

Analysis of the President John F. Kennedy  
Assassination Records Collection Act of 1992  
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T. Jeremy Gunn

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## Introduction

This memorandum analyzes the principal duties, responsibilities, and procedures of the Assassination Records Review Board (Review Board) and other government offices under the President John F. Kennedy Records Collection Act of 1992 (the “JFK Act” or “the Statute”). Because the JFK Act establishes the duties and powers of the Assassination Records Review Board, it is important to understand the scope of the Statute's provisions and anticipate its potential pitfalls. This memorandum -- which is based principally on an analysis of the JFK Act and its Senate Report<sup>1</sup> -- identifies: (a) the statutory provisions governing the Review Board's duties, including *all* of the Board's reporting obligations under the Statute; (b) the Board's powers under the JFK Act; (c) the statutory procedures governing the review process;<sup>2</sup> and (d) the responsibilities of other governmental entities to further the goals of the Statute.<sup>3</sup>

## Part I: Statutory Duties of the Assassination Records Review Board

The JFK Act does not systematically set forth the duties of the Review Board. Rather, the description of the Board's duties are interspersed among several different statutory

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<sup>1</sup>S. Rep. No. 102-328, 102d Cong., 2d Sess. (1992) (“Senate Report”), *reprinted in part*, in 1992 U.S.C.C.A.N. 2965. The Senate Report provides, *inter alia*, a section-by-section analysis of the final Senate version of the JFK Act.

<sup>2</sup>This memorandum does not address the substantive guidelines pertaining to postponements that are addressed in Section 6.

<sup>3</sup>This memorandum is designed to identify comprehensively the issues that are of immediate importance and concern to the Board. Accordingly, some important statutory provisions that are not of immediate concern are not discussed. For example, there is no discussion of the qualifications or appointment of Board members (Sec. 7(b)), removal of Board members (Sec. 7(g)), definitions (unless they pertain to the review process or the powers of the Board) (Sec. 3), or provisions pertaining to the hiring of staff (Sec. 8(b)).

provisions.<sup>4</sup> With the exception of the Board's procedural duties related to the review process, which will be described in Part III below, the remaining duties (including reporting obligations) of the Board are as follows:

***First, the Board should publish a schedule for review of records in the Federal Register.*** “The Review Board shall . . . not later than 90 days after the date of its appointment, publish a schedule for review of all assassination records in the Federal Register.” Sec. 9(b)(1). The Statute does not disclose the meaning of “schedule” -- that is whether it is a list or a time-frame. Assuming an enactment date of October 6, 1994,<sup>5</sup> a “schedule” should have been published by January 2, 1995. Although the Review Board does not have sufficient information to draft or to describe with particularity such a schedule, it would be advisable to prepare promptly a general schedule so that the Board will come into compliance as soon as possible with this provision of the Statute.

***Second, the Board should have begun its review of records by the first week of April, 1995.*** “The

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<sup>4</sup>The sections of the JFK Act may be described as follows:

Section 1	Short Title
Section 2	Findings, Declarations, and Purposes
Section 3	Definitions
Section 4	Creation and Implementation of the JFK Collection at NARA
Section 5	Government Office Responsibilities (identify, review, and transfer records)
Section 6	Grounds for Postponement of Assassination Records
Section 7	Establishment and Powers of Review Board
Section 8	Review Board Staff
Section 9	Review of Records by the Review Board
Section 10	Records Under Seal; Foreign Records
Section 11	Rules of Statutory Construction
Section 12	Termination of the JFK Act
Section 13	Appropriations
Section 14	Severability Clause

<sup>5</sup>Several of the Board's reporting obligations are triggered by the date of enactment of the Statute. In addition to the requirement to publish a schedule raised above, another such example is that the Board's first annual “report shall be issued on the date that is 1 year after the date of enactment of this Act . . . .” Sec. 9(f)(2). Technically, the date of enactment was October 26, 1992, although this memorandum will assume that the “date of enactment” for the Board's purposes -- although not for the purposes of the obligations of other government offices -- was October 6, 1994, the date the technical amendments were enacted. Pub.L. 103-345 §§ 2 to 5, 108 Stat. 3128-3130.

