MEMORANDUM TO THE PRESIDENT

Assassination Records Review Board
Sur-reply
to the United States Secret Service's Appeal
of the
April 13, 1998 Formal Determinations

June 15, 1998

This memorandum responds to the new evidence and arguments raised by the Secret Service's June 1, 1998 letter to Charles F.C. Ruff ("USSS June 1 letter").[1] The Review Board's principal arguments are found in its May 22 Reply, to which it continues to adhere.

In its June 1 letter, the Secret Service now agrees to withdraw its appeal of two of the four records previously at issue.[2] Because the Secret Service has agreed to release all information in the remaining contested records -- except for the names of individuals -- the only issue now facing the President is whether these names should be released under the standards of the JFK Act. With all due respect to our sister agency, the new evidence and reformulated arguments supplied in its June 1 letter do not alter the basic fact that the Secret Service has failed to show, by the required "clear and convincing evidence," that these names should not be released. Indeed, we observe that the fundamental problem in the Secret Service's briefing of the issues is that it fails to link its many points to the fact that the sole issue now facing the President is the release of names in two documents.[3]

I. The New Evidence and Arguments on Privacy Fail to Satisfy the Requirements of the JFK Act.

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[1]There are several additional misstatements regarding the Review Board that are contained in the June 1 letter. We will be addressing only those that actually are germane to the Appeal.

[2]*See* Merletti to Ruff, June 1, 1998 at 1. The records now at issue are attached as Exhibits 3 and 4 of the Review Board's May 22, 1998 memorandum. Technically, there were five records originally at issue -- although two of the records were essentially duplicates. *See* ARRB Reply, May 22, 1998, at 1, 4.

[3]For example, the Secret Service implies that the issue on appeal is the release of privileged communications rather than the release of names of persons who were kept on file by the Protective Research Section during the latter part of 1963. Although the Secret Service's June 1 letter ignored our challenge to show that any "confidential communications" are actually at issue, it continues the same theme as its original Appeal. **[is this fair? examples?]**

Prior to the Review Board's April 13 vote, the Secret Service was afforded the opportunity to submit specific evidence regarding persons who might be harmed by the release of their names. Unlike the FBI and the CIA, the Secret Service decided to rely on a policy argument and declined to provide any specific information that would show that any particular person would be harmed by the release of his or her name.[4] By following this risky strategy, the Secret Service essentially obligated itself to provide "clear and convincing" evidence that the release of such information is, as a matter of policy, an "an unwarranted invasion of personal privacy, and that invasion outweighs the public interest." JFK Act § 6(3).

[4]In the FBI's first appeals to the President, more than two years ago, it also relied on policy arguments rather than specific evidence. After being advised by Judge Mikva that such arguments were not sufficient, and after thorough briefing on the issues, the FBI withdrew its appeals and now provides the Review Board with specific information on persons whose identity it wishes to protect. The Secret Service was advised of this prior to the time it made its decision to appeal.

Six weeks after the Board voted on the records at issue, the Secret Service -- in its June 1 letter -- finally provided a sketchy piece of information about one individual whom it alleges would be harmed by the release of his name in the context of an activity he undertook as a child. *See* USSS June 1 letter at 6. Such information is exactly the type of information that the Review Board encouraged the Secret Service to make available before it voted, but which the Secret Service declined to provide. The extremely vague manner in which the evidence is presented in this peculiar case, however, makes it impossible to be objectively evaluated.

The Secret Service attempted to prove the existence of such a policy not by citing any relevant law, but by attaching letters from the medical health community.[5] Although the Secret Service argued that as a matter of policy and practice such information was not available to the public, the Review Board was able to provide several examples of where such information is already a matter of public record. In response, the Secret Service does not deny that this information was in fact open to the public, but suggests instead that the National Archives is to blame for the opening of some records and argues that there are some places in the country where such information continues to be closed to the public. We will respond to these two arguments in turn.

