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VIA Overnight Delivery

April 5, 2021

Hon. Gary C. Peters  
Chairman  
Senate Committee on Homeland Security and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Hon. Rob Portman  
Ranking Member  
Senate Committee on Homeland Security and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senators Peters and Portman:

In October 2017, former chairs of the Senate Judiciary Committee, Senators Charles E. Grassley and Patrick J. Leahy, co-sponsored Senate Resolution 281 (SR 281)<sup>1</sup> which urged President Trump to “*allow for the full public release of all remaining records pertaining to the assassination of President John F. Kennedy*” and “*to reject any claims for the continued postponement of the full public release of those records.*” SR 281 was subsequently referred to the Senate Committee on Homeland Security and Governmental Affairs (the “Committee”) on October 4, 2017.

Although the Resolution died in Committee, the public’s interest in the assassination of President Kennedy has not. Unfortunately, President Trump not only failed to honor the intent of SR 281 but when he certified that the release of remaining assassination records could be postponed to **October 26, 2021**<sup>2</sup>, he failed to comply with the requirements of the President John F. Kennedy Assassination Records Collection Act of 1992 (“JFK Act”).<sup>3</sup> At no time has either the President or the Archivist of the United States made the required document-by-document finding based on “clear and convincing evidence” that one or more of the enumerated grounds for postponement existed as well as why those grounds outweighed the public’s right to the records.

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<sup>1</sup> S. Res. 281, 115th Congress (2017-2018)

<sup>2</sup> Memorandum of President of the United States, “Certification for Certain Records Related to the Assassination of President John F. Kennedy” (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018).

<sup>3</sup> Pub. L. 102-526, 106 Stat. 3443 (1992), codified at 44 U.S.C. 2107 note, as amended by the “President John F. Kennedy Assassination Records Collection Extension Act of 1994”, Pub. L. 103-345, § 1, 108 Stat. 3128 (Oct. 6, 1994).



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For nearly another four years the public has been deprived of the remaining information that has been identified by a federal entity to be related to President Kennedy's assassination. After the passage of fifty-eight years it is time that this information sees the light of day (subject to, of course, any lawful proper exemptions that might apply). Accordingly, I am respectfully requesting that you hold oversight hearings on the failure of the Executive Branch to comply with the JFK Records Act as soon as possible, especially given that no later than **April 26, 2021**, all federal agencies are required by law to notify the Archivist as to whether any objections will be asserted to the release of the remaining JFK Records.

Attached to this letter as Appendix A is a memorandum providing history and analysis of the relevant events underlying my request. Additionally, a list of possible topics to be covered in the oversight hearing is attached as Appendix B.

I am happy to provide any additional information or assistance as desired. Please do not hesitate to have the appropriate Committee staff member contact me. Thank you for your attention to this matter of significant historical importance.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Larry Schnapf', is written over the typed name 'Lawrence Schnapf'. The signature is fluid and cursive, with a large initial 'L' and 'S'.

Lawrence Schnapf

cc: Hon. Charles Grassley  
Hon. Patrick Leahy  
Hon. Charles Schumer



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## APPENDIX A

### MEMORANDUM SUPPORTING REQUEST FOR OVERSIGHT HEARINGS

This memorandum is prepared in support of the request for the Senate Committee on Homeland Security and Government Affairs (the “Committee”) to conduct oversight hearings on compliance with the President John F. Kennedy Assassination Records Collection Act of 1992 (“JFK Act”) by agencies of the Executive Branch.

#### I. Background

Before Congress passed the JFK Act, members of the public seeking to review the government records relating to the assassination had to request the records either under the Freedom of Information Act (FOIA)<sup>4</sup> or await the release of the records under Executive Order 12536 which then governed declassification.<sup>5</sup> In enacting the JFK Act, Congress determined that reliance on FOIA<sup>6</sup> and Executive Order 12,356<sup>7</sup> was actually preventing timely disclosure of records relating to the assassination of President Kennedy.<sup>8</sup> As a result, Congress established a narrowed list of reasons that federal agencies could cite as a basis for requesting postponement of public disclosure of records relating to the assassination. The grounds for postponing disclosure under the JFK Act are far more stringent than the exemptions permitted under FOIA. Congress stated that records relating to the assassination would “*carry a presumption of immediate disclosure*”<sup>9</sup> and that “*only*

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<sup>4</sup> 5 U.S.C. § 552

<sup>5</sup> See Exec. Order No. 12,356, 3 C.F.R. 166 (1982-1995). The Executive Order allowed “agency heads” to make the decision to exempt records from automatic declassification provided that the “agency head” expected that disclosure of the records would result in one of the nine enumerated categories of harm. However, agency heads were often reluctant to release records and there was no independent review of “agency heads” decisions on declassification. See Final Report at pages 42-43.