Review Board shall . . . not later than 180 days after the date of enactment of this Act, begin its review of assassination records under this Act.” Sec. 9(b)(2). Technically, the Board has begun its review -- although it has as of yet made no final decisions. In order to comply with the “spirit” of the Statute, the Board should begin making decisions promptly.

***Third, the Board must submit four ongoing reports regarding the results of its decisions to postpone or to release information.*** The Board has four separate reporting requirements for describing the ongoing results of its decisions. First, the Board is required to report the results of its decisions on a document-by-document basis to the government office whose records it is reviewing as well as to the President (or to Congress in the case of legislative records). Second, the results of decisions must be reported in the *Federal Register* within 14 days of the date of the decision. Third, the Board must make a monthly summary report in the *Federal Register*. Fourth, the Board must prepare a document-by-document report to be submitted to NARA that describes the decision-making process for each record. Sec. 9(c)(3).

***Fourth, the Board must produce an Annual Report to Congress.*** The Board must submit an Annual Report to Congress on the anniversary of the enactment of the legislation. Thus the Board's first Annual Report is due on or before October 6, 1995. The Annual Report must include information on the following topics: (a) finances; (b) progress made on review; (c) estimates for completion of the review; (d) any special problems (including the degree of cooperation of government agencies); (e) a record of the volume of records reviewed and a summary of decisions; (f) an explanation of any additional needs of the Review Board; and (g) an appendix containing copies of reports of postponed records. Sec. 9(f)(3).

***Fifth, the Board must produce a Final Report.*** “Upon its termination, the Review Board shall submit reports to the President and the Congress including a complete and accurate accounting of expenditures during its existence, and shall complete all other reporting requirements under this Act.” Sec. 7(o)(2).

***Sixth, the Board must inform the President and Congress in advance of the termination of its activities.*** The Review Board must give Congress 90 days notice of the anticipated termination date for its operations. Sec. 9(f)(4).

***Seventh, the Board must transfer its own records to NARA.*** “[A]ll Review Board records” are to be transferred to NARA. Sec. 4 (a)(2)(C). See also 7(l) and 7(o)(3). The Statute is silent on the question whether the Review Board must prepare Record Identification Forms (or Identification Aids) for its own records prior to their submission to NARA.

*Eighth, the Review Board is under the Oversight Jurisdiction of the Appropriate Senate and House Committees.* The Review Board operates under the continuing oversight jurisdiction of House and Senate committees. Sec. 7(l).

## Part II: Statutory Powers of the Review Board.

The powers granted to the Review Board are not listed in any single section of the Statute, but are instead interspersed throughout. The Review Board's powers will first be enumerated below, followed by a more detailed discussion of the four most significant powers: the subpoena power; the power to grant immunity; powers to order federal agencies to comply with the Statute; and the power to require the transfer of records to the Review Board.<sup>6</sup>

*Enumeration of powers.* The JFK Act grants the Review Board the authority to:

- (1) “direct Government offices to complete identification aids and organize assassination records” Sec. 7(j)(1)(A).
- (2) “direct Government offices to transmit to the Archivist assassination records” Sec. 7(j)(1)(B); see also Sec. 9(1).
- (3) “direct Government offices” to provide “*substitutes and summaries of [postponed] assassination records*” Sec. 7(j)(1)(B) (emphasis added).
- (4) “obtain access to assassination records that have been identified and organized by a Government office” Sec. 7(j)(1)(C)(i).
- (5) “direct a Government office to . . . make available additional information, records, or testimony from individuals” and, “if necessary[,] investigate the facts surrounding additional information, records, or testimony from individuals” provided that the “Review Board has reason to believe” that obtaining such additional information “is required to fulfill its functions and responsibilities under this Act.” Sec. 7(j)(1)(C)(ii).
- (6) “request the Attorney General to subpoena private persons to compel testimony,

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<sup>6</sup>The Board is given some additional authority that is not important for present purposes, such as the power to “receive information from the public,” “use the Federal Supply Service” and “use the United States mails . . . .” Sec. 7(j)(E), (G), and (H). The Review Board also may use the services of GSA. Sec. 7(m).

records, and other information” Sec. 7(j)(1)(C)(iii) (see discussion below).

