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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE MARY FERRELL FOUNDATION,
INC.; JOSIAH THOMPSON; and GARY
AGUILAR,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as
President of the United States; and
NATIONAL ARCHIVES AND RECORDS
ADMINISTRATION,

Defendants.

No. 4:22-cv-06176-RS

AMENDED DECLARATION OF
WILLIAM SIMPICH

Date: April 30, 2022

Time: 1:30 pm

Dept: Hon. Richard Seeborg

I, William M. Simpich, declare:

1. I am the attorney for the Plaintiffs in this action.
2. NARA's pattern and practice is to urge researchers to file FOIA cases to seek
assassination records – exactly the reason that the JFK Act was passed. I have spoken

1 with Mr. Alcorn and with other individuals who have told me that they were also
2 advised by NARA to file FOIA requests rather than JFK Record Act requests.

3 3. Attached as Exhibit A is a document of public record, CIA counterintelligence chief
4 James Angleton's instruction to his subordinate Ray Rocca to "[wait out](#)" the Warren
5 Commission when the CIA was asked to pass on certain records to the Warren
6 Commission. Based on my review of this document and related documents, I can
7 state that this instruction was given after the Warren Commission asked the CIA to
8 provide documents that it sent to the Secret Service in the immediate aftermath of the
9 events of 11/22/63.
10

11 4. NARA failed to conduct periodic reviews between NARA and the releasing agencies
12 pursuant to Sec. 5(g)(1) for many years. Less than 6000 records were released
13 between 2000-2016, and more than 4000 of them were released during 2004.
14 Similarly, virtually no periodic reviews occurred between 2000-2016 until the 2017
15 deadline was front and center. In my review of the documents, I have found
16 documents stating that the outstanding searches pursuant to the NARA agreement
17 with the Board and the CIA of 1998 were continued into 1999, but I cannot find any
18 documents stating that these searches were completed nor that any new searches were
19 conducted after 1999. See Exhibit B (both the tables of releases and the 1999 letter).
20

21 5. Based on my information and belief, my research indicates each of the following
22 statements is true. The Executive Office of the President is now five years late in
23 releasing in full about 4,000 files.
24

25 6. NARA did virtually nothing regarding evaluating the files for disclosure between
26 1999 and 2013, but for a tiny bump in activity in the 2003-2004 period.
27
28

1 7. NARA created a "four-person team" only in 2013 to prepare for the 2017 release.

2 8. NARA did virtually nothing to continue the ARRB's work re new searches since
3 1999, notwithstanding the representations to the American public in the Federal
4 Register.

5 9. NARA did virtually nothing to continue the ARRB's work re identified documents
6 that needed to be obtained between 1999 and the present.
7

8 10. NARA did virtually nothing to search for missing and destroyed files between 1998
9 and the present, even though such files can also be found in computer databases.

10 11. NARA did nothing that we know of to ask the Attorney General to enforce the search
11 for missing and destroyed files between 1998 and the present.
12

13 12. Jeremy Dunn, general counsel of the Board, advised the Board take on the roles of the
14 agencies in writing the analyses of whether an assassination record should be
15 postponed or not, and offered insights on how to use the JFK Act. See Exhibit C,
16

17 13. CIA officers urged that certain documents not be released to the Board in the 1990s
18 stating they didn't want "the camel's nose under the tent." See Exhibit D, page 1.

19 I declare under penalty of perjury that the foregoing is true and correct and of my own
20 personal knowledge, except those stated on information and belief, and as for those
21 matters I believe them to be true. Executed on March 7, 2023, in Richmond, Contra
22 Costa County, California.
23

24
25 /s/ William M. Simpich

26 _____
27 William M. Simpich
28 Attorney for Plaintiffs

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Declaration of William Simpich
Case No. 3:22-cv-06176-

Exhibit A

MARY
FERRELL
FOUNDATION
preserving the legacy

www.maryferrell.org



Title: NOTE:WE HAVE A PROBLEM HERE FOR YOUR DETERMINATION

Author: n/a

Pages: 2

Agency: CIA

RIF#: 104-10423-10190

Subjects: OSWALD, L.H

Source: AARC



Date: 01/25/99
Page: 1

JFK ASSASSINATION SYSTEM
IDENTIFICATION FORM

AGENCY INFORMATION

AGENCY : CIA
RECORD NUMBER : 104-10423-10190
RECORD SERIES : JFK
AGENCY FILE NUMBER : RUSS HOLMES WORK FILES

DOCUMENT INFORMATION

ORIGINATOR : CIA
FROM : ROCK
TO : DICK
TITLE : NOTE:WE HAVE A PROBLEM HERE FOR YOUR DETERMINATION.
DATE : 03/05/64
PAGES : 1
SUBJECTS : OSWALD, L.H.

