[ROUGH DRAFT]
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Senate Governmental Affairs Committee
Hearing on S. 712

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Mr. Chairman and Members of the Committee -- I appreciate the opportunity to testify from the perspective of a person who has labored in the declassification trenches for the past three and one-half years. Although I serve as the Executive Director of the Assassination Records Review Board, I wish to emphasize that I am testifying here today not as a spokesman for the Review Board, but as an individual who has been involved in day-to-day interactions with numerous Federal agencies on issues related to declassification. The Board members -- who were appointed by the President and confirmed by the Senate -- Judge John R. Tunheim, Professor Anna Kasten Nelson (who is here today) [Professor Nelson is a Distinguished Adjunct Professor of History at American University and a longstanding expert on declassification], Professor Henry F. Graff, Dean Kermit L. Hall, and Dr. William L. Joyce, have provided the American people unparalleled access to information that has been held secret for more than a third of a century. The Review Board's official positions on matters related to declassification will be set forth in its Final Report to Congress and the President later this year.

Because my experience comes principally from the field of declassification, I will focus my remarks on that area rather than discuss the very important issue of initial classification.

I. Background

Although the word "unique" is over-used, it nevertheless can fairly be applied to the work and accomplishments of the Review Board. The Board was created by Congress in an effort to release the government's still-secret files on the assassination of President Kennedy. In accordance with the declassification standards articulated in Section 6 of the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107, Pub.L. 102-526 (as amended) ("JFK Act"), the Review Board has opened up previously classified records from numerous agencies and departments, including the CIA, NSA, FBI, the Departments of State, Defense, Treasury, and Justice, as well as the military services, Secret Service, Senate and House Committees, and the National Security Council.

Under the JFK Act, agencies are required either to open in full assassination records, or to present to the Review Board proposed redactions and evidence in

support of their proposed redactions. After receiving the agencies' evidence, the Review Board deliberates and makes "formal determinations" as to whether the records should be opened. The Board's determinations have been overwhelmingly in favor of opening records. If an agency disagrees with the formal determination of the Review Board, its sole recourse is to appeal the Board's decisions to the President. Thus far, only one agency, the FBI, has appealed Board decisions. (The appeals ultimately involved approximately 90 records and four different issues.) After extensive briefings had been submitted to the President -- with each side arguing why the records should or should not be released -- the FBI ultimately withdrew its appeals and negotiated with the Review Board for the resolution of the issues. Without exception, every formal determination ultimately made by the Review Board has prevailed and records have been released in accordance with Board decisions. It has now been almost two years since an agency has appealed a decision to the President. Thus, the Board's work has been a success. Although I do not consider the JFK Act to be the model to be copied for future government-wide declassification efforts, it nevertheless has provided valuable lessons that may be of use to you as you consider S. 712.

I strongly applaud the efforts of Senator Moynihan, Senator Helms, and this Committee to reduce government secrecy. One of the tragic consequences of government secrecy has been the widely held belief that the government has known much more about the assassination than it has been willing to reveal to the public. Many of the assassination records that we have seen could have been opened to the public years ago without any harm to the national security. The efforts of this Committee could go a long way to help alleviate the suspicion of government -- much of it being justifiable suspicion -- that has festered since the assassination of President Kennedy.

II. The "Four Noble Truths" of Declassification

In my opinion, any legislation that would seek to have a significant impact on the culture of secrecy must do more than articulate worthy goals and establish bureaucratic entities to reiterate those goals. Effective legislation must address the significant institutional impediments to declassification. Any conscientious effort to change the secrecy system should take into account what I will call the "Four Noble Truths" of declassification:

> *first*, an independent entity, not the classifying agency, should be the final decision maker on declassification;
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> *second*, the independent declassification entity should be informed, engaged, and skeptical;
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> *third*, in order for declassification to be successful, there must be internal

institutional incentives to declassify information; and

fourth, the key to successful declassification is *not* the articulation of the categories of information exempt from release (although the clear articulation of such categories is important), but the allocation of the burden of proof to the party that seeks to exempt information from release.