- (7) “require any Government office to account in writing for the destruction of any records relating to the assassination” Sec. 7(j)(1)(D).
- (8) “hold hearings, administer oaths, and subpoena witnesses and documents.” Sec. 7(j)(1)(F) (see discussion below).
- (9) grant immunity to witnesses. Sec. 7(k)<sup>7</sup> (see discussion below).
- (10) issue interpretive regulations. Sec. 7(n).
- (11) extend its tenure by one additional year from September 30, 1996 to September 30, 1997. Sec. 7(o)(1).
- (12) create advisory committees Sec. 8(d)(1).
- (13) require Government offices to transfer assassination records to the Review Board. Sec. 5(b); Sec. 5(c)(2)(E); Sec. 9(a) (see discussion below).
- (14) “request the Attorney General to petition any court in the United States or abroad to release any information relevant to the assassination . . . .” Sec. 10(a)(1) (see discussion in Part IV below).
- (15) “request the Attorney General to petition any court in the United States to release any information relevant to the assassination . . . that is held under the injunction of secrecy of a grand jury.” Sec. 10(b)(1).<sup>8</sup> (see discussion in Part IV below).

*Subpoena power.* The JFK Act is ambiguous with respect to the Review Board's subpoena powers. The Statute refers to the subpoena power in two provisions. The Statute first states that the Review Board has the authority to “*request the Attorney General to subpoena private persons to compel testimony*, records, and other information” Sec. 7(j)(1)(C)(iii) (emphasis added). This provision may

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<sup>7</sup>Items (1) through (9) are also identified in the Senate Report 42-43.

<sup>8</sup>Such requests are deemed to constitute “a particularized need” under Rule 6 of the Federal Rules of Criminal Procedure. Sec. 10(a)(2)(B).



be read in one of two different ways. It could be read to give the Board authority only to request the assistance of the Attorney General, but not to have the authority to issue subpoenas on its own behalf.

The second way of reading the provision is that the Board has the power to issue subpoenas on its own authority *and* that it may request the Attorney General to provide assistance to the Board in issuing such subpoenas.

The second provision of the Statute that addresses the subpoena power provides that the Board may “hold hearings, administer oaths, *and subpoena witnesses and documents.*” Sec. 7(j)(1)(F) (emphasis added). This second provision is also ambiguous. There are at least three different ways that it could be read. First, it could be read in tandem with the earlier provision, meaning that the Board may issue subpoenas only with the Attorney General's authorization. Second, it could mean that the Board may issue subpoenas on its own authority, but only as ancillary to holding hearings. Finally, the provision could be a simple and direct grant of authority to the Review Board to issue subpoenas.

Although the Statute on its face does not clearly require or exclude any of these interpretations, the Senate Report provides useful guidance in its statement that the Review Board has the full power to issue subpoenas on its own authority and that the role of the Attorney General is simply to provide additional assistance to the Board. The Senate Report interprets the JFK Act as providing that: “[T]he Review Board . . . *has the authority to subpoena private persons and to enforce the subpoenas through the courts.*”<sup>9</sup>

Because the Senate Report speaks clearly, and because it can be read consistently with the Statute,<sup>10</sup> the Review Board may reasonably conclude that it may issue subpoenas on its own authority and that the role of the Attorney General is to provide assistance to the Board.<sup>11</sup> However, because there is a degree of ambiguity in the Statute, it would be prudent for the Board to reach an understanding with the Attorney General prior to the issuance of its first subpoena.

***Immunity power.*** The Board is granted the power to immunize witnesses from criminal prosecution.

Sec. 7(k). This is an important power that can be very useful in eliciting testimony from reluctant witnesses. Because granting of immunity may affect the prosecutorial function, it would be

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<sup>9</sup>Senate Report 19 (emphasis added).

<sup>10</sup>Under federal law, an agency is entitled to “substantial deference” when interpreting its own enabling legislation, provided that its interpretation is “reasonable.”

<sup>11</sup>Moreover, it should perhaps be noted that the grant of the subpoena power to an agency, such as the Board, implies that the power may be extended to the staff when acting in accordance with the Board's authority. See Administrative Procedure Act, 5 U.S.C. 556(c).

advisable to consult in advance with the Attorney General regarding the manner and procedures for immunizing witnesses.

