DRAFT

Recommendations

This final report to Congress and the President, outlining our activity, evaluating our experience, and assaying the process of classification and declassification of federal records, provides an important opportunity. In this chapter, we reflect on the course of our experience in dealing with the larger issues of classifying and declassifying federal records, and on the challenge of secrecy and accountability in the federal establishment. We have framed recommendations responsive to these issues, in the context of the Kennedy assassination, as we suggest what the federal government might do to apply our findings to related areas of government activity. Our recommendations, therefore, distill our experiences and permit us to contribute to a continuing dialogue both within government and beyond about how best to balance national security and privacy with openness and accountability.

Congress passed the legislation establishing our Board hopeful that, by creating mechanisms to open records concerning the Kennedy assassination, some of the suspicion that the federal government had indeed been involved in a cover-up might be dispelled. After the assassination, growing numbers of Americans disagreed with the finding of the Warren Commission that Lee Harvey Oswald, acting alone, was responsible for the murder of the President, with some 65% of Americans in disagreement within a few years of issuance of the Commission's report in 1964. By the 1980s, in excess of 80% of the American people did not agree with the conclusion of the Commission. These facts, together with Oliver Stone's conspiratorial claim in his movie, "JFK," motivated Congress to pass the President John F. Kennedy Assassination Records Collection Act of 1992.

Our charge was not to investigate the assassination but rather to release as many of these restricted documents as possible. In the words of one of the legislative reports, lawmakers commented that the efforts of the Review Board "will stand as a symbol and barometer of public confidence in the review and release of the government's records related to the assassination of President Kennedy…. Several provisions [of the Act creating the Board] are intended to provide as much independence and accountability as is possible within our Constitutional framework."

This was a high standard, and we trust that our record will show that we did our utmost to create with the greatest possible fidelity the most complete record possible of the documentation surrounding the assassination. In this way, the government might allow the American people to review its files and draw their own conclusions as to what might have happened and why on that fateful day in Dallas in November 1963.

There are a great many unresolved issues relating to the assassination that need to be addressed, and our efforts have produced many more documents that shed light on events immediately surrounding the assassination. Perhaps even more important, the documentation that is now available has cast the event into a broader context as an episode of the Cold War. Beyond that, we believe that our experiences as a Board are most relevant to the important topic of classifying and declassifying federal records. Because of the provisions of the act, and because we were

able to take advantage of favorable circumstances (i.e., the end of the Cold War and the growing concern about the extent of secrecy in government), five private citizens and the staff that reviewed the records under our direction have had an impact on the manner in which the federal government has managed its restricted records.

Ultimately, it will be years before the work of the Review Board can be judged properly. The test will be in the scholarship that is generated by historians and other researchers who study the assembled documentation of the event and its aftermath. Does the historical record formed by the Board elicit confidence that the historical record is now reasonably complete? Will the documents released under the JFK Act lead to still other materials? Will the mass of assembled documentation formed in the Assassination Records Collection at the National Archives answer the questions posed by historians and others? Will the Board's compliance program inspire confidence that the agencies have produced all the relevant documentation that conforms to the Board definition of an "assassination record?"

There is no doubt that we have had a unique experience in declassifying federal records. *We were the first group of private citizens in American history to be assigned this responsibility.* Gradually, the Board review and determinations of documents, starting with our first formal vote in April 1995, developed precedents that have guided the staff in their review of documents and recommendations to the Board. The Board considered staff recommendations, often reaching decisions that reflected our commitment to the mandate of the legislation as well as our joint interest in developing the fullest possible historical record surrounding this tragic event.

At the same time, the Board determinations arising from this collaboration guided federal agency personnel who have increasingly used this information to facilitate their "consent releases" of many additional federal documents. There have been, of course, a variety of disagreements between the Review Board and the agencies, but the course of relations between the Review Board (staff and Board members alike) and the federal agencies has been characterized chiefly by growing mutual understanding and improved communication. Agency personnel have become increasingly aware that the responsible release of information can serve their interest and provide a positive use of their records. The information supplied through documents affords opportunity for evaluating agency accountability as well as demonstrating how policy mandates and Constitutional provisions were executed.