DOCUMENT TYPE : PAPER, TEXTUAL DOCUMENT
CLASSIFICATION : SECRET
RESTRICTIONS : OPEN IN FULL
CURRENT STATUS : OPEN
DATE OF LAST REVIEW : 12/07/98
OPENING CRITERIA :
COMMENTS : JFK-RH12:F216 1998.12.07.16:24:32:123120:

[R] - ITEM IS RESTRICTED

~~SECRET~~
A HISTORICAL REVIEW PROGRAM
RELEASE IN FULL 1998

5 March 1964

Dick:

We have a problem here for your determination.

This is responsive to paragraph 3 of Rankin's letter (see reference tab). JA does not desire to respond directly to paragraph 2 of that letter which made a levy for our material which had gotten into the hands of the Secret Service since 23 November. We found that, except for three telegrams, all that the Secret Service had was material we had sent to McGeorge Bundy at the White House. Apparently, he had simply passed it to the Secret Service as a matter of internal information.

Unless you feel otherwise, Jim would prefer to wait out the Commission on the matter covered by paragraph 2. If they come back on the point he feels that you, or someone from here, should be prepared to go over to show the Commission the materials rather than pass them to them in copy. Incidentally, none of these items are of new substantive interest. We have either passed the material in substance to the Commission in response to earlier levies, or the items refer to aborted leads, for example, the famous six photographs which were not of Oswald, and the passenger manifest on an airline which also did not pertain to Oswald.

If you desire to take note of the levy in paragraph 2, we would recommend that you indicate in the attached proposed memorandum solely that we will take care of it separately.

Rock

~~SECRET~~

Exhibit B

JFK Database Explorer: Date of Last Review

Listing of starting values of field Date of Last Review, sorted alphabetically.

Sort by: **Alphabetical** Document Count

Number of rows: 47

Total Count	on MFF	Date of Last Review
4754	10	<u>0000</u>
1	0	<u>1926</u>
1	0	<u>1934</u>
1	0	<u>1938</u>
1	1	<u>1948</u>
1	0	<u>1959</u>
1	0	<u>1960</u>
2	1	<u>1962</u>
288	0	<u>1963</u>
17	0	<u>1964</u>
1	0	<u>1965</u>
1	0	<u>1967</u>
14	0	<u>1969</u>
5	0	<u>1975</u>
3	0	<u>1976</u>
6	0	<u>1977</u>
132	49	<u>1978</u>
2	0	<u>1981</u>
1	0	<u>1982</u>
2	0	<u>1984</u>
1	1	<u>1986</u>
3	0	<u>1987</u>
25	11	<u>1989</u>
32099	647	<u>1992</u>
90603	5166	<u>1993</u>
48307	2844	<u>1994</u>
10583	6014	<u>1995</u>
13888	6851	<u>1996</u>
13865	5009	<u>1997</u>
48844	39444	<u>1998</u>
13172	3910	<u>1999</u>
46	4	<u>2001</u>
3	0	<u>2002</u>
451	213	<u>2003</u>

4269	3669	<u>2004</u>
58	18	<u>2005</u>
26	0	<u>2006</u>
1	0	<u>2007</u>
2	0	<u>2008</u>
31	0	<u>2009</u>
1	0	<u>2010</u>
2	0	<u>2011</u>
47	1	<u>2014</u>
131	1	<u>2015</u>
87	50	<u>2016</u>
16093	16066	<u>2017</u>
21234	20281	<u>2018</u>

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Title: MEMO: STATUS OF OBLIGATIONS UNDER MEMORANDUM OF UNDERST...

Pages: 3

RIF#: 104-10331-10205

Source: National Archives

ADMINISTRATIVE - INTERNAL USE ONLY

22 June 1999

MEMORANDUM FOR: •Edmund Cohen
Director, OIM

FROM: J. Barry Harrelson
JFK Project Officer
OIM/HRP

SUBJECT: Status of Obligations under Memorandum of Understanding With the
Assassination Records Review Board

REFERENCE: Memorandum of Understanding Regarding Continuing Obligations of the
CIA Under the JFK Act

On September 30, 1998, the Assassination Records Review Board, National Archives (NARA), and the CIA signed a Memorandum of Understanding to clarify the CIA's obligations under the JFK Act in view of the expiration of the Review Board's term on September 30, 1998. The MOU addresses categories of documents and activities that the Review Board had agreed could be postponed beyond September 1998. We have completed, or are on track to complete, most of these obligations by September 1999; however, we have missed deadlines on a few items. We are working closely with NARA in completing the JFK project, and I keep them apprised of our progress; our relationship with NARA remains excellent. Given the massive job that NARA has in processing the JFK collection, our missed deadlines have not been a problem to NARA, nor have they delayed NARA's release of information to the public. The following is a status report for each item listed in the MOU (numbers and letters reflect references in the MOU):

3. This section addresses assassination records in the CIA's JFK collection to be reviewed, processed and transferred to NARA after September 30, 1998.