<sup>6</sup> JFK Act, § 2(a)(5)

<sup>7</sup> JFK Act, § 2(a)(6) (“legislation is necessary because Executive Order No. 12356, entitled ‘National Security Information’ has eliminated the declassification and downgrading schedules relating to classified information across government and has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy”)

<sup>8</sup> FOIA could not serve as the mechanism for maximum disclosure of assassination records held by the CIA, FBI and Congress. For example, FOIA exempts CIA operational files from disclosure. 5 U.S.C. § 552(b)(3). FOIA also provides broad -based protection for law enforcement files which allowed the FBI to protect a substantial amount of its information from disclosure. *Id.* at § 552(b)(7). Finally, FOIA does not apply to unpublished Congressional records. The Senate believed that “legislation is necessary” in part “because congressional records related to the assassination would not otherwise be subject to public disclosure until at least the year 2029.” See Senate Governmental Affairs Committee, Report to Accompany S. 3006, The President John F. Kennedy Assassination Records Collection Act of 1992, 102d Cong., 2d sess., 1992, S. Rept. S. 102–328 at 20. See also “CRS Report for Congress: President John F. Kennedy Assassination Records Disclosure: An overview” (March 3, 1993).

<sup>9</sup> JFK Act, § 2(a)(2)



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*in the rarest of cases is there any legitimate need for continued protection” of assassination records.*<sup>10</sup>

The JFK Act directed federal agencies to search for records in their possession relating to the assassination of President Kennedy and to transfer those records to the John F Kennedy Assassination Records Collection (“JFK Collection”) established by the National Archives and Records Administration (“NARA”).<sup>11</sup> The JFK Act also established the Assassination Records Review Board (“ARRB”) to determine if a record constituted an “assassination record” and to determine if an assassination record or particular information in a record qualified for postponement of disclosure under this JFK Act.<sup>12</sup>

More importantly, the JFK Act mandated that each “assassination record”<sup>13</sup> be publicly disclosed in full and be available no later than the date that is 25 years after the date of enactment of the JFK Act (**October 26, 2017**). The JFK Act requires that any request for postponement must be based on “*clear and convincing evidence*”<sup>14</sup> that one of five enumerated harms would occur if the assassination records were disclosed and that harm would outweigh the public interest in disclosure.<sup>15</sup>

Congress further provided that public disclosure of a record required under the JFK Act would:

*...shall take precedence over any other law..., judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure....*<sup>16</sup>

The AARB issued its Final Report in September 1998, and urged Congress and federal agencies to continue the effort to disclose documents under the provisions of the JFK Act. The Final Report

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<sup>10</sup> JFK Act, § 2(a)(7)

<sup>11</sup> JFK Act, § 5(e).

<sup>12</sup> JFK Act, § 7(i)(2).

<sup>13</sup> 36 CFR 1290.1; see also 44 U.S.C. § 2107 note, Sec. 3(2)(E)

<sup>14</sup> JFK Act, § 6. Congress selected the clear and convincing evidence standard because “*less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation’s stated goal*” of prompt and full release. House Committee on Government Operations, Assassination Materials Disclosure Act of 1992, 102d Cong., 2d sess., H. Rept. 625, pt. 1, at 25. .

<sup>15</sup> The JFK Act defines “public interest” as “*the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy.*”

<sup>16</sup> JFK Act § 11(a). The only records exempted from the “supremacy clause” were (1) IRS tax-related records precluded from disclosure under Section 6103 of the IRS Code, and (2) records donated to the United States under a deed of gift whose terms precluded disclosure. Id.



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contained recommendations and conclusions that not only addressed future implementation of the JFK Act but also the much larger challenge of secrecy and accountability that overwhelms the federal government. Despite the fact that the problem of over-classification has continued to plague the federal government, Congress has yet to hold any hearings on the recommendations contained in the ARRB Final Report.