Because these four points are inextricably interrelated, I will discuss them in reference to our work and to a series of documents that are attached in the appendix to this testimony.

I have now spent hundreds of hours talking with officials from more than a dozen agencies and reading memoranda that argue against the release of certain types of classified information. It has been my general impression that the officials making such arguments are intelligent, conscientious, competent, hardworking, and serious. (I also have had the general impression that they have sought to be cooperative with the Review Board and that they have made good-faith efforts to comply with the JFK Act.) Nevertheless, one cannot help but often observe a deep-seated institutional reluctance to release information -- particularly by those institutions that were created for the purposes of collecting secret information and preserving secrets.

One of the mechanisms employed by S. 712 to push for openness is the requirement that agencies articulate their reasons for initial classification and for exempting material from declassification. For example, Section 4(c)(2)(A) would require the agency to "provide in writing a detailed justification for [an initial classification] decision." Similarly, with regard to the 30-year review, agencies would "certi[fy] to the President at the end of such 30-year period that continued protection of the information from unauthorized disclosure is essential to the national security of the United States . . . ." (Sect. 4(d)(2)). The talented officials who are hired by the agencies will be able to provide such explanations and such justifications. The issue from my perspective is not whether such justifications can be made, but to what extent they can withstand scrutiny. Let me provide some examples.

Example 1. Exhibit A [6]. The first illustration is a CIA cable dated November 27, 1963, that has now been released in full. As you can see, the second line of typed text includes the crypts (or cryptonyms) "RYBAT" and "GPFLOOR." These crypts appear in what is called the "slug line" and they are routing and sensitivity indicators. "GPFLOOR" is the crypt that refers to Lee Harvey Oswald. This same crypt appears in the first line of the second paragraph of text. The CIA originally advised that GPFLOOR could not be released in the slug line although it could be released in the text of the cable. I had several discussions with agency officials as they tried to explain why GPFLOOR could be released in one place but not in the other. I could not understand their explanations. At that time I was new to the work, and I did not know whether I was simply not bright enough or experienced enough to understand the

explanation or whether I was receiving double-speak. I raised the question again in a meeting with several agency officials that covered other topics. Finally, an official said: "I don't see why it can't be released. This is an issue for COMMO [COMMO is the Communications Office.] Someone ask COMMO whether it cares." COMMO was subsequently asked -- and it had no objection to the release. I now infer that protecting crypts in slug lines was an ingrained agency habit rather than a considered judgment. The disclosure came only after incessant questioning by a skeptical interlocutor.

Example 2. During the course of our review of records from the Secret Service, the Board identified for the Secret Service a record it intended to open in full, to which the agency objected. The Board then advised that a copy of the record had actually been published in full in 1964 as an exhibit to the Warren Commission Report. The agency nevertheless continued to object, arguing that even a subsequent release of an open document would again disclose matters that should be kept secret. The Board subsequently voted to open the record.

Example 3. In certain FBI documents that were subject to appeal to the President, the FBI argued that certain types of its electronic surveillance had not previously been disclosed. In our opposing memoranda, we showed that Director J. Edgar Hoover, in open testimony to Congress, had effectively disclosed the existence of the electronic surveillance. Those records are now open.

Example 4. Exhibit B. The Review Board was presented with a heavily redacted but provocative document pertaining to an FBI "Internal Security" inquiry into Lee Harvey Oswald in October 1960. The FBI declined to release the information, arguing that it was the equity of a foreign government and that the government had refused to release the information. The Review Board, with the assistance of the Department of State, thereupon approached the Swiss Government and requested that it consent to the release of information about the assistance that the Swiss Federal Police provided to the FBI to track down Oswald. The record is now released in full.