The Record. In its Reply, the Review Board disclosed that the Secret Service itself published the names of persons -- and psychiatric information regarding them -- who were of concern to the PRS in its internal publication entitled *The Record*. *See* ARRB Reply at 7-9; ARRB Ex. 6. In response, the Secret Service now attempts to downplay the significance of the fact that it published and distributed this allegedly "confidential" and "privileged" mental health information to its offices throughout the country without any identified restrictions on its internal distribution. Thus this "confidential" and "privileged" information was distributed to the Counterfeit Division and the Financial Crimes Division. The June 1 letter argues that it is perfectly appropriate for the Secret Service to distribute this PRS information on mental health as long as it is solely within the Secret Service. Once again, however, the Secret Service's argument is flatly inconsistent with its prior representations to the Review Board. In April of 1996, the Secret Service represented to the Review Board that it scrupulously protects the type of information at issue here and limits its distribution solely to those who have a need to know within the PRS itself and that it:

> *carefully safeguards the confidentiality of its protective intelligence files*. These records have *consistently been segregated from all other criminal investigative files* of the Secret Service, and data therefrom is not co-mingled in the Service's criminal investigative computer database, is not shared with other law enforcement agencies through shared databases, *is not maintained by the investigating Secret Service field offices as are other Secret Service criminal investigative files, is not generally available to the subjects of those records, and is not generally available to Secret Service employees outside the controlling headquarters division*.[6]

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[5]The Secret Service did refer to some privacy law which, as our Reply showed, is irrelevant under Section 11(a) of the JFK Act. *See* ARRB Reply at 6. Wisely, the Secret Service did not renew this argument in its June 1 letter.

[6]Letter from Jane Vezeris to David Marwell, April 15, 1996 at 3 (included as "Attachment 3" to USSS Appeal Ex. 11).

Thus, in April of 1996, in order to prevent the release of the records now at issue, it advised the Review Board that this information is carefully restricted only to selected persons within the Secret Service. Once the Review Board learns that this statement is incorrect, and that the information is distributed throughout the Secret Service, it simply offers a new argument.[7]

[7]It appears that here, as elsewhere, the Secret Service shifts its argument as soon as the Review Board discloses that the supposedly secret, confidential, and privileged information is much more widely available than the Secret Service originally acknowledged.

The Secret Service replies to the Review Board's argument that *The Record* is now open-in-full at the National Archives by the disappointing and unworthy suggestion that the National Archives erred in opening the documents without the permission of the Secret Service. In order to pass the blame to the Archives, the Secret Service ignores the unavoidable fact that its authorized representative, on March 4, 1981, signed a Standard Form 258 and agreed to open in full *The Record* for the years 1938 through 1959 without marking either box that would have placed restrictions on them. *See* ARRB Ex. 8 (boxes 5C and 5D).[8] The Secret Service's suggestion to the Archives that it now close *The Record* or return it to the Secret Service is certainly inconsistent with the spirit of the President's own Executive Order 12958.[9]

Public commitment hearings. In its Appeal, the Secret Service originally argued that mental health records are kept confidential **[good cite needed]**. The Review Board, with only a few hours work, was able to locate several civil commitment records in the District of Columbia -- the single most relevant jurisdiction -- on several of the very people whose names are at issue in this appeal. *See* ARRB Reply at 9-11. The information in these public records was more revealing than the sketchy information included in the records on appeal. Thus the core argument on which the Secret Service relied in its appeal, was belied in the very jurisdiction where the President lives and the Secret Service is headquartered.

Having had its original broad argument fall short in its home jurisdiction, the Secret Service now argues that: "[i]n some [unspecified] states, the records are sealed by the court and may only be disclosed upon court order.' USSS June 1 letter at 5. This may be true -- but making such a statement does not begin to satisfy the Secret Service's obligation to provide the evidence that any of the states that may have such rules have any bearing on the names at issue in this appeal. The Secret Service, once again, simply makes a broad statement and believes that the broad statement satisfies its duty to provide clear and convincing evidence. Because the Secret Service has not even alleged that the laws in any of the unspecified states applies to the names at issue in the two documents, it has not begun to satisfy its burden of proof.