It is important to point out that although the ARRB ceased operating on September 30, 1998, the JFK Act continues to remain in effect until NARA concludes that all assassination records have been made available to the public in full.<sup>17</sup>

This provision is significant because it underscores the **continuing obligation** of federal agencies to release records on the assassination after the ARRB term expired. In fact, the JFK Act requires that all postponed or redacted assassination records under section 6 be periodically reviewed “*by the originating agency and the Archivist*” to determine if the justifications for postponement remained valid.<sup>18</sup>

## **II. President Trump and Executive Branch Agencies Have Failed to Comply with the JFK Act**

Between September 2014 and November 2015, NARA sent notices to all agencies that still possessed records or portions of records postponed under section 6, reminding them of the JFK Act’s October 26, 2017, disclosure deadline. According to a report issued by the Office of Inspector General of the National Archives,<sup>19</sup> NARA staff attended multi-agency meetings hosted by the National Security Council to urge agencies to review records in accordance with the JFK Act. NARA staff also conducted follow-up meetings with agencies to facilitate this review.<sup>20</sup> In February 2017, NARA sent letters to the various agencies requesting a summary of agency review efforts and asking if any records could be immediately released.<sup>21</sup>

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<sup>17</sup> JFK Act § 12(b) This section provides:

*The remaining provisions of this 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 this Act.*

<sup>18</sup> JFK Act § 5(g)(1)–(2).

<sup>19</sup> Review of JFK Assassination Records Collection Act of 1992, Special Report No. 18-SR-07(OIG 3/29/2018).

<sup>20</sup> Id.

<sup>21</sup> Id. The letter reminded the agencies that the JFK ACT does not require waiting until the deadline to release records, and that NARA would prefer to release records on a rolling basis.



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In addition, the National Security Council's Records Access and Information Security Interagency Policy Committee instructed each affected agency to provide by May 1, 2017, a memorandum either advising that the agency would not ask for further postponement or that it was requesting the President to certify further postponement pursuant to the JFK Act section.<sup>22</sup> Any such request for further postponement would have to be accompanied by justification mandated by the JFK Act.<sup>23</sup>

The statutorily-mandated October 26, 2017, deadline was supposed to represent the end of the decades-long effort to release all of the records related to the assassination of President Kennedy. Absent any action by the Executive Branch, NARA was to release the remaining assassination records. Unfortunately, certain Executive Branch agencies asked President Trump to postpone the disclosure either in whole or in part of approximately 31,000 records.<sup>24</sup>

On October 12, 2017, the Archivist of the United States wrote to the President expressing “*significant concerns*” about the proposed postponements. The Archivist expressed doubt that agencies had properly applied the statutory standard for postponing disclosure.<sup>25</sup> The Archivist then concluded that:

*“there is insufficient time for NARA and the pertinent agencies to further consider our concerns and identify those certain, specific instances where information could warrant continued postponement”*<sup>26</sup>

As a result, on October 26, 2017, President Trump issued a memorandum allowing records that agencies had proposed for continued postponement to be temporarily withheld from full public disclosure until no later than April 26, 2018. The purpose of this action was to allow sufficient time to determine if such information warranted further postponement.<sup>27</sup> In issuing this certification, the President wrote:

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<sup>22</sup> JFK Act § 5(g)(2)(D).

<sup>23</sup> Id. *See also* Curtis E. Gannon, Memorandum Opinion for the Counsel to the President, “Temporary Certification Under the President John F. Kennedy Assassination Records Collection Act of 1992” (Office of Legal Counsel, 10/26/2017).

<sup>24</sup> Memorandum for John A. Eisenberg, Legal Adviser to the National Security Council, from John P. Fitzpatrick, Senior Director for Records, “Access and Information Security Management, National Security Council, Department and Agency Requests for Continued Postponement of Records under the JFK Assassination Records Collection Act” (Oct. 25, 2017) (“NSC Memorandum”).

<sup>25</sup> JFK Act § 5(g)(2)(D).

<sup>26</sup> Memorandum for the President, from David S. Ferriero, Archivist of the United States, “Re: Concerns Regarding Agency Proposals to Postpone Records Pursuant to Section 5 of the President John F. Kennedy Assassination Records Collection Act of 1992” at 1 (Oct. 12, 2017).

<sup>27</sup> Memorandum of President of the United States, Oct. 26, 2017, 82 F.R. 50307 (10/31/2017).