*Power to order federal offices to comply with the JFK Act.* The Board is given the authority to order government offices within the executive and legislative branches to comply with the terms of the JFK Act.<sup>12</sup> Thus the Board may “direct a Government office to . . . make available additional information, records, or testimony from individuals” and, “if necessary[,] investigate the facts surrounding additional information, records, or testimony from individuals” provided that the “Review Board has reason to believe” that obtaining such additional information “is required to fulfill its functions and responsibilities under this Act.” Sec. 7(j)(1)(C)(ii).

The Senate Report speaks of this particular power as being “extremely important to the proper implementation and effectiveness of the Act because it provides the Review Board with the authority to seek the fullest disclosure possible by going beyond the information and records which government offices initially chose to make available to the public and the Review Board.”<sup>13</sup> The Report further presumes that all government offices should “comply expeditiously to satisfy the Review Board’s request and need for access.”<sup>14</sup> The Senate Report summarizes this by stating that: “the Review Board has the *authority to direct any government office to produce additional information* and records which it believes are related to the assassination.”<sup>15</sup>

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<sup>12</sup>The Statute defines “government office” as “any office of the Federal Government that has possession or control of assassination records” (Sec. 5), which would seem to extend to the judiciary as well. However, the specific examples listed in Section 5 are all from the executive and legislative branches.

<sup>13</sup>Senate Report 31.

<sup>14</sup>Senate Report 31.

<sup>15</sup>Senate Report 19 (emphasis added).

Although the Board is granted the power to order government offices to comply, there remains the question of what measures are available to the Board in order to enforce compliance. The Statute does not, however, answer this question. Under general provisions of federal law, one agency does not have the power to seek judicial relief against another agency unless it is specifically granted power to do so in its enabling legislation. The JFK Act does not clearly provide the Board with such power. In the absence of any statutory provision, inter-agency legal disputes are traditionally resolved by seeking the opinion of the Attorney General.<sup>16</sup> “The issuance of an Attorney General’s opinion is frequently used to settle inter-agency disputes . . . . Professor Peter Strauss states: ‘Once the agencies have received advice from the Attorney General, they may lack the means to generate valid litigation that would test its correctness . . . .’”<sup>17</sup>

***Power to require government offices to transfer records to the Review Board.*** Government agencies are to maintain custody of their own records during the review process *unless* “the Review Board requires the physical transfer of records for purposes of conducting an independent and impartial review” or “transfer is necessary for an administrative hearing or other Review Board function . . . .” Sec. 5(b). See also 5(c)(2)(E); Sec. 9(a). Agencies also are instructed to make records available for the Review Board’s inspection. Sec. 5(b) and 5(c)(2)(E-F); 5(c)(2)(H) -- including any records about which there is any uncertainty as to whether they are assassination records. Sec. 5(c)(2)(F). Agencies also must “[m]ake available to the Review Board any additional information and records that the Review Board has reason to believe it requires for conducting a review under this Act.” Sec. 5(c)(2)(H).

### Part III: Statutory Guidance on Review Procedures and Transfer of Records to NARA.

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<sup>16</sup>The President could, of course, solve the *political* aspects of an inter-agency dispute by ordering the relevant agency to comply with his directives.

<sup>17</sup>William F. Fox, Jr., *Understanding Administrative Law* 60 (2d ed. 1992) (quoting Peter Strauss, *An Introduction to Administrative Justice in the United States* 101 n.152 (1989)).

The JFK Act establishes general guidelines for the procedures to be followed in reviewing records. The basic procedures are relatively straightforward: government offices that possess assassination records are to locate and review the records to determine what can be released and what should be postponed. The postponed records are then to be made available to the Review Board for its independent assessment. But there are many questions left unanswered. For example, agencies are allowed to present “clear and convincing evidence” in order to sustain their postponements, but no mechanism is established for when and how such evidence should be presented.<sup>18</sup>

The JFK Act provides two types of guidance relating to the review process. *First*, the Statute provides substantive guidance relating to postponements. *Second*, the Statute explains the basic procedural steps that follow from the Review Board's decisions. This memorandum addresses only the procedural steps established by the Statute.<sup>19</sup>