In keeping with the congressional desire that the Board's efforts might have an impact on public confidence in the federal government, the Board has sought to consult the public frequently by holding frequent public meetings and by conducting hearings (in Washington, Dallas, Boston, New Orleans, and Washington). In addition, we conducted two experts' conferences for the same general purpose and undertook to depose witnesses where the documentary records were inadequate or unclear (especially in the area of medical records). The hearings proved to be especially productive, directly leading, for example, to the donation to the JFK Collection of the personal papers of Warren Commission General Counsel J. Lee Rankin, as well as the papers of William Wegman, defense attorney for Jim Garrison. The records of the Louisiana Grand Jury that indicted Garrison were also added to the Collection, after a court battle with New Orleans District Attorney Harry Connick, Sr., that went all the way to the Supreme Court. The Board

also voted to make the famous Zapruder film—the ultimate assassination record—part of the Assassination Records Collection in the Archives. In addition, the Board has sought to conduct as much of its own business as possible in the open, applying to its own work the high standards that Congress set for it in releasing the records of others.

From the point at which the White House announced our respective nominations to the Review Board in the late summer of 1993 through to the end of the work of the Board, each of us has had contact with the public concerning the work of the Board. From the outset, it was apparent that there was a pattern in the responses of the various groups. First, the **federal agencies** themselves have gradually come to the realization that release of records in itself can be an opportunity for them to create a fuller record of their activity and effort as these related to the assassination. Second, the **assassination research community** has had an intense interest in our work, monitoring it closely, urging us to be aggressive in our effort, and quick to call us to account for perceived shortcomings. Third, the **community of professional historians** initially exhibited comparatively slight interest in our work, eventually paying attention when it began to gain access to records, especially those that shed light on the Cold War context in which the assassination was so obviously enmeshed. Fourth, the **general public** has been responsive to our activity primarily in terms of their evaluation of the work of the Warren Commission and its successors. Older Americans, those who reached adulthood prior to the Kennedy Presidency, tend to support the conclusions of the Commission; younger Americans, especially those not born at the time, are almost universal in their disagreement with the Commission's findings. For those who fall between these age groups, the event elicits controversy.

There were critics of our effort, those who believed that the "targeted declassification" effort of the Board not only interfered with the goal of systematic declassification as directed in the most recent Executive Order on the subject (12958), but was also too expensive. It is difficult, of course, to put a price tag on the nature of the information with which we were dealing, harder still to compare one method of declassification with that of another. Indeed, any meaningful approach to declassification will be multi-faceted, with different methods adopted for different circumstances. The circumstances of the assassination of President Kennedy and the response of the federal government to it have nurtured over the years suspicion and belief that the government may have conspired in the murder of its own leader. Our effort to release documentation should enable American citizens to draw their own conclusions. In that light, the total cost of this four-year project seems entirely appropriate. We have left to posterity a historical bequest that is truly invaluable.

Beyond that, our efforts have created precedent and identified tools that future researchers might employ with good effect. We hope that those in federal service will note that, in our experience of releasing classified federal documents, the Republic has not collapsed under the weight of threats to national security, that openness is itself a good, and that careful scrutiny of government actions can strengthen agencies and the process of governance, not weaken it. Perhaps there are or will be problems that might also best lend themselves to the extraordinary attention that a Review Board with powers similar to those that we enjoyed can provide. Formation of a historical record that can augment understanding of important events is central not only to openness and accountability but to democracy itself.

Similarly, we believe that our effort represented a financial outlay that, while being significant, was also warranted by the result. We have augmented substantially the historical record by working with agencies whose records are intrinsically sensitive, not only increasing through exacting review the quantity of information available about the assassination, but also by providing substitute language in those cases where we voted to restrict access temporarily. The Act was designed to foster the confidence of the American people in its government by reducing the amount of secrecy concerning this event; we have worked hard to accomplish this goal, and we believe that our efforts have constituted an effective approach.

At an early stage of our work, one of our number commented that we should strive to accomplish as much as we could, to be remembered for what we attempted. Or, to paraphrase Robert Kennedy, we worked hard to insure that our reach continually exceeded our grasp. Surely, we did not always attain that standard, but we did strive to contribute to what we hope will be a continuing effort to create the best possible historical record concerning the assassination.