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*The American public expects—and deserves—its Government to provide as much access as possible to the President John F. Kennedy Assassination Records (records) so that the people may finally be fully informed about all aspects of this pivotal event.*

The President went on to say that:

*Any agency that seeks to request further postponement beyond this temporary certification shall adhere to the findings of the Act, which state, among other things, that “**only in the rarest cases is there any legitimate need for continued protection of such records.**” **The need for continued protection can only have grown weaker with the passage of time since the Congress made this finding.** Accordingly, each agency head should be **extremely circumspect in recommending any further postponement of full disclosure of records.** [emphasis added]<sup>28</sup>*

On March 26, 2018, the Archivist recommended that 13,922 documents of the Central Intelligence Agency, Federal Bureau of Investigation, the Department of Defense and the Department of State and Drug Enforcement Agency be further postponed under Section 5(g)(2)(D) of the JFK Act.<sup>29</sup> The Archivist’s recommendation was that any further requests for postponements be made contingent on the agencies making such future requests on a document-by-document basis in writing by April 26, 2021.<sup>30</sup>

On April 26, 2018, President Trump issued a memorandum adopting the recommendation of the Archivist to continue withholding certain records until **October 26, 2021**, and directed the agencies to re-review each record to determine if any redactions were necessary.<sup>31</sup> In particular, the memorandum went on to say that:

*Any agency that seeks further postponement beyond **October 26, 2021**, shall, no later than **April 26, 2021**, identify to the Archivist the specific basis for concluding*

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<sup>28</sup> President Trump’s certification for postponing the release of the remaining assassination records did not make the mandated document-by-document finding of identifiable harm and explaining how these harms outweighed this public interest based on a “clear and convincing” standard.

<sup>29</sup> JFK Act § 5(g)(2)(D).

<sup>30</sup> Memorandum for the President, from David S. Ferriero, Archivist of the United States, “Recommendations Concerning Certification of Certain Records Related to the Assassination of President John F. Kennedy” (March 26, 2018) (“2018 Archivist Memorandum”).

<sup>31</sup> Memorandum of President of the United States, “Certification for Certain Records Related to the Assassination of President John F. Kennedy” (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018).



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*that records (or portions of records) satisfy the standard for continued postponement under section 5(g)(2) (D) of the Act. Thereafter, the Archivist shall recommend to the President, no later than **September 26, 2021**, whether continued withholding from public disclosure of the identified records is warranted after **October 26, 2021**. [emphasis added]*<sup>32</sup>

### III. The Committee Has Statutory Oversight Authority

The JFK Act provides that the Committee, along with the House Committee on Oversight and Reform, **shall** have *continuing oversight jurisdiction* over the disposition of postponed records after termination of the Review Board.<sup>33</sup> This jurisdiction shall continue until NARA certifies that all assassination records have been disclosed in full to the public in accordance with the JFK Act.<sup>34</sup>

Since the AARB concluded its work in 1998<sup>35</sup>, the Committee has had the authority to conduct oversight hearings. Despite the fact that thousands of assassination records continue to be withheld for alleged national security reasons and the agencies requesting postponement have failed to identify the specific harm posed by each postponed record or how these harms outweigh the public interest in disclosure, the Committee has not conducted any hearings or conducted any investigation to consider the AARB recommendations and conclusions as well as to determine if the continued withholding of records complies with the “*clear and convincing evidence*” standard of JFK Act.<sup>36</sup>

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<sup>32</sup> President Trump’s certification for postponing the release of the remaining assassination records did not make the mandated document-by-document finding of identifiable harm and explaining how these harms outweighed this public interest based on a “clear and convincing” standard.

<sup>33</sup> JFK Act § (7)(l)(1).

<sup>34</sup> JFK Act § 12(b)

<sup>35</sup> The AARB concluded its work with the issuance of its September 30, 1998 final report and transferred all of its records to the National Archives and Records Administration. See 65 FR 39550 (06/27/2000).

<sup>36</sup>JFK Act § 6.





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#### **IV. Members of Both the HOUSE and SENATE Introduced Bi-Partisan Resolutions that Called for the Release of all Remaining Assassination Records**

On October 4, 2017, Senators Charles E. Grassley, as Committee Chair, and Senator Patrick J. Leahy, as former Committee chair, co-sponsored Senate Resolution 281 calling for “full public disclosure of documents pertaining to the assassination of President John F. Kennedy”<sup>37</sup>

An identical resolution was introduced in the House of Representatives at the same time and was referred to the Committee. Co-sponsors included the current chair of the Subcommittee on Government Operations, Congressman Gerald Connolly.<sup>38</sup>

When SR 281 was introduced, co-sponsor Senator Grassley issued a statement:

*The assassination of President Kennedy was one of the most shocking and tragic events in our nation’s history,” Leahy said in a statement. “Americans have the right to know what our government knows. Transparency is crucial for our country to fully reckon with this national tragedy, and that is the purpose of these resolutions.”<sup>39</sup>*

Senator Grassley also tweeted a three part-message on the same day:

*25 yrs ago Cong said all gov records abt JFK assassination shld b released this month unless Pres blocks No reason 2 keep hidden anymore 1/3<sup>40</sup>*

*2/3 2day I introd resolution urging Pres Trump 2 allow full release of docs Time 2 let American ppl + historians draw own conclusions<sup>41</sup>*

*3/3 a real problem in gov't is over classification Transparency in gov't brings acctblty Resolutions like this help<sup>42</sup>*

<sup>37</sup> S. Res. 281, 115th Congress (2017-2018) ( Referred to Senate Homeland Security and Governmental Affairs on 10/04/2017).