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[8]The Secret Service is apparently suggesting that letters written in 1978, three years before it agreed to open *The Record* in full, should be taken to supersede the later document. The Review Board is aware of no theory of contract interpretation or interpretation of a last will and testament -- probably the closest analogies -- that would support revising a document that is clear on its face and has been uncontested for 17 years, based upon prior inconsistent statements.

[9]"Information may not be reclassified after it has been declassified and released to the public under proper authority." Section 1.8(c).

II. The Names at Issue are Relevant to the Assassination

In its opening brief, the Review Board stated that the names at issue were those of individuals who were identified as being potential threats to President Kennedy and that two prior investigations of the assassination (the Warren Commission and the HSCA) believed that these names and documents were relevant for their investigations. *See* ARRB Reply at 1, 12-13.[10] The Secret Service wisely did not dispute or challenge the Review Board's evidence on the prior interest of the Warren Commission and the HSCA. Rather, the Secret Service only challenged the Review Board's initial description of these records.[11] In italics, the Secret Service responded that "[i]t is important to note that upon investigation, the *majority* of these individuals were evaluated as not of protective concern." USSS June 1 letter at 2 (general italics omitted, emphasis added here). In making this argument, the Secret Service attempts to downplay the significance of the names. There are three problems with this effort of the Secret Service to minimize the importance of these names in records to the investigation of the assassination of President Kennedy.

First, as stated above, the Warren Commission and the HSCA, which were charged with investigating the assassination, previously rejected this position and examined the underlying records. *See* ARRB Reply at 12-13. The JFK Act itself defines those records that were made available to the Warren Commission and the HSCA as "assassination records" that should be transferred to the National Archives. JFK Act, § 3(2). The Review Board, like the Warren Commission and the HSCA, believe that the fact that a school child was in the Secret Service's PRS files and that Lee Harvey Oswald was not is relevant to the assassination and a fact worth noting.

Second, the Secret Service elsewhere -- albeit inadvertently -- characterizes this very same information quite differently from how it describes it here. When discussing the purpose of *The Record,* the Secret Service explains that it was ***"used as a means of communicating . . . significant cases of interest . . . ."*** USSS June 1 letter at 4. The Review Board does not understand how the

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[10] Not only did these individuals come to the Secret Service's attention , they were located among the files of the Protective Research Section (PRS). In 1964, Robert Bouck testified before the Warren Commission that one of the functions of PRS was "the responsibility of attempting to detect persons who might intend harm to the President, and to control those persons or take such corrective measures as we can take security -wise on them . . . ." Testimony of Robert Bouck, Warren Commission, Vol. IV, at __.

[11] The Review Board described them unremarkably as records that "identify people whom the Secret Service's Protective Research Section ("PRS") considered to be potential threats to President Kennedy . . . ." ARRB Reply at 1.

Secret Service can plausibly argue that the information routinely published in *The Record* can pertain to "significant cases of interest" prior to the assassination, but that it becomes "insignificant" after the assassination.

Third, in making its argument that it has determined that many of the people identified were not involved in the assassination, the Secret Service is asking the President, the Review Board, and the American people to believe that its judgment regarding who was or was not involved in the assassination should be taken as dispositive. Under the JFK Act, it is neither the responsibility of the Review Board nor the Secret Service to identify the person or persons who ultimately were responsible for the assassination of President Kennedy. The Review Board is officially agnostic on this issue. It is, however, the business of the Review Board to identify the types of records that are "relevant" to the assassination. And, *using the very words employed by the Secret Service to describe the types of records at issue here*, these were "significant cases of interest" to the PRS and should be included in the JFK Collection.

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