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MEMORANDUM

To: John Judge, John Newman, Bill Kelly, John Craig, Mike Sheppard, Michael Burns, Art Pineda, Dick Russell, Bob Groden, Al Navis, Charles Sanders, Esq., Jerry Rose, Gaeton Fonzi, Jim Lesar, Esq., Gary Shaw, Paul Hoch, Gus Russo, Walt Brown, Richard Scheck, Esq., George Michael Evica, Roger Feinman, Esq., Cyril Wecht, Jim Marrs, Mary Ferrell *et al.*

From: Mark S. Zaid, Esq.

Subject: "JFK Records Collection Act of 1992"--Advisory Committee

Date: November 30, 1992

As I indicated to you in my earlier memorandum of November 22, 1992, one aspect of the Records Collection Act that merits serious consideration concerns the Review Board's authority to create an advisory committee. Since the law explicitly maintains restrictions on who can serve as a Board member, Executive Director or as staff, restrictions that virtually eliminate the vast majority of the research committee, the rules surrounding the advisory committee becomes that much more important. It will be through such a committee that many of you might be able to have your opinions and concerns directly voiced before the Board. Therefore, I thought it necessary to provide you with some background regarding the logistics of advisory committees.

The relevant section of the new law states:

ADVISORY COMMITTEE.--(1) The Review Board shall have the authority to create advisory committees to assist in fulfilling the responsibilities of the Review Board under this Act.

(2) Any advisory committee created by the Review Board shall be subject to the Federal Advisory Committee Act (5 U.S.C. App.). § 8(d)

The Federal Advisory Committee Act (FACA) was enacted on October 6, 1972, and became effective on January 4, 1973. Its purpose was "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals." *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C.Cir. 1983). The Act has been widely used since its enactment. For example, in fiscal year 1989 alone, sixty federal departments and agencies sponsored 1,042 advisory committees which were composed of a total of 22,960 individuals. Nearly 3,500 meetings were held and just under 1,100 reports were issued. See "President's Eighteenth Annual Report on Federal Advisory Committees at 2 (Fiscal Year 1989).

There are various legal intricacies involved with FACA, nearly all of which do not merit attention at this time. Therefore, allow me to outline several of the Act's references that are important to your possible interests in the advisory committee. If you have a specific question that I have failed to answer in this memorandum, you may feel free to contact me to inquire.

First, there is no set criteria detailed in the Act as to membership on the committee. However, section 5(b) of FACA requires:

the membership of the advisory committee to be *fairly balanced in terms of points of view* represented and the functions to be performed by the advisory committee. 5 U.S.C.App II § 5(b).
(emphasis added)

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Thus you may wish to consider whom you trust and respect among those "critics" you might disagree with as to theories and speculations. Ultimately, according to law, they will achieve representation. It would certainly denote objectivity and professionalism on our part to present the Board a list of persons sporting a range of theories rather than just "our" viewpoint. Furthermore, it would hopefully remove the possibility of an unwelcome surprise addition to the committee.

As you can surmise, the purpose of this requirement was to prevent undue influence on agency decision-making by any one special interest organization. Yet, it is worthwhile to note that there are no firm standards by which to determine what is a "balanced" membership. See, e.g., Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C.Cir. 1989).

Apparently, no court has ever ordered a change in an advisory committee's membership. But if an individual or an organization is under the impression that their interests are unrepresented on an advisory committee considering those interests they may have standing to sue. "When the [fair balance] requirement is ignored, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue." *National Anti-Hunger Coalition*, 711 F.2d at 1974 n.2. You may wish to know that the General Services Administration, the organization responsible for all matters relating to advisory committees, has interpreted the balanced representation provision to require agencies to "consider for membership a cross-section of interested persons and groups with *demonstrated professional or personal qualifications or experience* to contribute to the functions and tasks to be performed." 41 C.F.R. § 101-6.1007(a)(2)(iii) (emphasis added).

Second, unless the President determines otherwise for reasons of national security (which I suppose may be at issue) 5 U.S.C.App. II § 10(a)(2) requires timely notice of each committee meeting to be published in the Federal Register. Generally, this would occur at least 15 days prior to that meeting except under exceptional circumstances. 41 C.F.R. § 101-6.1015(b). Most importantly, "[e]ach advisory committee meeting shall be open to the public", 5 U.S.C.App II. § 10(a)(1), and "[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator shall prescribe." *Id.* at (a)(3). However, there is no inherent right of public participation created therein. *Gates v. Schlesinger*, 366 F.Supp. 797, 801 (D.D.C. 1973).

Thus, it appears that even those of us that are not placed upon the committee will still have an opportunity to contribute to its recommendations. However, of course there are certain exemptions. For instance, the two sections stated above do not apply "to any portion of any advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public...". 5 U.S.C.App. II § 10(d) [The ten exemptions are listed in the Government in the Sunshine Act at § 552b(c) of title 5].

Finally, section 10(b) also states that records, reports, minutes, working papers, etc., shall be available for public inspection and copying. Of course, this is subject to the same nine exceptions that apply to access to agency records under FOIA, 5 U.S.C. § 552(b). Upon request the above will be made available for inspection. Denial of access to any of these records or to meetings grants standing to challenge the decision. *Public Citizen v. Department of Justice*, 491 U.S. 440, 450-51 (1980).

As I indicated in the introduction to this memorandum there is of course a great deal more involved with FACA, but I believe the above information should be sufficient for

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your purposes. I suggest you consider assembling a list of persons whom you feel merits selection to the committee and why this is so. The better prepared we are now the more likely we will accomplish what we have been attempting to do for the last twenty-nine years. In my opinion, this is undoubtedly the last instance of direct government intervention or investigation of the case. It is therefore essential to utilize the powers of the Review Board to their maximum potential. For your information, I have interpreted several of the provisions of the law to allow for loopholes which I will detail to you in a future memorandum, but please do not hesitate to begin work now.

If you have any questions or comments, do not hesitate to contact me at your convenience.

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