<sup>38</sup> H. Res. 556, 115th Congress (2017-2018). Other co-sponsors included Brendan F. Boyle, John Conyers, Anna G. Eshoo, Matt Gaetz, Eleanor Holmes Norton, Marcy Kaptur, Ro Khanna, Walter B. Jones, Bill Pascrell, Jr., Dana Rohrbacher and Louise Slaughter.

<sup>39</sup> “Lawmakers Push Trump to Release JFK Assassination Files: Bipartisan group introduce resolutions ahead of October deadline”, Rollcall (Oct. 4, 2017)

<sup>40</sup> @ChuckGrassley 6:46 PM · Oct 4, 2017

<sup>41</sup> @ChuckGrassley 6:47 PM · Oct 4, 2017

<sup>42</sup> @ChuckGrassley 6:49 PM · Oct 4, 2017



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For his part, Senator Leahy issued the following statement about SR 281:

*The assassination of President Kennedy was one of the most shocking and tragic events in our nation's history," Leahy said in a statement. "Americans have the right to know what our government knows. Transparency is crucial for our country to fully reckon with this national tragedy, and that is the purpose of these resolutions."<sup>43</sup>*

When Senator Grassley learned that President Trump had postponed the release of the assassination records, he tweeted:

*Thx for kennedy files release Ridiculous that CIA wants to review to redact YeGods u had fifty yrs NOW CIA WANTS FURTHER COVERUP/POTUS STOP<sup>44</sup>*

In sponsoring the House Resolution, Congressman Walter B. Jones said:

*After 54 years, there is no reason, for the sake of honesty and integrity in America, that the facts of the JFK assassination should not be made public. Virgil once said, 'Evil is nourished and grows by concealment.' It's time to reveal what happened that awful afternoon in 1963.*

#### **V. Continued Withholding of Assassination Records Violates Other Government Policies Adopted Since the Passage of the JFK Act.**

Since the JFK Act was enacted, there has been widespread, bipartisan recognition that the federal government classifies too much information for too long, at great and unnecessary cost to taxpayers.<sup>45</sup>

In 2000, Congress established the Public Interest Declassification Board (PIDB)<sup>46</sup> “to promote the fullest possible public access to a thorough, accurate, and reliable documentary record of

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<sup>43</sup> “Lawmakers Push Trump to Release JFK Assassination Files: Bipartisan group introduce resolutions ahead of October deadline”, Rollcall (Oct. 4, 2017)

<sup>44</sup> @ChuckGrassley 1.:06 PM Oct. 26, 2017. *See also* “Grassley slams 'ridiculous' delay in JFK document rollout”, Politico (10/27/2017)

<sup>45</sup> A Vision for the Digital Age: Modernization of the U.S. National Security Classification and Declassification System”, page iii (May 2020).

<sup>46</sup> Public Interest Declassification Act of 2000, Pub. L. 106-567, as amended, 50 U.S.C. § 3355a; Pub. L. 116-92, codified at 50 U.S.C. 3161 note.



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*significant U.S. national security decisions and activities.*” Since 2008, the PIDB has issued a number of reports and recommendations that call for Government-wide reform of the nation’s classification and declassification system.<sup>47</sup>

A recurring theme in the PIDB Reports is to prioritize and simplify the declassification of records of major historical significance. At many of PIDB Board meetings, there have been continued and prominent calls and suggestions from researchers that the PIDB and National Declassification Center review the postponed JFK Records. Indeed, when the PIDB asked for recommendations on priorities of records older than 25 years, 12 of the 13 comments were about declassifying the records related to the assassination of President Kennedy.<sup>48</sup>

After President Trump’s April 26, 2018, memorandum certifying withholding of JFK Records until October 26, 2021, the PIDB Blog said:

*we must note disappointment [with the] **failure of the responsible agencies to meet the legal requirements set by the President John F. Kennedy Assassination Records Collection Act of 1992....** with the 25 years of advance notice afforded by the 1992 Act, it is difficult now to understand **why the October 26 deadline passed largely unmet.** Certainly, there will be no excuse for a failure by any agency to meet the extended deadline of April 26, 2018, set by the President. The American public deserves no less. We look forward to the completion of the re-review process that the President has directed and will continue monitoring the release of these records of high historical significance.*<sup>49</sup>[emphasis added]

