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 blunderbuss 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

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

> "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).[5]

The Committee also specifically rejected "claims that known informants or deceased informants should be protected." Id.[6] 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[7]], there would be other judgments used as to the disclosure of confidential

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[5]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 confidentaility") (emphasis added).

[6]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").

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

> informants.
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> . . . .
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> 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]."

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).

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).

C. The Particular Postponements at Issue