In fulfilling the congressional mandate, we have framed recommendations that reflect our experience and pose guidance for those who wish to capitalize on that experience to further reform the process of classification and declassification of federal documents. We recognize that our project represents but one approach to declassification, one whose activity was designed to review sensitive records concerning a controversial event. Accordingly, we recommend the following:

Future declassification initiatives concerning controversial events must depend on a genuinely independent body that reviews documents.

The independence of the Board started with the juridical idea that the Review Board was in fact an independent executive agency with powers conferred on it through its enabling legislation. This independence was consequently as political as it was legal, thereby facilitating our dealing with the agencies, as did the precepts included by the Congress in the legislation. As a group of five outsiders, heretofore uninvolved in previous investigations or research concerning the assassination, but trained in historical, archival, and legal issues that are central to the records of the assassination, we collectively brought to our work a perspective framed by professional training and experience.

The JFK Assassination Records Collection Act created both by the legislation (mandating that JFK assassination records be transferred to the Archives) and the Board (charged to review everything that the agencies felt they couldn't release) led to the formation of a collection of over four million pages of records. This daunting mass of records concerning this traumatic event and featuring such sensitive records stands as testimony not only to the centrality of the

assassination as an event, but it also gives witness to the problem of so many federal records being classified. An open and accountable form of governance requires that this volume of secret documentation be reduced. The independence of any group charged to declassify records is a key attribute.

1. Serious, sustained effort to declassify federal documents will require congressional legislation with clear standards of access, an enforceable review and appeals process, and a budget appropriate to implement the legislation.

The President John F. Kennedy Assassination Records Collection Act set admirable and effective standards through its precepts of "presumption to disclosure" for releasing records and "clear and convincing evidence of harm" in restricting them. Both standards have guided the Board in its action, and we urge that these standards be rigorously applied to other efforts to declassify federal records. The discerning enumeration in the Act of criteria for sustaining restricted access creates an obligation both for the Review Board and the agencies to apply these criteria to the many situations reported in the documents. These criteria for sustaining restrictions, especially that of "clear and convincing evidence of harm," provide a very important focus and disciplined way of thinking about federal records and the information they often contain.

There were other powers conferred on the Board by the Act that were central to the exercise of our duties. The agencies could challenge our decisions only by appealing our recommendations to the President who had the "non-delegable" responsibility to decide them. This stringent provision raised our declassification activity to a threshold level that prompted the agencies to weigh the ramifications of any appeal that perforce expended valuable political capital.

These standards have been a central consideration in guiding the work of the Board. Its importance cannot be overlooked, and the pervading influence of the standards was consistently reflected in our deliberations. In balancing the public interest and privacy rights, the Board voted consistently that the precept of a "presumption to disclosure" prevailed in every case where we believed that there was salient information relative to the assassination.

Our relations with the agencies often faltered over the "clear and convincing evidence of harm" standard. This was not only a new criterion for them, but it placed the burden on them to explain why a document should remain shrouded in secrecy. This occasioned conflict and misunderstanding, especially as the agencies complained that satisfying the test entailed unwarranted expenditure of funds for which they were hard-pressed. The Board, however, insisted on adherence to the legislative provisions, and the agencies ultimately learned, in general, how to satisfy the Board's expectations.

While reviewing records, we observed that our relations with the agencies followed a remarkably similar course. Initially, we found that they sent public relations and declassification staff to participate in our meetings, to advise us of their effort in trying to fulfill the goals of the legislation, and to assure us that their policies pertaining to restricting access to federal documents were based on tried and true concepts of "national security" and " individual privacy." Essentially, we were asked to trust their judgment and to understand how these important twin

concepts informed their work. It is also the case that the agencies initially approached the mandate of the Act as they would a FOIA request. They soon learned—with the prompting of Review Board staff—that the provisions of the JFK Act were different and that a change in response was necessary to meet the higher standard to sustain restricted access. As this process moved forward, the agencies invariably bringing operations personnel into the discussions.

Fortunately, the JFK Act contained specific criteria stating that the agencies had to produce "clear and convincing evidence of harm" if redactions were to be sustained. This standard is difficult to achieve for records thirty-five years old, and the agencies faced time-consuming—and expensive—procedures in order to meet that standard. Where the agencies demonstrated that agents or informants, for example, faced danger (organized crime informants living in the same city as they had back then, for example), we voted to sustain not releasing their names, but used the substitute language provision of the statute.