On his first day in office, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act<sup>50</sup> (“FOIA Memo”) directing that agencies should act with a clear presumption of transparency. The President instructed departments and agencies not to withhold information:

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<sup>47</sup> See “A Vision for the Digital Age: Modernization of the U.S. National Security Classification and Declassification System” (May 2020); “The Importance of Technology in Classification and Declassification” (June 2016); “Setting Priorities: An Essential Step in Transforming Declassification” (December 2014); “Transforming the Security Classification System (November 2012)””; “Transforming Classification Policy Forum (May 2011); PIDB Letter to the President (March 6, 2009); “Improving Declassification” (January 2, 2008).

<sup>48</sup> <https://transforming-classification.blogs.archives.gov/2013/12/02/new-prioritization-category-topics-older-than-25-years/#comments>.

<sup>49</sup> Available at: <https://transforming-classification.blogs.archives.gov/2017/12/18/completion-of-the-jfk-records-rolling-release>.

<sup>50</sup> 5 U.S.C. § 552.



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*merely because "public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."<sup>51</sup>*

The President also required agencies to respond to FOIA requests "*promptly and in a spirit of cooperation.*" The President further directed agencies to adopt a presumption in favor of disclosure with regard to all FOIA decisions. The President asked the Attorney General to issue FOIA Guidelines for the Executive Branch that "*reaffirm[] the commitment to accountability and transparency.*"<sup>52</sup>

Attorney General Eric Holder, Jr. then issued his own memorandum ("DOJ FOIA Memo")<sup>53</sup> which established new guidelines for complying with the Freedom of Information Act. In this memo, the Attorney General stated that the principle of openness was the Federal Government's default position for FOIA issues and that this principle had the following implications:

- An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption; and
- Whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.<sup>54</sup>

The DOJ FOIA Memo also established a "foreseeable harm" standard for defending agency decisions to withhold information.<sup>55</sup>

On December 29, 2009, President Obama issued Executive Order 13526<sup>56</sup> which made a number of significant changes to current information policies including:

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<sup>51</sup> "Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act", 74 Fed. Reg. 4683 (Jan. 21, 2009).

<sup>52</sup> Id. The Director of the Office of Management and Budget (OMB) subsequently issued "Open Government Directive", M-10-06 (December 8, 2009).

<sup>53</sup> Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (March 19, 2009), 74 Fed. Reg. 51879 (Oct. 8, 2009).

<sup>54</sup> Id. The DOJ FOIA Memo goes on to state that:

*Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.*

<sup>55</sup> Id. *See also* "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government" (posted 4/17/09).

<sup>56</sup> Executive Order 13526, "Classified National Security Information", (December 29, 2009); 75 Fed. Reg. 707



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- (1) creating a presumption that records older than 25 years are to be automatically declassified;<sup>57</sup>
- (2) declaring that “no information may remain classified indefinitely”,<sup>58</sup>
- (3) providing for automatic declassification of records with permanent historical value that are more than 25 years old subject to certain limited exceptions;<sup>59</sup>
- (4) barring agencies from classifying records to “prevent embarrassment to a person, organization, or agency”,<sup>60</sup>
- (4) requiring agencies to establish and conduct programs for “systematic declassification review” for records of permanent historical value that are exempt from automatic declassification;<sup>61</sup> and
- (5) requiring the establishment of a National Declassification Center at the National Archives to streamline declassification processes and implement standardized training regarding the declassification of records determined to have permanent historical value.<sup>62</sup>

On the same day, President Obama issued a memorandum to the heads of executive departments and agencies to implement the executive order. In the memorandum, the President said, *inter alia*,

*I expect that the order will produce measurable progress towards greater openness and transparency in the Government’s classification and declassification programs while protecting the Government’s legitimate interests, and I will closely monitor the results.*<sup>63</sup>

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(January 5, 2010).

<sup>57</sup> Id. at § 1.5(b)-(c) and § 2.2(f).

<sup>58</sup> Id. at § 1.5(d).

<sup>59</sup> Id. § 3.4. The Executive Order provides that a record may be exempt from automatic declassification unless there is a clear and demonstrable damage to national security if disclosed. §§ 3.3(b)-(d) and (g)-(j).

<sup>60</sup> Id. at § 1.7(a)(2).

<sup>61</sup> Id. at § 3.4.

<sup>62</sup> Id. at § 3.7.

