CHAPTER 4:
THE STANDARDS FOR RELEASE OF INFORMATION UNDER THE JFK ACT

A. Introduction and Background

Section 6 of the *President John F. Kennedy Assassination Records Collection Act of 1992,*[1] ("JFK Act"), establishes a short list of reasons that Federal agencies can cite as a basis for requesting postponement of public disclosure of records relating to the assassination of President Kennedy. The JFK Act directs the Review Board to sustain postponements under Section 6 only in the "rarest cases," but beyond the statute's presumption of disclosure,[2] the Review Board had little guidance from Congress concerning how to apply each of the grounds for postponement set forth in section 6. This chapter will explain how the Review Board analyzed and applied each of the standards for declassification listed in section 6.

Part I of the chapter will begin with an overview of the existing law governing the Federal Government's release of information. In addition, Part I will summarize the Review Board's analysis and decision-making about the section 6 standards. Part II will enumerate the general principles, or "common law," that the Review Board established as it applied the provisions of section 6 to individual documents. Part II also addresses the general principles that the Review Board applied in dealing with records that it determined to be less relevant to the assassination.

a. Current Guidelines for Release of Assassination Related Information

[1] 44 U.S.C. § 2107 (Supp. V 1994) (hereinafter "JFK Act").

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

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[3] ("FOIA") or wait for the records to be released under the terms of the current Executive Order.[4] 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. 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 are listed below.

The second set of guidelines that governed the disclosure of records relating to the assassination of President Kennedy before the passage of the JFK Act is contained in the President's Executive Order. At the time that Congress enacted the JFK Act, Executive Order 12,356 was in effect.[5] In 1995, President Clinton signed Executive Order 12,958.[6] The current Executive Order applies to all Executive branch records and, unlike the JFK

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[3]5 U.S.C. § 552 (1988) (hereinafter "FOIA").

[4]President Reagan's Exective Order was in effect at the time that the JFK Act was passed. *See* Exec. Order No. 12,356, ____ C.F.R. _____ (19____ - 1995), *reprinted in* _____ U.S.C. § _____ (19_____) (hereinafter "Executive Order 12,356"). The current Executive Order is Exec. Order No. 12,958 ____ C.F.R. _____ (1995-present), *reprinted in* _____ U.S.C. § _____ (19_____) (hereinafter "Executive Order 12,958").***Chris Burton is locating cites ***

[5]Executive Order 12,356 was not as disclosure-oriented as Executive Order 12,958. The Senate Report for the JFK Act notes that it believed that,

> Executive Order 12,356, National Security Information, has precluded the release of [assassination] records. . . .
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> [L]egislation is necessary . . . because E.O. 12,356, "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. . . .

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

[6]Because the audience for this report presumably will encounter the current Executive Order more often, the standards for release of information under Executive Order 12,958 are quoted. We have not quoted the standards for release of information under Executive Order 12,356.

Act, requires agencies to engage in a systematic declassification of all records over 25 years old. The Executive Order's terms governing automatic declassification are listed below.

b. 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 12,356. 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 was enacted, 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. *First,* the FOIA exempts CIA operational files from disclosure.[7] *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.[8] *Third,* the FOIA does not apply to unpublished Congressional records.[9] Thus, for the above reasons, combined with Congress' finding that the FOIA did not provide for the disclosure of records actually *within* its scope, Congress believed that the FOIA was not a satisfactory mechanism for guaranteeing disclosure of assassination records.[10]

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[7] 5 U.S.C. § 552(b)(3) (**Chris Burton is locating current version of FOIA so that we can insert language from Exemp. 3 of the FOIA**).

[8] 5 U.S.C. § 552(b)(7) (**Chris Burton is locating current version of FOIA so that we can quote relevant provisions from exemp. 7**)

[9] 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).

[10] The House Committee that sponsored an early version of the JFK Act wrote in its report:

> [T]he [FOIA], as implemented by the executive branch, has failed to secure the timely release of information relating to the assassination. The FOIA provides a mechanism for the disclosure of agency records. Many records pertaining to the assassination of President Kennedy have been disclosed under that Act, but many executive branch records have also been withheld. Several factors have failed to secure the timely release of assassination records under the FOIA.
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> First, and most importantly, the executive branch has routinely made extensive and unjustified use of statutory exemptions to withhold information that no longer actually warrants protection. . . . Unfortunately, agencies have been unwilling to use their existing authority to release documents that can be disclosed without harm to any significant public or private interest. . . .
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> Second, both the agencies and the courts have been relying on presumptions -- sometimes irrebuttable presumptions -- to justify the withholding of information. This interpretation is directly contrary to the express language of the FOIA, which provides that "the burden is on the agency to sustain its action." Executive agencies and the courts which conduct de novo review, are required by the FOIA to find facts in each individual case that justify withholding. Although any reliance on presumptions is wholly inconsistent with the language and the intent of the FOIA, such practices have become widespread and have prevented th release of records which may not actually qualify for withholding.
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> It is the [House] Committee's intent that [the House version of the JFK Act] be implemented with full recognition that the FOIA as implemented by the executive branch has failed to secure the timely release of information relating to the assassination.