Moreover, the Act provided sufficient funds for the Board to hire staff to undertake its work. We were fortunate to recruit talented, loyal, and dedicated colleagues, with whom we worked to fulfill the Board's mission. Our accomplishment is, in a direct way, that of our staff, and we record our debt to them with gratitude. (Other federal declassification efforts, especially that at the Archives, badly need substantially more resources if they are successfully to accomplish their mandates.) The work of our staff shows what adequate funding can achieve.

1. The Review Board "common law" of decisions, formed in the context of a "presumption of disclosure" and the "clear and convincing" evidence of harm criteria, should be applied to future declassification efforts. Perhaps parts of this "common law" might be codified to provide further guidance for declassifying federal records.

In undertaking our work, we were, of course, guided by the legislation and its provisions. The Congressional standards of a "presumption of disclosure" in the release of documents and that of "clear and convincing evidence of harm" in sustaining restricted access were guiding beacons in the work that we did. We were aggressive in employing both standards, much to the initial discomfort of agency personnel. As the issues were confronted and the standards applied, however, the application of these principles became gradually more apparent, and the public policy wisdom reflected in these unprecedented precepts became more evident.

As stated earlier, Congress wished the Board to become through its activity a symbol and barometer of public confidence in the review and release of the government's records related to the assassination of President Kennedy. This release was designed to enhance openness and accountability in the federal government, especially since previous behavior had contradicted those qualities. At the outset, we made slow progress in resolving these matters.

Our approach was to discuss the records in seminar-like sessions, working to frame guidance by which our staff might then process records and relay our guidance to the agency staff with whom they were working. The experience of the Board in undertaking its legislative mandate was initially complicated by some disagreement as Board members sought first to understand the documents and then to find ways to reach common ground on issues such as privacy and liaison

relationships, especially in documents that outlined relations between the U. S. government and its allies. Board members engaged in some spirited discussion as we struggled to frame an approach to records containing these and other attributes. But the differences among Board members ultimately proved to concern tone and emphasis more than substance. In time, the body of decision-making began to grow, and with it a kind of "common law." When there were disagreements between the Review Board and agency staff, we conducted meetings designed to identify common ground. Initial wariness and some misunderstanding gradually yielded to more trusting and productive effort to process records.

In the course of our work, it became apparent that there were a great many documents that shared common characteristics. The names of agents and informants, crypts, digraphs, the location of CIA stations abroad, and other numerical data used to identify documents, recurred constantly in the documents that we reviewed, and helped form the Review Board "common law" about how to treat redacted information in federal documents. As the effort to release federal documents presses forward on other fronts, we believe that there are common ways of handling these categories of information, so that similar substitute language may be provided, and there might also be consensus concerning how long the information needs to be restricted. Handling restricted documents by adopting common substitute language as appropriate will also enhance the efficiency of the review, lowering unit costs for processing documents in the process.

Codification of this nature would seem to allow restricted access to some of this information, and yet still indicate to researchers and other citizens what kind of identifying information had been withheld and for how long. The idea of substitute language for critical pieces of redacted information, together with less sweeping and more discerning application of what is to be withheld, offers a promising way of limiting the volume of restricted information in federal documents.

4. Future declassification efforts should recognize the shortcomings of the JFK Act and work to avoid them.

If the legislation passed by Congress represented a milestone in articulating useful principles by which to review classified records, there were also shortcomings in the Act that we present here in order to guide future declassification efforts of controversial events:

- the timetable laid out for us to accomplish our work was overly optimistic and required us to play "catch up" even before we started;
- the provision that we could not hire those who were currently working for the government seemed unduly restrictive, and obliged us to undertake costly and time-consuming security checks for each of our employees (for whom security clearances were, of course, central to their work with classified documents);
- there is uncertainty in the Act about the status of openings that will occur after expiration of the statute, and whether any further appeals by agencies might be permitted, and, if so, who would represent the interest of openness;
- the sunset provision in our legislation undermined the careful review and disposition of records that the Congress sought. We lost critical staff in the final phases of our activities because they had to seek job security for themselves and their families.