<sup>63</sup> Memorandum of December 29, 2009, “Implementation of the Executive Order- Classified National Security Information,” 75 Fed. Reg. 733 (Jan. 5, 2010).



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Congress followed these actions with the FOIA Improvement Act of 2016.<sup>64</sup> This bipartisan legislation codified the policy established by President Obama in his January FOIA Memo and the DOJ FOIA Memo. The bill mandated that an agency may withhold information only if it *reasonably foresees a specific identifiable harm* to an interest protected by an exemption, or if disclosure is prohibited by law.

## VI. Public Interest Demands Release of the Remaining Records

A broad swath of historians<sup>65</sup>, former government officials<sup>66</sup> and other prominent Americans<sup>67</sup> have requested full release of the records. Even former President Gerald Ford<sup>68</sup> and David Belin, former Warren Commission Counsel and Executive Director of the Rockefeller Commission and one of the staunchest defenders of the Warren Commission's conclusions, asked the ARRB to *"release every single document in CIA files concerning the assassination of President Kennedy and also all of the remaining Warren Commission files (about 2%) that have not previously been released."*<sup>69</sup>

In 2003 a group of 13 authors holding diverse views on President Kennedy's assassination published an open letter in the *New York Review of Books* asking the CIA to release records relating to career CIA operations officer George E. Joannides, who died in 1990.<sup>70</sup> In 2013, Judge John R. Tunheim (former ARRB chair) called on the CIA to release its withheld records.<sup>71</sup> As

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<sup>64</sup> Pub. L. 114-185.

<sup>65</sup> The list included Steven M. Gillon (professor of history at the University of Oklahoma); John McAdams (political science professor at Marquette University); Gerald McKnight (professor emeritus-Hood College); John Newman (professor of political science at James Madison University); Larry Sabato (director of the University of Virginia Center for Politics) and Peter Dale Scott (professor emeritus at the University of California, Berkeley).

<sup>66</sup> For example, G. Robert Blakey (former chief counsel of the House Select Commission on Assassinations); Dan Hardway, Esq. (former researcher for HSCA); Douglas Horne (former ARRB senior analyst); Judge Burt Griffin (former Warren Commission attorney); former Senator Gary Hart; Edwin Lopez, Esq. (former HSCA researcher); John T. Orr, Esq. (former DOJ national criminal enforcement director) and Adam Walinsky (Attorney, Department of Justice, legislative assistant and speechwriter to Sen. Robert F. Kennedy).

<sup>67</sup> The signatories included Robert F. Kennedy, Jr., Alec Baldwin, David Crosby, Daniel Ellsberg, Rob Reiner, Abby Rockefeller, Mort Sahl, Martin Sheen, Oliver Stone, and Kathleen Kennedy Townsend.

<sup>68</sup> George Lardner, Jr., "Ford Urges House Leaders to Seek Release Of All Records on Kennedy Assassination," *Washington Post*, 30 January 1992, A-12

<sup>69</sup> David W. Belin letter to T. Jeremy Gunn, Executive Director and General Counsel, Assassination Records Review Board (June 16, 1998).

<sup>70</sup> JFK's Assassination, *New York Review of Books* (12/18/2003). The authors included Don DeLillo, Norman Mailer, Jefferson Morley, Gerald Posner, and Anthony Summers. Other authors who have called for the release of the remaining JFK assassination records include James W. Douglass, Jacob G. Hornberger, Dick Russell, Philip Shenon, David Talbot and Josiah Thompson.

<sup>71</sup> Troves of Files on JFK assassination remain secret, *Boston Globe* (11/25/13).



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recently as January 22, 2019, more than 60 prominent American citizens released a petition asking Congress to reopen the investigations into the assassinations.<sup>72</sup>

When Congress enacted the JFK Act in 1992, it said:

*most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.*<sup>73</sup>

It is now nearly six decades since the assassination. The continued failure to release the remaining assassination records violates both the letter and spirit of the law. Except in the case where past human sources could be at risk, it is hard to fathom how any postponed records could pose an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations after 57 years. Postponing release of the assassination records also conflicts with FOIA which now mandates that agencies proactively disclose certain records and not wait for specific requests.<sup>74</sup>

Trust in our institutions is at an all-time low. Many historians have pointed to the secrecy surrounding the JFK assassination as the moment when Americans began to lose faith with our government. Conducting public oversight hearings on the JFK Record Act can be a first step in restoring trust in our political system. It is time for the Committee to exercise its oversight authority.

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<sup>72</sup> <https://www.americantruthnow.org/signatories>.

<sup>73</sup> 44 U.S.C. § 2107 note, Sec. 12(a)(7).