#### A. Review Board Quorum and Voting Requirements.

The JFK Act does not directly address quorum or voting requirements for Board meetings. The sole relevant guidance from the Act is its repeated statement that it *presumes* disclosure, which suggests that a *majority* of the members of the Board would need to vote *for a postponement* (rather than requiring a majority to vote for a release) in order for the postponement to be sustained.<sup>20</sup>

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<sup>18</sup>Given the absence of clear statutory guidance on the question of when agencies should be able to present their evidence, it would be appropriate for the Review Board to consult with the government offices to determine efficient, fair, and reasonable procedures to afford opportunities to present evidence. The Senate Report offers the following guidance: “to the extent possible, consultation with the government offices creates an understanding on each side as to the basis and reasons for their respective recommendations and determinations.” Senate Report 31.

<sup>19</sup>The substantive rules relating to postponement decisions will be addressed in a separate memorandum.

<sup>20</sup>See, for example, “The underlying principles guiding the legislation are independence, public confidence, efficiency and cost effectiveness, speed of records disclosure, and enforceability. In order to achieve these objectives, the Act creates a presumption of disclosure upon the government, and it establishes an expeditious process for the review and disclosure of the records.” Senate Report 17.

The JFK Act is, however, silent on several procedural issues affecting internal Review Board decisionmaking, including: (a) whether Board voting must be by a majority or supermajority; (b)

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whether the statutory presumption of disclosure necessarily implies that a majority (or supermajority) must vote *against* release rather than requiring a majority (or supermajority) to *favor* release; (c) whether the statutory presumption favoring disclosure implies that a “tie vote” requires release of information; (d) what constitutes a quorum for the purpose of decisions on the release of information and for other purposes; (e) whether the Board may delegate some or all of its postponement decisions to subcommittees of the Board; (f) whether a roll-call is required; and (g) whether the votes of the individual members must be recorded.

The Administrative Procedures Act, which regulates agency rulemaking and establishes federal agency notice and publication requirements, does not establish rules governing agencies' internal rulemaking and voting requirements, although the Sunshine Act does establish some limited voting requirements related to decisions on holding meetings.<sup>21</sup> Similarly, Executive Order 12,866 (Sept. 30, 1993), exempts from reporting requirements those rules that “are limited to agency organization, management, or personnel matters . . . .”<sup>22</sup> Accordingly, the significant legal restriction on the Board's internal voting procedures, quorum requirements, and other internal operating procedures, is that they be reasonable and rational.<sup>23</sup>

It would be advisable for the Review Board to establish voting and quorum requirements as soon as practicable. Although the law does not require the formal establishment of voting and quorum requirements, it would probably be advisable for the Board to establish such rules (subject to later revision or amendment) and to make the rules and procedures available for public inspection in the Reading Room.

#### **B. Statutory Constraints on Postponement Decisions.**

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<sup>21</sup>The relevant portion of the Administrative Procedure Act provides that the reporting requirements that pertain to most federal rulemaking procedures do not apply to an agency's “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .” 5 U.S.C. 553(b)(A). The Administrative Procedures Act contains some quorum and voting requirements with respect to noticing meetings. 5 U.S.C. 552b.

<sup>22</sup>Exec. Order No. 12,866.

<sup>23</sup>See, for example, *Idaho v. ICC*, 939 F.2d 784, 788 (9th Cir. 1991) (“In the absence of Congress' explicit direction, the [Interstate Commerce] Commission is empowered to prescribe regulations and procedures to carry out [its obligations under its enabling statute]. We need only satisfy ourselves that the Commission set forth a rational basis for its notational vote counting policy.”)

The Statute provides that when postponements are sustained in whole or in part, the Board must nevertheless disclose as much information as possible -- including through the use of substitute language. The Statute requires that whenever a record cannot be disclosed in its entirety, the Review Board shall attempt to “provide for the disclosure of segregable parts, substitutes, or summaries of such a record.” Sec. 9(c)(2)(A). These substitutes shall be performed “in consultation with the originating body and consistent with the standards for postponement under this Act . . . .” Sec. 9(c)(2)(B). Although this language provides that the substitutes shall be drafted in consultation with the agencies, the Statute does not disclose when, how, or under what circumstances such consultations should take place.<sup>24</sup> The Senate Report nevertheless presumes that because the Statute mandates broad disclosure, the need for such summaries will be infrequent.