- a. By October 30, 1998, the balance of non-duplicate documents from the CIA-HSCA Sequestered Collection.

The bulk of these documents were provided within the October/November 1998 timeframe. As part of our duplicate processing, we are finding some "non-duplicate" documents that were missed during the review for the Board or not acted on by the Board. These include a number of "open in full" documents that were originally thought to be duplicates. We are including these documents in our duplicate processing.

- b. By September 30, 1999, the duplicate documents within the CIA-HSCA Sequestered Collection.

We are on track to complete by September 30. We have completed approximately 70% of the collection.

- c. By December 31, 1999, the duplicate documents within the working files of CIA officer Russ Holmes.

We completed the Russ Holmes files in January 1999. NARA recently opened this collection to the public.

- d. By September 30, 1999, 185 audio tapes of CIA surveillance of Soviet and Cuban diplomatic facilities in Mexico City.

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Of the 185 tapes, 98 have been reviewed and transferred to NARA (all released in full); DO has said they will be completed by the deadline, however, we have not received any tapes recently. [Eileen Wukitch is following-up]

e. By December 31, 1998, DCI area working files.

Completed May 1999.

f. By December 31, 1998, document # 104-10061-10115 (list of names and crypts).

Completed February 1999.

g. By September 30, 1999, CIA's JFK project records (HRG/HRP files, JFK Project working files, DO cables, certifications, etc.).

In progress, the bulk of this work will be done in August/September timeframe. Due to the impact of Nazi project, this is the one item that could miss the September deadline.

h. Non-duplicate assassination-related records created or discovered by the CIA after September 30, 1998.

A small number of additional assassination records have in found in response to a FOIA request and by ADD's 25-year program. Approximately 1 ft hardcopy material plus 44 microfiches related to the HSCA investigation were located in OGC files being retired to Records Center. The new records have been reviewed and incorporated into the collection; the OGC HSCA material is pending a duplicate review.

4. Referrals of assassination records from other Agencies by April 30, 1999.

- a. Church Committee records (10,000 pages). *Completed May 1999.*
- b. JFK Presidential Library's RFK files (2,000 pages). *Completed May 1999*
- c. Rockefeller Commission Records at LC (15 linear ft) *Believed duplicate of Ford Library Collection; no action required.*
- d. Army file on individual (147 pages) *Completed January 1999*

Other referrals: ARRB files at NARA (11,200 pages) *Completed April 1999*

5. This section addresses the JFK Act's requirement that the classified original (or full text copy) of sanitized or postponed documents be transferred to NARA for secure storage until 2017.

a., b. By September 30, 1998, classified originals of Oswald files (Lee and Marina).

Completed September 1998.

c. By September 30, 1998, original microfilm reels for the CIA-HSCA Sequestered Collection.

We "technically" met the deadline in that the reels are at NARA. However, they are stored in a safe in the Agency's 25-year unit's area. A final decision on secure storage until 2017 has to be made.

d. By October 30, 1998, all other assassination records not otherwise addressed in this MOU.

We have taken no action on this item. The DO has concerns with this requirement and there are a few sensitive documents that it would like to hold at the Agency; we need to work the details of secure storage with NARA and resolve any sensitive document issues. In addition, the process is very labor

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intensive, and I have not had the resources to handle the task. This process requires locating each sanitized document in the collection; making a copy of the document and Iden aid; sending either an original or a copy of document to NARA, or, if a sensitive document, microfiche the document and send the fiche to NARA.

e. By October 30, 1998, the printed version of the Oswald 201 file from the CIA-HSCA sequestered Collection microfilm.

Completed in October 1998.

f. By December 31, 1998, the originals of all postponed records from the Russ Holmes working files.

See "5.d." above.

6. This section addresses the handling of the Not Believed Relevant (NBR) records which remain in the Agency's custody. There are three action items required of the agency:

(1) preservation of the Nosenko audio tapes

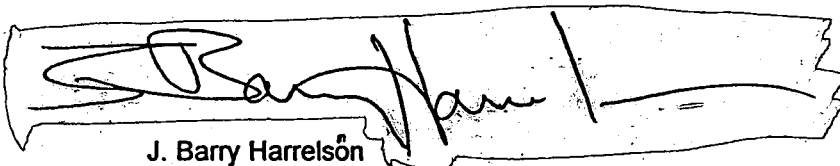
The tapes need to be indexed (low priority); once indexed, we will contact Records Center re proper storage.