Moreover, a government entity, such as the President's Foreign Intelligence Advisory Board (PFIAB), which was not inclined to cooperate with us, could simply try to wait us out. A more open-ended provision, in which the Board, supervised by its Congressional Oversight Committee and the Office of Management and Budget, would declare its progress, but not set a termination date until there was agreement that the successful completion of our mandate was about to be successfully realized, would seem a desirable outcome;

- if there were some mechanism, perhaps some type of preferred status in the Office of Personnel Management, by which staff might be assisted in their efforts to find other jobs, that, too, would be welcome. Anything that could facilitate the job security of staff working in term appointments obviously would enable them to stay focused on the work at hand, not worrying over their future job security.

We submit that future legislation concerning the opening of restricted federal records should review carefully these provisions and take steps to insure that those problems are satisfactorily resolved.

1. The problem of referrals for "third party equities" (classified information of one agency appearing in a document of another) must be addressed in future declassification activities by convening representatives of all agencies with interests in selected groups of important documents, and referring information to one another all at once. A second, complementary approach establishes uniform substitute language as z means of dealing with certain categories of recurring sensitive equities.

The practice of extensive classification of government documents has created a jungle of secrecy in which agencies are protective of one another's prerogatives, meticulously referring records to the originating agency in all cases. The frequency of this occurrence has had a substantial impact on the rate and pace of release of such information. It is not surprising that such information, especially among law enforcement and intelligence agencies, is shared extensively. One consequence of this sharing is that one agency's restricted information is often found in another's files. When this occurs, the agency creating the information must agree to its release by another agency. Such equities are expensive to search and release.

The Review Board staff developed an effective means of mitigating these referrals by convening on occasion (as occurred at the Kennedy Library with documents relating to Cuba) representatives of agencies with interests in the documents so that a group of documents might be collectively declassified at once, with representatives there to sign off on the specific interests associated with each agency. A second means of easing this problem might be to develop a uniform means (perhaps through substitute language that could be agreed to beforehand) of dealing with certain recurring categories of sensitive information.

1. Future declassification efforts, particularly those entailing a search for records, should incorporate a compliance program as an effective means of eliciting full cooperation in the search for records.

The Review Board compliance program was established to ensure that all federal agencies holding assassination records would warrant under oath that every reasonable effort had been made to identify assassination records, following the definition of records as set by the Board and published in the *Federal Register*, and that such records had been made available for review by the Board. Throughout our work, we have been concerned that critical records might have been withheld from our scrutiny and that we have not secured all that was "out there." It is all too easy to imagine that agencies and agency personnel not inclined to cooperate might simply have waited us out, using our sunset provision against us by waiting for it to take effect, thereby ending the need to cooperate at all since we would no longer exist.

Our solution to this concern was to develop a compliance program whereby each agency had to designate a "compliance officer" to warrant, under oath and pain of perjury, that records had been diligently searched for and turned over to the Board for review and/or release to the National Archives. This program entails a detailed review (overseen by Review Board staff) of the effort undertaken by each agency in pursuit of such records and constitutes a record to guide future researchers in terms of what assassination records were actually uncovered. The program is also intended to be forward-looking, so that the agencies will continue to follow the provisions of the Act after the Board passes out of existence.

1. To ensure that the provisions of the JFK Act are exercised after the Review Board passes out of existence, it is essential that *the National Archives have:*
a) the authority and means to continue to implement Board decisions,
b) that an appeals procedure be developed that puts the burden for preventing access on the agencies, and that
c) the professional and public interest warrants the creation of joint oversight group (composed of representatives of the four organizations that originally nominated individuals to serve on the Review Board) to facilitate the continuing execution of the provisions of the JFK Act.

The creation of the President John F. Kennedy Assassination Records Collection at the National Archives has created a large collection undergoing intense use by researchers. Having created this national research resource, Congress should ensure that the National Archives receives the additional resources necessary to manage this collection responsibly, and that it is also be given the authority to administer the provisions of the original act as passed by Congress. We recommend that a Memorandum of Understanding be negotiated among the National Archives, the FBI, and the CIA that would establish a common agreement on how to resolve some of the issues concerning the extensive assassination records of these two agencies, especially insofar as additional records will still be coming to the Archives and additional releases of documents are scheduled to take place after the dissolution of the Review Board. The formation of liaison group composed of individuals from the professional organizations that originally nominated members for the Review Board to oversee implementation of the provisions of the JFK Act would ensure the continuing representation of the public interest by those trained to understand the historical, archival, and legal issues that inhere in these records.