While it is intended that government office[s] shall have the ability to issue such substitutes or summaries in lieu of an actual record, this practice should be limited to the rarest cases if ever, with the understanding that the release of information other than official records will perpetuate public distrust and undermine public confidence in the government’s responsibility to disclose the assassination records.<sup>25</sup>

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<sup>24</sup>The Statute requires that:

all postponed assassination records determined to require continued postponement shall require an unclassified written description of the reason for such continued postponement. Such description shall be provided to the Archivist and published in the Federal Register upon determination.

Sec. 5(g)(2)(B). The Statute does not state which entity bears the responsibility for drafting written explanations for continued postponements. Because the requirement is placed in Section 5 of the JFK Act, it would appear that the obligation would belong to the Government office that was in possession of the records in question. The specific provision in which the requirement appears, Subsection (g), is titled “Periodic review of postponed assassination records.” Thus the location of the requirement within the Statute, the title of the section, and the subtitle of subsection all point to the requirement of drafting the written description for the reason for the postponement as adhering to the Government office where the record originated. Although neither the language nor the location of the subsection obligates the Review Board to undertake the responsibility, it may, as a practical matter, be advisable for the Review Board to accept the burden.

<sup>25</sup>Senate Report 45.

### C. Review Board Reporting Requirements.

Once the Review Board has made its decision, it must report the results to the government office whose record has been reviewed, to the President (or Congress), to NARA, and in the *Federal Register*. (See Part I above.) The Board must not only report its decisions in a timely manner, but it must report specific types of information about its decisions.

***Timing of reports.*** After a decision is made to postpone or to release a document, “the Review Board shall notify the head of the originating body of its determination and publish a copy of the determination in the Federal Register within 14 days after the determination is made.” Sec. 9(c)(4)(A). At the same time (*i.e.*, within 14 days), the Review Board must give notice regarding its decisions to the President (for Executive Branch records) or to the Congressional oversight committees (for Legislative Branch records). Sec. 9(c)(4)(B). In addition, there must be ongoing monthly reports to the *Federal Register*.

***Content of the Reports to the President, Congress, and the originating office.*** The Report to the President (or Congress) and to the originating office “shall contain a written unclassified justification for public disclosure or postponement of disclosure, including an explanation of the application of any standards contained in section 6.” Sec. 9(c)(4)(B).

***Content of monthly reports in the Federal Register.*** There must be a “Notice to the Public” of decisions once every 30 days in Federal Register. (Sec. 9(d)(3)). These notices must include “a description of the subject, originating agency, length or other physical description, and each ground for postponement that is relied upon.” Sec. 9(e).

***Content of the Report to NARA.*** For *each* postponed record, the Board must send a Report to the Archivist containing the following information: (a) a description of actions; and (b) a specified time or occurrence for the record to be opened. (Although the Statute requires a form for NARA and for the Agencies, it appears that the forms could easily be consolidated so as to include the relevant information and prevent unnecessary duplication.)

### D. The Role of the President (Executive Branch Records).

The Statute provides no clear guidance with respect to the mechanics of Presidential review of Board decisions. It is frequently assumed in discussions of the JFK Act that the President’s role is that of route of appeal for an agency that is displeased with a decision by the Board. This is not, however, what the Statute provides. According to the Statute, the President possesses the full power and



authority to make all decisions for both postponement and disclosure of executive branch records.<sup>26</sup> According to the Statute, once the Board makes a

formal determination . . . *the President shall have the sole and nondelegable authority to require the disclosure or postponement of such record* or information under the standards set forth in section 6, and the President shall provide the Review Board with an unclassified written certification specifying the President's decision with 30 days . . . . stating the justification for the president's decision, including the applicable grounds for postponement under section 6, accompanied by a copy of the identification aid . . . .

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<sup>26</sup>The provision acknowledging presidential authority over executive branch records intentionally excluded the President from any responsibility over legislative branch records. Senate Report 32. The Senate Report recognizes that there might be a dispute between the President and the Congress with respect to identifying records as executive or congressional:

For example, within the files of the House Select Committee on Assassinations (HSCA) there are staff notes [that] rely in part on information obtained or developed by the CIA. Under the 'third agency' rule in the Act, the CIA could choose to recommend that the Review Board postpone those portions which it identifies as originating at the CIA. If the Review Board declined the recommendation and the President sought to override the determination, the President would be limited to postpone those sentences or words which were originated or developed by the CIA. The remainder of the document would have to be publicly disclosed.