(2) by November 30, 1998, provide NARA a list of the hardcopy files being retained until 2017.

No action taken; we plan to use the database to create the listing, however, it may require some programming work on the by SAIC team. We have asked NARA for a delay until September 1999 to complete the updating of the database.

(3) confirm with NARA arrangements for securing this material.

Part of the final decision concerning the disposition of the JFK collection; NARA requires the right of inspection upon request.



J. Barry Harrelson

Attachment: See Reference

CC: Lee Strickland
Jim Oliver

Exhibit C

CIA HAS NO OBJECTION TO
DECLASSIFICATION AND/OR
RELEASE OF INFORMATION
IN THIS DOCUMENT

**Analysis of the President John F. Kennedy
Assassination Records Collection Act of 1992
June 6, 1995**

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 Report¹ – 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;² and (d) the responsibilities of other governmental entities to further the goals of the Statute.³

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

¹S. 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.

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

³This 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)).

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provisions.⁴ 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, 1994,⁵ 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.

⁴The 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

⁵Several 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.

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

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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.⁶

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).

⁶The 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).

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- (6) "request the Attorney General to subpoena private persons to compel testimony, 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)⁷ (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).⁸ (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 be read in one of

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

⁸Such requests are deemed to constitute "a particularized need" under Rule 6 of the Federal Rules of Criminal Procedure. Sec. 10(a)(2)(B).

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.*"⁹

Because the Senate Report speaks clearly, and because it can be read consistently with the Statute,¹⁰ 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.¹¹ 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.

⁹Senate Report 19 (emphasis added).

¹⁰Under federal law, an agency is entitled to "substantial deference" when interpreting its own enabling legislation, provided that its interpretation is "reasonable."

¹¹Moreover, 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).

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 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.¹² 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.”¹³ The Report further presumes that all government offices should “comply expeditiously to satisfy the Review Board’s request and need for access.”¹⁴ 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.”¹⁵

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

¹²The 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.

¹³Senate Report 31.

¹⁴Senate Report 31.

¹⁵Senate Report 19 (emphasis added).

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.¹⁶ "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'"¹⁷

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.

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

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

¹⁷William 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)).

mechanism is established for when and how such evidence should be presented.¹⁸

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.¹⁹

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.²⁰

¹⁸Given 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.

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

²⁰See, 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) 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

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.²¹ Similarly, Executive Order 12,866 (Sept. 30, 1993), exempts from reporting requirements those rules that "are limited to agency organization, management, or personnel matters"²² 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.²³

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.

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

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.

²¹The 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.

²²Exec. Order No. 12,866.

²³See, 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.")

- 14 -

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.²⁴ 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.²⁵

²⁴The 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.

²⁵Senate 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

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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.²⁶ 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

Sec. 9(d)(1) (*emphasis added*).²⁷ 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

²⁶The 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.

Senate Report 32.

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

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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."²⁸

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).

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."²⁹ This suggests that Congress will remove itself from the

²⁸Senate Report 46.

²⁹ 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

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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."³⁰

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 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

have to be publicly disclosed." Senate Report 32.

³⁰Senate Report 25.

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upon enactment and have this work completed within ten months of enactment."³¹

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"³²

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).

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

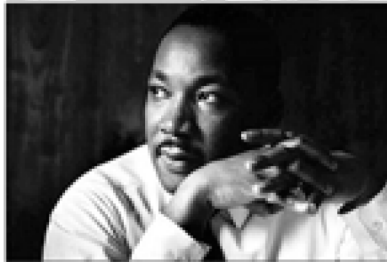
³²Senate Report 26.

Exhibit D

MARY FERRELL FOUNDATION

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Title: NOTE: JFK RECORDS

Pages: 6

RIF#: 104-10331-10062

Source: National Archives

New Note

NOTE FOR: Edward P. Moffett @ DCI
FROM: John N. Greer
DATE: 02/27/95 06:02:46 PM
SUBJECT: JFK Records

This is in response to your request that I review ASAP the proposed regulations by the JFK Assassination Records Review Board.

I see Sheryl Walters hand very much in evidence here. I see from the attachment that she is the Board's GC.

Like you, I am very concerned about the breadth of the reg's definitions. The key to keep in mind is the statutory authority for the Board. I would argue that the definition of "assassination record" in the statute (44 U.S.C. section 2107 note; section 3(2) of the Act) is more limited than the reg. The statute defines an assassination record as one "related" to the assassination of JFK. Thus, when section 1400.2(d) and (e) of the reg authorize Board access to organizational charts of governmental agencies and records necessary and sufficient to describe the agency's records policies and schedules, filing systems and organization, and storage facilities and locations, I would argue that such information is way too far afield. There is no way we can allow the Board to have access to this information, which in any event is prohibited by section 403g from disclosure notwithstanding any other law.