Example 5. Exhibit C. The Review Board located several Top Secret documents related to military contingency planning for a coup in Cuba. Exhibit C contains one page from a 58-page document from this group that had been "excluded from automatic downgrading and declassification." The Review Board staff arranged for a group of declassifiers from several military entities to meet at the Review Board offices in a joint-declassification session. The 58 pages of this document, and many others from this group, have gone from being completely closed to completely open.

Example 6. Exhibit D. In May 1963, Secretary of Defense Robert McNamara met with military advisers in a conference on Vietnam in Honolulu, Hawaii. Exhibit D includes all of the material that had been publicly released on the Conference prior to Review Board action (a six page summary published in *Foreign Relations of the United*

States, 1961-63 Vol. 3) and the title page of a 213 page *Record [of the] Eighth Secretary of Defense Conference* from the Joint Chiefs of Staff Official File that has now been opened in full. Prior to Review Board action, the memorandum had been excluded from automatic regrading and declassification and could presumably have remained classified forever. A stamp on page 1 discloses that the document was systematically reviewed by JCS in May 1989 and the classification of Top Secret was continued. The document was opened in full at a declassification session in July 1997.

Example 7. Exhibit E. Like the FBI, the CIA typically is reluctant to release information regarding technical surveillance. Exhibit E is a monthly operational report from Mexico City from September 1-30, 1963, a period that includes Oswald's arrival in the Mexican capital. In 1993, the document was postponed in its entirety. The Review Board voted to open the record in its entirety.

Example 8. Exhibit F. The Review Board has even had some success in releasing NSA records. Exhibit F is dated November 26, 1963, and discloses NSA's intercepts of communications related to Cuban military alerts after the assassination. It was originally unavailable in any form to the public and was exempt from declassification. After Board action, the important information has been released.

Example 9. Exhibit G. Exhibit G is a document dated June 15, 1964, that pertains to an alleged plot to assassinate Castro that was made known to the National Security Council in 1964. Although originally classified "Secret" and exempt from declassification, the NSC agreed to release it in full after discussions with the Board.

I trust that these examples show that agencies, left to their own devices, protect information that can and should be released. I believe that the four major reasons that the Review Board has been successful in opening this type of information are *first*, that it is an *independent agency* that was provided by Congress with the power to make formal determinations to release information unless the agencies successfully appeal the Board's decisions to the President; *second*, that the Review Board and its staff have become well informed about the arguments regarding secrecy and have challenged agencies to justify their positions; *third*, that the agencies bear the burden of proving, "by clear and convincing evidence," that redactions should be preserved; and *fourth*, that the Review Board has shown the initiative of locating records and devising innovative schemes to bring agencies together to declassify information jointly.

Under the current scheme, agencies have little incentive to declassify records. The message is not sent to agency personnel that a fast track to career advancement lies with the release of more information than is absolutely necessary. Agencies have the very natural disinclination to release information that has been painstakingly acquired. Ultimately, secrecy becomes a habit.

III. Recommendations for Making S. 712 More Effective

With regard to S. 712, I would make the following suggestions.

First, the entity responsible for overseeing the declassification process (which, in the current version of the S. 712, is the National Declassification Center), must be genuinely independent of the agencies whose records it oversees. The Center should be staffed by persons who are both sensitive to the genuine secrets of the agencies, but who also are skeptical and demanding of proof.

Second, the legislation should incorporate a statutory provision that, at a certain point in time, records will presumptively be opened unless the agencies are able to articulate specific and compelling reasons for continued redactions. It would be sensible to provide the benefit of the doubt regarding declassification to the agencies for an initial period (*e.g.*, between 10 and 25 years) after which the overwhelming presumption is that the information should be released.

Third, mere written justifications for classifying and refusing to declassify are insufficient.[1] The written explanations must be convincing to a skeptical reader who has sufficient information to evaluate the merits of the writing.