Sec. 9(d)(1) (*emphasis added*).<sup>27</sup> This language clearly suggests that it is not the Board that makes decisions, subject to appeal by the President, but it is the President that makes decisions after having been informed of the Board's "formal determination." The Senate Report makes the same point: "the President has the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6, and the President must provide the Review Board with an unclassified written certification specifying his decision within 30 days after the Review."<sup>28</sup>

Although the Statute requires the President to be faithful to the requirements of section 6 of the Act when making his decisions, there is no procedural mechanism either to ensure that the President fulfills this responsibility or that he complies within the statutorily mandated 30 day period.

Given these constraints, it would seem advisable for the Review Board to begin negotiations with the White House for the disposition of records once the Board has made its "formal determination." It may be that the White House, which no doubt does not want to be distracted from its other duties by confronting the task of a document-by-document review, will be willing adopt a procedure that effectively ratifies the Board's decision within thirty days *unless* an agency makes a particularized appeal. The Statute does not seem to require the President to make such an agreement, but it would seem to be consistent with the Statute, to be time and effort efficient, and to spare all parties needless confusion.

Once the Review Board is notified of the President's decision, it must memorialize that decision on the record form that it forwards to NARA. Sec. 9(d)(3).

#### **E. The Role of the Congress (Legislative Branch Records).**

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<sup>27</sup>Postponement decisions made by the President continue to be subject to periodic review and downgrading. Sec. 9(d)(2).

<sup>28</sup>Senate Report 46.

Unlike Executive Branch records, where the President retains final decisionmaking authority, legislative records are not subject to further procedural review by Congress. Although Congress must be notified of the Board's decisions, it does not have a role comparable to that which the President retains for executive branch documents. The Review Board's decisions are thus automatic, with one important exception: Congress retains the power to pass a resolution in both houses to limit the Review Board's actions. The Senate Report explains that “[f]or congressional records, in the event that the Congress disagrees with a determination by the Review Board, each House would be required to adopt a resolution to change or create a rule governing the disposition of its records at issue.”<sup>29</sup> This suggests that Congress will remove itself from the document-by-document review process, but could undercut the Review Board's decisions if it becomes sufficiently disturbed by the Board's decisions.

#### F. Transfer of Records to NARA.

Once the executive and legislative branch records decisions are final, the Board is required to transfer the *original records* and identification forms directly to NARA. Sec. 4 (d)(2). The Senate Report clearly anticipates that *all* originals will be transferred to the JFK Collection, regardless of whether there are continuing postponements. “The Committee believes that such review should occur at a single facility. That will be most effectively achieved by bringing the review committee to the documents and not vice versa. . . . [T]here is less likelihood of loss or destruction, and therefore ease of access at a single central location.”<sup>30</sup>

The records at NARA will be subject to periodic and continuing review, even after the Review Board ceases to operate. The periodic review will be conducted jointly by NARA and the originating body.

“All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B).” Sec. 5(g)(1). For congressional records, the House and Senate committees “shall have continuing oversight jurisdiction with respect to . . . the disposition of postponed records after termination of the Review Board.” Sec. 7(l). The Act “shall continue in effect until such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to

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<sup>29</sup> Senate Report 18. Elsewhere the Report explains this in somewhat different terms: when documents contain both executive and legislative equities, the President may protect only executive branch interests. “The remainder of the document would have to be publicly disclosed.” Senate Report 32.

<sup>30</sup>Senate Report 25.

the public in accordance with the Act.” Sec. 12(b).