The same issue arises with respect to section 1400.7(d) of the reg that proposes to include in the definition of record any records for a person by another name or personal identifier. This would appear to authorize Board access to all information about an agent who may have only been tangentially involved in the assassination but whose crypt is given in many other unrelated documents about unrelated operations. Talk about your camel's nose under the tent!

Finally, section 1400.5 of the reg raises an old dog of an issue. The National Security Archive (Sheryl's old employer) has been fighting for a long time in FOIA litigation that the FOIA refers to records and that therefore all information in a responsive record must be released unless otherwise exempt. There is no FOIA exemption, they argue, for non-responsive material in a record. This is a big problem for multi-topic documents, such as the NID. We, of course, argue that agencies are only required to process that which is asked for and delete non-responsive material as unrequested. The proposed reg would mean that the Board would have access to all information in a document about several unrelated operations or events if that document even mentioned the assassination or anything related to it. Again, the camel's nose.

CC: Thomas J. Benjamin @ DCI

New Note

ADMINISTRATIVE - INTERNAL USE ONLY

CSI-0316/95
16 February 1995

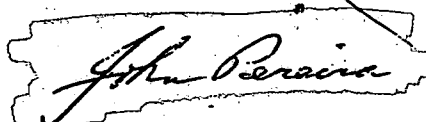
NOTE FOR: D/IM/ADDA/IS
DCI/IRO
DA/IRO
DI/IRO
DO/IRO
DS&T/IRO
OGC (Bob Eatinger)
~~DD/OCA~~
C/IP&CRD
C/RDP/MSG/OIT

FROM: John Pereira
Historical Review Group

SUBJECT: JFK Assassination Records
Proposed Regulations

1. Attached for your review and comment is a copy of proposed regulations prepared by the JFK Assassination Records Review Board. The regulations focus on the definition of "assassination record", which is very broad. The possibility of requiring additional records searches is raised.

2. The Board plans to discuss the regulations at its next meeting on 6-7 March, so it would be helpful to give the Board our input in advance of that meeting. Please provide Barry Harrelson (x30292) or me (x30373) with your comments by 1 March.



John F. Pereira

Attachment

703-243-8343

facsimile

TRANSMITTAL

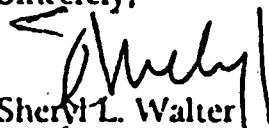
to: John Pereira, CIA Historical Review Program
fax #: (703) 243-8343
re: ARRB proposed interpretive regulations
date: February 9, 1995
pages: 4, including cover sheet.

Dear John:

Following this cover sheet is a courtesy copy of the Assassination Records Review Board's proposed interpretive regulations, published yesterday in the Federal Register. The proposed regulations include guidance on interpretation of the scope of certain provisions of the Assassination Records Collection Act, including the terms "assassination record" and "additional records and information." The Board is soliciting comment from all interested parties and would welcome any comments that the CIA may have. (The comment period is 30 days; the deadline is March 10.)

If you have any questions or need any additional information, please don't hesitate to give me a call on my direct line or at our main number, 724-0088.

Sincerely,


Sheryl L. Walter
General Counsel

From the desk of

Sheryl L. Walter
General Counsel
Assassination Records Review Board
600 E Street, NW, Second Floor
Washington, D.C. 20530

(202) 724-0915
Fax: (202) 724-0457

(B) For dependents of active duty members in pay grades of E-5 and above, \$25; and,

(C) For retirees and their dependents, \$25.

(vi) The copayment for prescription drugs per prescription, for a maximum 30-day supply, is as follows:

(A) For dependents of active duty members in pay grades E-1 through E-4, \$5;

(B) For dependents of active duty members in pay grades of E-5 and above, \$5; and,

(C) For retirees and their dependents, \$9.

(vii) The copayment for ambulance services is as follows:

(A) For dependents of active duty members in pay grades of E-1 through E-4, \$10;

(B) For dependents of active duty members in pay grades of E-5 and above, \$15; and,

(C) For retirees and their dependents, \$20.

(e) *Inpatient cost sharing requirements under the Uniform HMO Benefit.*—(1) *In general.* In lieu of usual CHAMPUS cost sharing requirements (see § 199.4(f)), special cost sharing amounts are required. The specific requirements shall be uniform and shall be published as a notice annually by the Assistant Secretary of Defense (Health Affairs).

(2) *Structure of cost sharing.* For services other than mental illness or substance use treatment, there is a nominal copayment for active duty dependents and for retired members, dependents of retired members, and survivors. For inpatient mental health and substance use treatment, a separate per day charge is established.

