T. Jeremy Gunn
Executive Director and General Counsel
Assassination Records Review Board

Prepared Statement for
Senate Governmental Affairs Committee
Hearing on S. 712

March 25, 1998

Mr. Chairman and Members of the Committee -- I appreciate the opportunity to testify on S. 712 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 Review Board members, who were appointed by the President and confirmed by the Senate, are Judge John R. Tunheim, Professor Henry F. Graff, Dean Kermit L. Hall, Dr. William L. Joyce, and Professor Anna Kasten Nelson. The Board members 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.

I 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 -- some of it being justifiable suspicion -- that has festered since the assassination of President Kennedy.

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 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 related to 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 assassination records in full, 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 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 precise model for future government-wide declassification efforts, it nevertheless has provided valuable lessons that may be of use to you as you consider S. 712.

II. The "Four Noble Truths" of Declassification

In my opinion, any legislation that would attempt 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;
>
> *second*, the independent declassification entity should be informed, committed, and skeptical;
>
> *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 interconnected, I will discuss them in reference to our work and to a series of documents that are attached as exhibits to this testimony.

During the past four years, I have spent hundreds of hours talking with officials from more than a dozen agencies and reviewing 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, and hardworking. (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.) One nevertheless cannot help but observe a deep-seated, institutional reluctance to release information -- particularly on the part of those institutions that were created for the purposes of collecting secret information and preserving secrets.

In order to facilitate declassification, S. 712 requires agencies to articulate their reasons for initial classifications and for exemptions 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 agencies are able to articulate such justifications, but to what extent their justifications can withstand scrutiny. Let me provide some examples where initial justifications for withholding information did not withstand scrutiny.

Illustration 1. *See* Exhibit A. 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 being offered. I again raised the question in a later 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.

Illustration 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 and 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 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.

Illustration 3. In several 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.

Illustration 4. See 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 contained the equities 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 Swiss government agreed and the record is now open in full.

Illustration 5. See 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 and other national-security entities to meet at the Review Board offices in a joint-declassification session. The 58 pages of this document, and many other records from this group, have gone from being completely closed to completely open.

Illustration 6. See Exhibit D. In May 1963, Secretary of Defense Robert McNamara met with military advisers in the eighth of a series of conferences on Vietnam. Exhibit D includes all of the material that had been publicly released on the

conference prior to Review Board action (a 6-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 downgrading 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.

Illustration 7. *See* 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.

Illustration 8. *See* Exhibit F. The Review Board has also 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 to the public in any form and was exempt from declassification. After Board action, the important information has been released.

Illustration 9. *See* Exhibit G. Exhibit G is a National Security Council document that pertains to an alleged plot to assassinate Castro. Although it was originally classified "Secret" and was deemed to be exempt from declassification, the NSC agreed to release it in full after discussions with the Board.

I trust that these examples show that agencies are initially inclined to protect information that can and should be released. But the examples also show that, with a little prodding by an independent entity, agencies can and will participate in a cooperative spirit to declassify secrets. Under the current regime, outside of the JFK Act, agencies have little internal or external incentive to take an energetic approach to declassifying records. Agencies do not send the message to agency personnel that a fast track to career advancement lies with the release of more information than is absolutely necessary. Agencies have the natural disinclination to release information that has been painstakingly acquired. Ultimately, secrecy becomes a habit and declassification is mired in lack of attention and inertia. There is, however, an important and encouraging message that comes out of the Board's experience: *once agencies come to the understanding that they must declassify records and that there is a presumption that records should be opened, the agencies will cooperate in good faith with the requirements established by Congress.*

III. The Mechanics of Declassification

Declassification involves more than appropriate standards for the release of information. It also calls for the establishment of effective mechanisms to move records through the bureaucracy. Once again, the experience of the Review Board provides valuable lessons that should be of use to this Committee in considering legislation. I would like to draw attention to four important points involving the mechanics of declassification.

First, the "referral process" is one of the most significant, government-wide bottlenecks to the declassification of records. Before an agency can release information in its records that was obtained from another agency, it must refer the record to the agency from which it derived that information. Although this procedure is a sensible arrangement that promotes the valuable goal of sharing information among agencies, it becomes a costly and time-consuming obstacle to declassification. Very frequently, records become trapped in the morass of the referral process.

