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Hearing witness, Moynihan legislation on declassification March 25, 1998

Work on possible testimony on experiences of the Board--sketch out bullet points with lots of examples and identify any useful documents

JFK Act is not the perfect model for declassification but clearly some valuable lessons have evolved from the Board's experiences:

1. Agencies have trouble explaining why some things need to remain secret. Difference of secrecy habit vs national security need. Example: CIA's desire to protect a crypt in slug lines even when that same crypt was released throughout the document. Example: FBI appeal which the FBI gave up because it could not justify redaction. Example: FBI tried to withhold information which Hoover had released to Congress years ago. **Give examples of what is secret and what is habit.**

2. Review needs to be overseen by an independent agency which can demand evidence and which is seen as a significant decision maker.

Intelligence agencies have no internal incentive to release information. No intelligence officer was ever promoted because he/she released information. FOIA litigant don't know what is under the redactions so they can't judge the viability of the "national security" argument. Judges don't have time to do the research.

3. Agencies need to be made accountable for their justifications for withholding information. The JFK standards may not be ideal but some standard needs to be set where agencies must justify withholding information that is within the guidelines or standards. For example agent or informer names.

MANY TYPES OF DOCUMENTS RELEASED UNDER JFK ARE EXEMPT FROM THE EXECUTIVE ORDER DECLASSIFICATION

NSA

The JFK documents were never released under FOIA prior to Board Review.

The following are exempt from E.O. automatic declassification:

- all sigint product reports
- documents containing informational or cryptologic efforts
- documents on traffic analytical techniques

NSA has released some of these types of documents under voluntary programs using specific declassification guidelines and driven by requests or specific tasking such as Venona, Guatemala, POW-MIA, and UFO's

Resources are the limitation for exempted information. More could be released with increased resources.

CIA

All Directorate of Operations documents are exempt under the Executive Order.

Secret Service -- all

Talking Points

1. Secrecy as a habit vs secrecy as a national security necessity.
2. Review needs to be overseen by an independent agency which can demand evidence and which is seen as a significant decision maker.
 - By demanding evidence the Board has been able make informed choices by listening to the argument of the concerned agency and by examining the documents in question.
 - E.O. requires a challenge by a member of the public. Yet, in 22 months of its existence ISCAP has voted on fewer than 100 documents.
 - FOIA litigants do not have the ability to challenge specific redactions because they have no way of knowing what is under the black box.
 - Judges have neither the time nor the access to research specific FOIA challenges and tend to accept the Government's word as to whether the information in question has national security implications.
 - ISCAP does not deal in volumes of information though decisions are supposed to set precedents which all agencies would follow.
 - An independent agency would also be able to set priorities for the review of historically significant information.
3. Agencies need to be made accountable for their justifications for withholding information.
 - Seventy percent of the documents appealed to ISCAP were opened in full over the objections of agency heads. In the remaining documents, additional information was released.
 - To date, not one ISCAP decision has been appealed to the President.
 - Referrals are difficult and standards are different or unevenly applied based on the clarity of the guideline and the conscientiousness of the reviewer.
4. Totally exempting certain block of records provides an inaccurate view of decision making and the past.
 - Entire blocks of records are exempt under the E.O.

- NSA --all SIGINT production reports.
 - CIA--all Directorate of Operations documents
 - Secret Service--all documents
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- Documents exempt under the E.O. have been released under the standards of the JFK Act.
 - NSA-all documents released under JFK were exempt from E.O. and had never been released under FOIA. Most were released with redactions but many are open in full.
 - CIA--Directorate of Operations documents have been released with redactions or open in full.
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- Documents exempt under the E.O. have been released through voluntary programs from the agencies using specific declassification guidelines and driven by requests from the public or specific tasking.
 - NSA--Venona, Guatemala, POW-MIA, and UFO's
 - CIA--Bay of Pigs and Guatemala
 - Secret Service--The Record