(3) *Amount of inpatient cost sharing requirements.* Beginning in fiscal year 1995, the inpatient cost sharing requirements are as follows:

(i) For acute care admissions and other non-mental health/substance use treatment admissions, the per diem charge is as follows, with a minimum charge of \$25 per admission:

(A) For dependents of active duty members in pay grades E-1 through E-4, \$11;

(B) For dependents of active duty members in pay grades of E-5 and above, \$11; and,

(C) For retirees and their dependents, \$11.

(ii) For mental health/substance use treatment admissions, and for partial hospitalization services, the per diem charge is as follows, with a minimum charge of \$25 per admission:

(A) For dependents of active duty members in pay grades E-1 through E-4, \$20;

(B) For dependents of active duty members in pay grades of E-5 and above, \$20; and,

(C) For retirees and their dependents, \$40.

(f) *Updates.* The enrollment fees for fiscal year 1995 set under paragraph (c) of this section and the per services specific dollar amounts for fiscal year 1995 set under paragraphs (d) and (e) of this section may be updated for subsequent years to the extent necessary to maintain compliance with statutory requirements pertaining to government costs. This updating does not apply to cost sharing that is expressed as a percentage of allowable charges; these percentages will remain unchanged.

(g) *Applicability of the Uniform HMO Benefit to Uniformed Services Treatment Facilities Managed Care Program.* The provisions of this section concerning the Uniform HMO Benefit shall apply to the Uniformed Services Treatment Facilities Managed Care Program, effective October 1, 1995. Under that program, non-CHAMPUS eligible beneficiaries have the same payment responsibilities as CHAMPUS-eligible beneficiaries.

Dated: February 2, 1995.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 95-3028 Filed 2-7-95; 8:45 am]
BILLING CODE 5000-04-M

ASSASSINATION RECORDS REVIEW BOARD

38 CFR Part 1400

Guidance on Interpreting and Implementing the President John F. Kennedy Assassination Records Collection Act of 1992

AGENCY: Assassination Records Review Board (ARRB).

ACTION: Proposed interpretive regulation.

SUMMARY: The ARRB proposes to issue regulations providing guidance on the interpretation of certain terms defined in and the implementation of the President John F. Kennedy Assassination Records Collection Act of 1992.

DATES: To be considered, comments must be received on or before March 10, 1995.

ADDRESSES: Comments should be mailed to the Assassination Records Review Board at 600 E Street, NW, Second floor, Washington, D.C. 20530 or delivered in person to that address

between the hours of 9:30 a.m. and 4:30 p.m., Monday through Friday (except legal holidays). Comments may also be faxed to the Board at (202) 724-0457. Comments received may be inspected in the Board's public reading room, located at the address shown above, between 10 a.m. and 3 p.m. Monday through Friday (except legal holidays). Persons wishing to inspect comments in the Board's public reading room should call the Board's office beforehand at (202) 724-0088 for further information.

FOR FURTHER INFORMATION CONTACT:
Sheryl L. Walter (General Counsel),
(202) 724-0088.

SUPPLEMENTARY INFORMATION:

Background

The President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. 2107 note (as amended) (ARCA), established the President John F. Kennedy Assassination Records Collection (the JFK Collection) at the National Archives and Records Administration (NARA). In establishing the process for public disclosure of all records relating to the assassination, Congress created an independent agency within the executive branch, the Assassination Records Review Board (the Board), which consists of five citizens appointed by the President. Under the statute, the Board is empowered to decide "whether a record constitutes an assassination record." 44 U.S.C. 2107 note, Sec. 7(i)(2)(A). Congress further made clear its intent that the Board "issue guidance to assist in articulating the scope or universe of assassination records." President John F. Kennedy Assassination Records Collection Act of 1992, S.Rep. 102-328, 102d Cong., 2d Sess. (1992) at 21.

In constructing the proposed guidance set but here, the Board seeks to implement congressional intent that the JFK Collection contain "the most comprehensive disclosure of records related to the assassination of President Kennedy." *Id.* at 18. The Board is also mindful of Congress's instruction that the Board apply a "broad and encompassing" working definition of "assassination record" in order to achieve the goal of assembling the fullest historical record on this tragic event in American history and on the investigations that were undertaken in the assassination's aftermath. The Board recognizes that many agencies have already begun to organize and review records responsive to the ARCA even before the Board was appointed and began its work. Nevertheless, the Board's aim is that this guidance will aid in the ultimate assembly and public

disclosure of the fullest possible historical record on this tragedy and on subsequent investigations and inquires into it.