The Review Board developed essentially three procedures to help expedite the referral process: (a) establishing joint-declassification sessions where several agencies convened at the Review Board offices (or sometimes at another site) and declassified records; (b) hand-carrying records from one agency to another and having them declassified on-site; and (c) giving agencies notice that unless records were reviewed by a certain date, the Board would simply vote to open the records without receiving the benefit of their input. In my opinion, any legislation designed to improve the declassification process must take into account this referral bottleneck by giving to the independent, supervising agency, the authority to set enforceable timetables.

The ability to bring agencies together, such as in the joint-declassification sessions, has important beneficial effects that extend beyond expediting the referral process. In our experience, agencies tended to lose some of their institutional inhibitions as they sat at a table with each other and discussed records openly. Surprisingly, agencies typically *assumed* that another agency would not release information when the other agency was in fact willing to do so. Frequently, it is the suspicion that one agency does not want to release information that inhibits other agencies from releasing information. Like the COMMO example from Illustration 1 above, the perception of unwillingness to open records is sometimes greater than the need to keep records closed.

Second, the Review Board profitted from the power, authorized by Congress, to "direct a Government office to make available to the Review Board . . . additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities . . . ." JFK Act, § 7(j)(1)(C)(ii). This power enabled the Review Board to obtain information about the basis for classifications, the existence of records relevant to completing its mandate,

and the circumstances surrounding the creation of records. It is important that an agency with supervisory responsibility over declassification have the authority to obtain the information it needs to accomplish its work.

Third, as with the referral process, a frequent bottleneck in the declassification process is the final transfer of records from the declassifying agency to the National Archives. An independent entity responsible for supervising this process should have the authority and responsibility of guaranteeing that once the declassification process is complete, the final step of making records available to the public is taken.

Fourth, although the start-up process is very time-consuming, it is a necessary prelude to more efficient and productive work. The start-up time for the Review Board, as I understand is also the case for Interagency Security Classification Appeals Panel (ISCAP), required education not only of the Board and staff, but also of the agencies. It is important that any future planning of an endeavor of this nature take into account the initial costs and, importantly, take advantages of the lessons learned by the Review Board. The initial cost can be recuperated in the long run.

When an independent agency, such as the Review Board, has the authority to set the agenda (by establishing timetables), sponsor joint declassification sessions, require the production of evidence, and ensure the prompt transfer of declassified records from the agencies to the National Archives, declassification can be a success. I strongly urge this Committee to take advantage of the momentum created by the JFK Act and by ISCAP, and create an authority that will be able to bring independence, consistency, and energy to the process of making the government more open and accountable to the people who have paid for it.

IV. Recommendations for Making S. 712 More Effective

With regard to S. 712, I wish to summarize the following recommendations that have been offered either explicitly or implicitly in the testimony above:

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 independent entity should have the power to set reasonable timetables by which an agency must complete the declassification review (or referral review). The independent entity should be empowered to release information on its own authority if agencies do not comply with reasonable timetables. The independent agency should additionally be empowered to obtain information from the agencies that

is essential for completing its work.

Third, 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 persuasive reasons for continued redactions. Although it would be sensible to provide agencies with the benefit of the doubt regarding declassification for an initial period (*e.g.*, between 10 and 25 years), once this period has passed the presumption should shift decisively in favor of releasing the information.

Fourth, agencies should be required to do more than provide mere "detailed justifications" (*see, e.g.,* S. 712 § 4(c)(2)(A)) for classifying and refusing to declassify records. The written explanations must be *more than* "justifications," they must be able to convince a skeptical reader who has sufficient information to evaluate the merits of the writing.

Fifth, 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.

Finally, there is one additional recommendation that I would make that presumably goes beyond the scope of today's hearing and so I will raise it only in passing. I believe it would be advisable for future Executive Orders to break down the "sources and methods" exemption, inasmuch as it is used too casually and it covers a multitude of very distinct issues. To the extent that the Committee is interested, I would be willing to submit additional comments at a later point to develop this issue.

* * * *

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.