1. The Review Board model could be applied in certain extraordinary circumstances

(such as, for example, the U.S. entry into World War II or perhaps in the war in Vietnam) where continuing controversy concerning government actions has been most acute and where an aggressive effort to release all "reasonably related" federal records would serve usefully to enhance historical understanding of the event.

The public stake in creating a mechanism such as the Review Board to inform American citizens of the details of some of the most controversial events in American history is clear. Moreover, the release of documents enables citizens to form their own views of events, to evaluate the actions of elected and appointed officials, and to hold them to account. There will not be a large number of such events, but there must be procedures grounded in experience that might be used to uncover the truth when these events, tragic as most of them are, occur. The provisions of the JFK Act have fostered the release of such documents, and the Board's experience demonstrates that similar legislation (especially with some of the remedies discussed above) would be successful in the future.

1. Both the Freedom of Information Act (FOIA) and Executive Order 12958 should be strengthened, the former to narrow the categories of information automatically excluded from disclosure, the latter to add "independent oversight" to the process of "review" when agency heads decide that records in their units should be excluded from release. In addition, declassification efforts must be guided by a resolve to limit the period of time for which records might be classified, and, in both cases, substitute language must be used for all restrictions.

Despite the sound public policy goals encompassed in both the Freedom of Information Act (FOIA) and the most recent Executive Order (12958), both of these measures fall short of their goal, as witnessed by the inability of researchers to use these measures to release assassination records. The categories of exclusion are far too broad in the case of FOIA to constitute a meaningful program of opening restricted federal records, and the succession of Executive Orders issued since the FOIA legislation more than twenty years ago reflects the same problem. The most recent Executive Order also fails by not creating for the federal agencies an "oversight" procedure to ensure that the decisions concerning access to agency records made by that agency's head will be independently reviewed. The mandate to release must become internalized in the agencies and penalties for secrecy must rival in consequence those for unauthorized release of national security information.

The mandate of the Review Board, underscored by powers conferred in its legislation and further aided by an adequate appropriation, exceeds what the FOIA legislation and Executive Orders can accomplish because the Review Board has the authority and resources to both review and release. Proponents of the Freedom of Information Act and declassification via Executive Order would benefit from consulting the JFK Act to identify how best to augment the resources and authority of those measures.

1. A federal classification policy that substantially:
<u>limits</u> the number of those in government who can actually classify federal documents,
<u>restricts</u> the number of categories by which documents might be classified,

reduces the time period for which the document(s) might be classified, and increases the resources available to the agencies and NARA for declassifying federal records is what is needed. Moreover, the most effective means of declassifying already restricted documents is the systematic declassification program mandated in the most recent Executive Order, though it surely needs far more resources and enforceable sanctions to be a truly successful effort.

Our experience leaves little doubt that the federal government needlessly and wastefully classified and then withheld from public access millions of records that did not require such treatment. Consequently, we have no doubt that an aggressive policy is necessary to address the significant problems of lack of accountability and an uninformed citizenry that are created by the current practice of excessive classification and obstacles to releasing such information. This need is not something recently identified, though the Moynihan Commission on Secrecy in Government is a recent expression of this long-standing concern. A clearly conceived, precisely rendered policy outlining its goals, and procedures to accomplish them, should be adopted. The federal government must address these needs forthrightly and with a humble sense that such an action is egregiously overdue. In the same way, an aggressively, adequately funded program for declassifying systematically previously restricted federal records is also urgently required.

These recommendations are designed to ensure that the comprehensive documentary record of President Kennedy's assassination is both actively developed after the Board passes out of existence, and that the experience of the Board be turned to the larger purpose of addressing the negative consequences of the excessive classification of federal records. The Board effort to accomplish the purposes of our legislation has been focused and aggressive. It will be for others, of course, to judge our success in achieving these goals, but there can be no doubt about our commitment to making the JFK Act a model for the future.