#### Part IV: Statutory Responsibilities of Government Offices under the JFK Act

*Obligations of all Government offices possessing assassination records.* The Statute required all government offices possessing assassination records to “review, identify and organize each assassination record in its custody or possession for disclosure to the public, review by the Review Board, and transmission to the Archivist.” Sec. 5(c)(1). This provision effectively ordered agencies to have completed the review process by August, 1993. The Senate Report is even more explicit: “Government offices holding assassination records are required to begin organizing and reviewing such records upon enactment and have this work completed within ten months of enactment.”<sup>31</sup>

#### *Specific Obligation of Presidential and Other Libraries to Comply with JFK Act.*

The Statute instructs Presidential libraries to give priority to processing assassination records. Sec. 5(c)(3). According to the Senate Report, the JFK Act “specifically requires the directors of presidential libraries to expedite the review of all assassination records and make them available to the Review Board as required by this Act. It is incumbent on the presidential libraries to determine which of its records may qualify as ‘assassination records’, regardless of whether the records were conveyed to the government by a deed or gift or donation . . . .”<sup>32</sup>

*General Obligations to Cooperate With the Review Board.* In addition to their statutory obligations to identify and review assassination records, it is the sense of Congress that “all Executive agencies should cooperate in full with the Review Board to seek the disclosure of all information relevant to the assassination of President John F. Kennedy consistent with the public interest.” Sec. 10(b)(3).

*Specific Obligations of Justice and State to Cooperate With the Review Board.* The Department of Justice and the Department of State are given particularized responsibilities to assist the Review Board. The Attorney General is to assist in issuing subpoenas, obtaining court records, and obtaining Grand Jury testimony under seal. Sec. 10(a)(1)-(2) and 10(b)(1). The Statute also provides that it is “the sense of Congress” that the Secretary of State should assist the Review Board in obtaining records from foreign governments. Sec. 10(b)(2).

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<sup>31</sup>Senate Report 18. See also *ibid* at 38, 39 (300 days).

<sup>32</sup>Senate Report 26.

## Part V: Recommendations to the Review Board and Staff for Priority Action

*First*, establish and publish a review schedule.

*Second*, establish rules for quorums and voting.

*Third*, establish an understanding with the Attorney General for the issuance of subpoenas and the immunizing of witnesses.

*Fourth*, establish a working relationship and procedures with the *Federal Register* (and OPM) for publishing Review Board decisions.

*Fifth*, establish an understanding and working relationship with the White House for referring Board determinations to the President.

*Sixth*, establish working relationships with governmental offices for handling Review Board decisions.

*Seventh*, establish working relationships with Congressional oversight committees for reporting of Review Board decisions.

*Eighth*, develop guidelines for Decision Report Forms. The Board presumably should create one form that will satisfy all of its reporting requirements for the President, the originating agency, for Congress, and for NARA.

Proposed postponement language: The Review Board holds that postponement number \_\_\_\_\_ shall be sustained. continued until [specify date] or until the Review Board shall be continued pending either a re-review by the Board based upon further information that it learns in the course of its review. Unless the Board

The Assassination Records Review Board is “an independent agency.” Sec. 7(a).

Priority review to FOIA requests in litigation as of date of enactment. [1992 or 1994]

“public interest” defined in Section 3.

“[T]he determinations of the Review Board are reviewable and enforceable in a court of law.

“The Assassination Records Review Board is an independent agency within the executive branch.” at 19.

[*Forthcoming*. Attach appendix with statutory analysis. Clear and convincing evidence whether record is an assassination record. *Constraints on Board discretion*.

“The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that--

(A) a Government record is not an assassination record; or

(B) a Government record or particular information within an assassination record qualifies for postponement of public disclosure under this Act.” Sec. 9(c)(1).]

HSCA staff personnel records: Committee presumes disclosure. Senate Report 33.

“the determinations of the review board are reviewable and enforceable in a court of law.” at 18.

The Statute does provide some specific limitations on the Review Board’s powers.<sup>33</sup>

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<sup>33</sup>[Records that remain outside the purview of assassination records are: First, IRS Sec. 11(a) [section 6103 of IRS code]; Second, “does not include the autopsy records donated by the Kennedy family . . . or copies and reproductions made from such records.” Sec. 3(2). To the extent that autopsy records exist that were never a part of (or derived from) the Kennedy family's deed of gift, such records would, presumably, come within the scope of assassination records that should be forwarded to NARA. Third, does not include “deeds governing access to or transfer or release of gifts and donations of records to the United States Government. Sec. 11(a). See also Senate Report 21-22.] “This provision specifically governs all reproductions or copies made by official investigative committees or for other purposes, including those created by or for the house Select Committee on Assassinations (HSCA).” Senate Report 22.