The Board's proposed guidance is designed to help government agencies and the Board identify and make available to the public all documents that will enhance, enrich, and broaden the historical record of the assassination of President John F. Kennedy. The Board seeks through this guidance to fulfill Congress's "intent" and emphasis that the search and disclosure of records under this Act must go beyond the records of previous commissions and committees established to investigate President Kennedy's assassination. *Id.* at 21. The Board also seeks to provide notice of the scope of its intended exercise of authority to seek additional information or records in order to fulfill its functions and responsibilities under the ARCA.

In addition, the Board proposes to create a mechanism to facilitate the Board's ongoing work and to further ensure future public access to the broadest possible historical record. This mechanism will be known as the "Catalog of Assassination Records" (COAR). The COAR is intended to be an official listing of all records determined by the Board to meet the definition of "assassination record" and included in the JFK Collection.

Request for Comments

The Board seeks public comment on its proposed interpretive regulations intended to provide guidance on the interpretation of the term assassination record, the intended scope of its exercise of authority to seek additional information or records, and its additional proposals for implementation of the ARCA.

List of Subjects in 36 CFR Part 1400

Administrative practice and procedure, Archives and records.

Accordingly, the Assassination Records Review Board hereby proposes to establish a new chapter XIV in title 36 of the Code of Federal Regulations to read as follows:

CHAPTER XIV—ASSASSINATION RECORDS REVIEW BOARD

PART 1400—GUIDANCE FOR INTERPRETATION AND IMPLEMENTATION OF THE PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION ACT OF 1992 (ARCA)

Soc.

1400.1 Interpretation of assassination record.

1400.2 Interpretation of additional records and information.

1400.3 Sources of assassination records and additional records and information.

1400.4 Types of materials included in scope of assassination record and additional records and information.

1400.5 Requirement that assassination records be released in their entirety

1400.6 Originals and copies.

1400.7 Additional guidance

1400.8 Implementing the ARCA—Catalog of Assassination Records

Authority: 44 U.S.C. 2107 note.

§ 1400.1 Interpretation of assassination record.

(a) An assassination record includes, but is not limited to, all records, public and private, regardless of how labeled or identified, that document, describe, report, analyze, or interpret activities and events that may have led to the assassination of President John F. Kennedy; the assassination itself; and investigations of or inquiries into the assassination.

(b) An assassination record further includes, without limitation:

(1) All records as defined in Sec. 3(2) of the ARCA;

(2) All records called by or segregated by all federal, state, and local government agencies in conjunction with any investigation or analysis of or inquiry into the assassination of President Kennedy (for example, any intra-agency investigation or analysis of or inquiry into the assassination; any inter-agency communication regarding the assassination; any request by the House Select Committee on Assassinations to collect documents and other materials; or any inter- or intra-agency collection or segregation of documents and other materials);

(3) Other records or groups of records listed in the Catalog of Assassination Records, as described in § 1400.8 of this chapter.

§ 1400.2 Interpretation of additional records and information.

The term *additional information and records* includes:

(a) All documents used by government offices and agencies during their declassification review of

assassination records as well as all other documents, indices, records, and other material that disclose cryptonyms, code names, or other identification material in assassination records.

(b) All training manuals, instructional materials, and guidelines created or used by the agencies in furtherance of their review of assassination records.

(c) All records, lists, and documents describing the procedure by which the agencies identified or selected assassination records for review.

(d) Organizational charts of government agencies.

(e) Records necessary and sufficient to describe the agency's:

- (1) Records policies and schedules;
- (2) Filing systems and organization; and
- (3) Storage facilities and locations.

§ 1400.3 Sources of assassination records and additional records and information.

Assassination records and additional records and information may be located at, or under the control of, without limitation:

(a) Agencies, offices, and entities of the executive, legislative, and judicial branches of the federal government;

(b) Agencies, offices, and entities of the executive, legislative, and judicial branches of state and local governments;

(c) Record repositories and archives of federal, state, and local governments, including presidential libraries;

(d) Record repositories and archives of universities, libraries, historical societies, and other similar organizations;

(e) Individuals who possess such records by virtue of service with a government agency, office, or entity;

(f) Persons, including individuals and corporations, who have obtained such records from sources identified in paragraphs (a) through (e) of this section;

(g) Federal, state, and local courts where such records are being held under seal; or

(h) Foreign governments.

§ 1400.4 Types of materials included in scope of assassination record and additional records and information.

The term *record* in assassination record and additional records and information includes, for purposes of interpreting and implementing the ARCA:

(a) Papers, maps, and other documentary material;

(b) Photographs;

(c) Motion pictures;

(d) Sound and video recordings;

(e) Machine readable information in any form; and

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(f) Artifacts.

§ 1400.5 Requirement that assassination records be released in their entirety.