<sup>74</sup> 5 U.S.C. § 552(a)(2).

## APPENDIX B

### Potential Topics for Oversight Hearing

#### 2018 Withheld Assassination Records

- Take testimony on the failure of the Executive Branch Agencies to comply with the JFK Act;
- Determine if legal action is warranted for the destruction of assassination records that occurred after the creation of the ARRB in violation of the JFK Act;<sup>1</sup>
- Instruct agencies that requested records to be withheld in 2017 that they are to comply with the **April 26<sup>th</sup>** deadline;
- Instruct any agency requesting further postponement to provide a Vaughn Index<sup>2</sup> setting forth specific explanations on a document-by-document basis why the particular document needs to be withheld as required by Section 4(3)(e) of the JFK Act;
- Require all agencies to provide and publish in the Federal Register explanations for each and every postponed document (or portion of a document).

#### Status of Pending Records Reviews at the time of the AARB Final Report

- Request the Department of State to obtain the foreign government records requested by the AARB such as KGB files in Moscow and Belarus, and relevant records in Cuba and Mexico;<sup>3</sup>
- Request that Senate Committee on Intelligence search for the missing hard copies of the Church Committee transcripts that could not be located at the time of the Final Report;<sup>4</sup>
- Request that the JFK Library release the RFK Cuba-related materials that the AARB identified as relevant assassination records;<sup>5</sup>
- Request the Office of Naval Intelligence to confirm if it has completed the review and transfer of records pursuant to Executive Order 12958 requiring declassification of government records that had been pending at the time of the Final Report;<sup>6</sup>
- Request the U.S. Citizenship and Immigration Service (USCIS) to confirm it has transmitted the assassination records to the National Archives that were outstanding at the time of the Final Report;

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<sup>1</sup> JFK Act § 5(a)(2). The Final Report discusses the destruction of records by the Secret Service in January 1995 at page 149.

<sup>2</sup> A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption. See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). See also *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995).

<sup>3</sup> Final Report at pages 140-142.

<sup>4</sup> Final Report at page 164.

<sup>5</sup> ARRB had been discussing the release of these records at the time but an agreement had not been secured by the ARRB at the time it ceased operations it ceased. Final Report at page 93.

<sup>6</sup> These materials had not been transmitted at the time of the Final Report. See Final Report at page 158.



## AARB Final Report Recommendations

- Determine if recommendation 7 of the Final Report issued by the Assassination Records Review Board (AARB) requires additional legislation to complete the goals of the JFK Act<sup>7</sup>;
- Consider the AARB recommendation that Congress enact legislation allowing the release of the tax records of Lee Harvey Oswald,<sup>8</sup> seek consent from Marina Oswald Porter to release the tax records or confirm her earlier consent to authors Ray and Mary La Fontaine.<sup>9</sup>

## Problems with NARA Online JFK Collection Database

- Ask NARA to provide a list of the record numbers for the 520 records withheld under sections 10/11 of the JFK Act;
- Ask NARA when the JFK online collection which has not been updated since 2008 will be updated. Only 3,598 of 9,000 records are available;
- Instruct NARA to place online the 336 records identified as “previously released”.

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<sup>7</sup> Final Report of the Assassination Records Review Board dated September 30, 1998 (Final Report) at pages xxvii and 175 . Recommendation 7 suggests the following to ensure that NARA can exercise the provisions of the JFK Act after the AARB ceased operating:

- (a) *That NARA has the authority and means to continue to implement the JFK Act,*
- (b) *that an appeals procedure be developed that places the burden for preventing access on the agencies, and*
- (c) *create a 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 access provisions of the JFK Act.*

The Final Report also recommended that a memorandum of understanding be negotiated among NARA, the FBI, and the CIA to establish a common agreement on how to resolve the issues that may arise regarding the additional documents are scheduled to take place after the termination of the AARB. Id. at 175

<sup>8</sup> Final Report at page 75. The full recommendation is:

*the Review Board recommends that Congress enact legislation exempting Lee Harvey Oswald's tax return information, Oswald employment information obtained by the Social Security Administration, and other tax or IRS related information in the files of the Warren Commission and the HSCA from the protection afforded it by section 6103 of the Internal Revenue Code, and that such legislation direct that these records be released to the public in the JFK Collection.*

<sup>9</sup> The Final Report indicated in a footnote that Marina Oswald had allowed authors Ray and Mary La Fontaine to review Mr. Oswald's tax returns and had “declared her intent to have the La Fontaines release these returns to the public, but to our knowledge they have not done so.” Id. at page 168 n5.