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

Of course, President Clinton did not sign Executive Order 12,958 until April 17, 1995 -- over 2 years after Congress passed the JFK Act. Clearly, the terms of the Executive Order apply to most assassination records because it applies to Government records that are of permanent historical value *and* that are over 25 years old.[11] Most Government records relating to President Kennedy's assassination meet these two criteria. At the time that President Clinton's Executive Order came into effect, the Review Board compared its provisions to those of the JFK Act and realized that although the Executive Order would require agencies to *review* assassination records under its terms, it would not require agencies to *release* the records. Instead, the Executive Order allows agency heads to exempt records from automatic declassification provided that the agency head expects that disclosure of the records will result in one of the nine enumerated categories of harm. Thus, although the Executive Order's standards for declassification appear to be disclosure-oriented, the Executive Order fails to hold agency heads accountable for their decision-making.

On the contrary, the JFK Act does require agencies to account for their decisions. To ensure agency accountability, Congress included four essential provisions in the JFK Act: *first,* the JFK Act presumes that assassination records may be released; *second*, the JFK Act states that the only way that an agency can rebut the presumption of disclosure is 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 express the

[11] **cite to E.O. 12,958 (Chris Burton is locating a current copy of the E.O. so that we can cite the proper section.)**

goal of obtaining maximum disclosure, the JFK Act ensures that the goal will 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.

*1. The JFK Act Presumes Disclosure of Assassination Records***.** The most pertinent language of the JFK Act is 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."*[12] The statute further declares that *"only in the rarest cases is there any legitimate need for continued protection of such records."*[13]

[12]Section 2(a)(2) (emphasis added).

[13]Section 2(A)(7) (emphasis added).

2. The JFK Act Requires Agencies to Provide Clear and Convincing Evidence. If agencies wish to withhold information in a document, the JFK Act requires the agency to submit "clear and convincing evidence" that the information falls within one of the narrow postponement criteria.[14] Congress "carefully 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.[15] When agencies do present to the Review Board evidence of harm that will result from disclosure, it must be 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.[16]

The Review Board's application of the clear and convincing evidence standard is covered in more detail in Section II of this chapter. Section II includes a discussion of the "Rule of Reason" that the Review Board ultimately adopted with regard to receiving evidence from the agencies.

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[14] *See* Sections 6, 9(c)(1).

[15] H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 25 (1992). The legislative history of the JFK Act emphasizes the statutory requirement that agencies provide "clear and convincing evidence." The House Committee on Government Operations concluded in its Report on 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, 102d Cong., 2d Sess., pt. 1, at 16 (1992) (emphasis added).

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

3. The JFK Act Requires the Review Board to Balance Evidence for Postponement Against Public Interest in Release. Assuming that agencies do provide clear and convincing evidence that information should be protected from disclosure, the terms of section 6 require 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."[17] The Review Board interprets the balancing requirement to mean that agencies must 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 leaves room for discretion in evaluating the historical significance, or public interest, of particular assassination records, it is the Review Board -- not the agency that originated the document -- that is to exercise this discretion. 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.[18]

d. Other Relevant Provisions: Segregability and Substitute Language

If 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 possible to avoid the stated harm, and (2) provide substitute language to take the place of the redaction.

C. Summary of Review Board's Application of Declassification Standards to Assassination Records

a. Defining "Assassination Record"

[17]JFK Act, Section 3(10).

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

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.[19]

[19]JFK Act, Section 3(2).

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 carefully consider the scope of the term "assassination record" and to issue an interpretive regulation defining this crucial term.[20] 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 Record Groups and the Standards Applied to Each

Once the Review Board promulgated its regulation defining "assassination record," it turned its attention to those assassination records that were clearly within the scope of the statutory definition of "assassination record." Prior to the Review Board's nomination and appointment in 1994, some of the agencies had started to identify and process the following assassination record groups:

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

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.

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[20]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.

The "related" files include FBI files on Marina Oswald, Marguerite Oswald, George DeMohrenschildt, Ruth Paine, and Michael Paine.
The FBI began its processing of the "Core and Related" files in 1993. The Review Board applied very strict standards in its review of the core and related files.

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

CIA opens a 201 file on when there is some sort of operational interest in an individual. The Agency opened Lee Harvey Oswald's 201 file on December 9, 1960 in response to a request from the Department of State on defectors. But the Oswald 201 file is not a typical 201 file. After the Assassination of President Kennedy, it served as a depository for records gathered and created in CIA's wide-ranging investigation of the assassination. Thus, the file is the most complete record of CIA's inquiry in the months and years immediately following the assassination rather than an operational file on Lee Harvey Oswald.

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 produce records relevant to their investigation of the Kennedy assassination. In response to the 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 the "Segregated Collection" guidelines to the HSCA subject files.

d. The CIA's "Segregated Collection" Files

During the investigation conducted by the House Select Committee on Assassinations, HSCA investigators gained access to CIA files. Upon completion of the HSCA's work, the CIA files that had been made available to the HSCA were segregated and retained as a group, known as the Sequestered Collection. The Collection is divided into two parts: hard copy records and microfilm. The hard copy records, which can be found in the first 63 boxes of the collection, were available to the HSCA staffers during

their investigation. Box 64 contains 72 reels of microfilm which were copied from the complete files of the records to which the HSCA had gained access. In many cases the microfilmed files contain material well beyond the scope of the HSCA investigation, for example, covering an agent's entire career when only a small portion of it intersected with the assassination story.

B. Declassification Standards

Section 6 of the JFK Act establishes a framework for the Review Board to analyze agency claims for continued protection of assassination records. The Review Board's primary purpose, as outlined in section 7(b) of the JFK Act, is to determine whether an agency's request for information in postponement of disclosure of an assassination record meets the criteria for postponement set forth in section 6. Section 6 consists of an introductory clause, which establishes the "clear and convincing evidence" standard, and five subsections that set forth the criteria under which the Review Board can agree to postpone public disclosure of assassination-related information.