An assassination record shall be disclosed in its entirety except for portions specifically postponed pursuant to the grounds for postponement of public disclosure of records established in section 6 of the ARCA, and no portions of any assassination records shall be withheld from public disclosure solely on grounds of non-relevance.

§ 1400.6 Originals and copies.

(a) For purposes of determining whether originals or copies of assassination records may be made part of the President John F. Kennedy Assassination Records Collection (the JFK Records Collection) to be established under the ARCA:

(1) In the case of papers, maps, and other documentary material, the Assassination Records Review Board (the Board) may determine that a true and accurate copy of the original is sufficient;

(2) In the case of photographs, the term record means the original negative if available, otherwise, the earliest generation print;

(3) In the case of motion pictures, the term record means the camera original if available, otherwise, the earliest generation print;

(4) In the case of sound and video recordings, the term record means the original recording, if available, otherwise, the earliest generation copy;

(5) In the case of machine-readable information, the Board may determine that a true and accurate copy of the original is sufficient; and

(6) Artifacts means the original object itself.

(b) In cases where a copy, as defined in paragraph (a) of this section is authorized by the Board to be included in the JFK Records Collection the Board may, at its discretion, require a certified copy. In cases where an original, as defined in paragraph (a) of this section, is required for inclusion in the JFK Records Collection the Board may, at its discretion, accept the best available copy.

§ 1400.7 Additional guidance.

(a) A government agency, office, or entity includes, for purposes of interpreting and implementing the ARCA, all departments, agencies, offices, divisions, foreign offices, bureaus, and deliberative bodies of any federal, state, or local government and includes all inter- or intra-agency working groups, committees, and

meetings that possess or created records relating to the assassination of President John F. Kennedy.

(b) The inclusion of artifacts in the scope of the term assassination record is understood to apply solely for purposes of establishing the President John F. Kennedy Assassination Records Collection and for fully implementing the terms of the ARCA and has no direct or indirect bearing on the interpretation or implementation of any other statute or regulation.

(c) In the case of artifacts deemed to be assassination records and included in the John F. Kennedy Assassination Records Collection, provision to the public of photographs, drawings, or similar materials depicting the artifacts shall be sufficient to comply with the ARCA's requirement that copies of assassination records be provided to the public upon request. Other display to or examination by the public of artifacts in the John F. Kennedy Assassination Records Collection shall occur under terms and conditions established by the National Archives and Records Administration that are adequate to preserve and protect the artifacts for posterity.

(d) The terms *and*, *or*, *any*, *all*, and the plural and singular forms of nouns shall be understood in their broadest and most inclusive sense and shall not be understood to be terms of limitation. Any records identified with respect to a particular person also includes any records for that person by any other name, pseudonym, codeword, symbol, number, cryptonym or alias. Any record described with respect to an operation or program includes any record pertaining to that program by any other name, pseudonym, codeword, symbol, number or cryptonym.

§ 1400.8 Implementing the ARCA—Catalog of Assassination Records.

(a) A Catalog of Assassination Records (COAR) shall be created as the official listing of all records determined by the Board to meet the definition of assassination record.

(b) Notice of all decisions to include records in the COAR will be published in the Federal Register within 30 days of the decision.

(c) In listing records or groups of records in the COAR, the Board must determine that the record or group of records will more likely than not enhance, enrich, and broaden the historical record of the assassination.

Dated: February 3, 1995.

David G. Marwell,
Executive Director, Assassination Records
Review Board.

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ENVIRONMENTAL PROTECTION
AGENCY

40 CFR Parts 51 and 93

[FRL-5149-9]

Transportation Conformity Rule
Amendments: Transition to the Control
Strategy Period

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes to permanently align the timing of certain transportation conformity consequences with the imposition of Clean Air Act highway sanctions. For ozone nonattainment areas with an incomplete 15% emissions-reduction state implementation plan with a protective finding; incomplete ozone attainment/3% rate-of-progress plan; or finding of failure to submit an ozone attainment/3% rate-of-progress plan, and areas whose control strategy implementation plan for ozone, carbon monoxide, particulate matter, or nitrogen dioxide is disapproved with a protective finding, the conformity status of the transportation plan and program would not lapse as a result of such failure until highway sanctions for such failure are effective under other Clean Air Act sections.

This action would delay the lapse in conformity status, which would otherwise prevent approval of new highway and transit projects, and allow States more time to prevent the lapse by submitting complete ozone implementation plans.

EPA has published in the final rule section of this Federal Register a similar interim final rule which takes effect immediately and applies for six months. This proposal would apply the provisions of the interim final rule permanently.

DATES: Comments on this action must be received by March 10, 1995. A public hearing will be held at 10:30 a.m. on February 22, 1995 in Washington, DC.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Attention: Docket No. A-95-02, 401 M Street, SW., Washington, DC 20460.