There are two final recommendations that I would make that presumably go beyond the scope of today's hearing. I will describe them only briefly, but would be willing to provide further analysis at the Committee's request.

Fourth, it would be advisable for future Executive Orders to break down the "sources and methods" exemption, inasmuch as it is used too casually and that it

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[1] The following are deemed by this witness to be insufficient to provide a significant degree of assurance that records are not improperly being kept from the public domain:

> "ensure that the amount of information classified is the minimum necessary to protect the national security." § 4(a).
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> "weigh the benefit from public disclosure of the information against the need for initial or continued protection of the information under the classification system." § 4(c)(1).
>
> Regular declassification review § 4(d)
>
> "provide a detailed justification for that decision" § 4(c)(2)(A).

covers a multitude of very distinct issues.

Finally, it would be highly advisable to provide the declassification entity (the National Declassification Center), with the authority to make binding requests to agencies to search out records that may have been misplaced or misfiled.

I would like once again to thank the Committee for taking seriously the right of the American people to better understand how their government functions. I would be pleased to answer your questions.

Appendix

Exhibit 1. In May 1963, Secretary of Defense Robert McNamara met with military advisers in a conference on Vietnam in Honolulu, Hawaii. Exhibit 1 includes all of the material that had been publicly released on the Conference prior to Review Board action (a six page summary published in *Foreign Relations of the United States, 1961-63* Vol. 3) and the title page of a 213 page *Record [of the] Eighth Secretary of Defense Conference* from the Joint Chiefs of Staff Official File that has now been opened in full. Prior to Review Board action, the memorandum had been excluded from automatic regrading and declassification and could presumably have remained classified forever. A stamp on page 1 discloses that the document was systematically reviewed by JCS in May 1989 and the classification of Top Secret was continued. The document was opened in full at an ARRB declassification session in July 1997.

Exhibit 2. This is a memo from the Joint Chiefs to the Secretary of Defense regarding a contingency plan for a coup in Cuba. This document formerly was classified Top Secret--Sensitive and was excluded from automatic declassification. It was systematically reviewed in October 1989 and the classification was continued. It was opened in full at an ARRB declassification session in July 1997 after review by representatives of the Joint Chiefs of Staff (JCS), CIA, the National Security Council, and the Office of the Secretary of Defense (OSD).

Exhibit 3. These two documents are from the Legal Attaché in Paris. Both documents appear to have been reviewed in 1977 and stamped exempt from declassification. The documents were re-reviewed in 1992 and severely redacted. In December 1995 they were released in full after a Board vote and with the concurrence of the Swiss Federal Police.

Exhibit 4. This document is a CIA monthly operational report for Mexico City for the month of September 1963 that details various technical operations. The attached form discloses that this document was reviewed in 1993 and denied in full. The brackets suggest that possible redactions were considered in 1993. The document was released in full in 1995 after a Board vote.

Exhibit 6 [A]. This is a November 27, 1963 document from CIA Headquarters to Mexico City. The 1992 release this document redacted both the “slug line” routing indicators that identified this cable as concerned with Lee Harvey Oswald/ GPFLOOR. The cable also contains an older cryptonym for the FBI/ ODENVY. This document was released in full after a Board vote in 1995.

Exhibit 7. This document is a November 29, 1963 memorandum from a CIA Contact Division office in Chicago concerning a telephone conversation. There are two versions of this document: the first a 1976 FOIA release that redacts most of the information: the second is a 1995 open in full version of the document.

Exhibit 8. This document is a January 1964 memorandum from J. Lee Rankin and the Warren Commission that details information developed by CIA on Lee Harvey Oswald's activity in Mexico City 28 September - 3 October 1963. Originally classified SECRET, this document was released under FOIA in 1976 with heavy redactions. The document was released in 1993 with one redaction--the name of an intelligence officer now retired overseas.

Exhibit 9. NSA November 26, 1963.

Exhibit 10. NSC June 15, 1964