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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 the NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Defendants.	No. 3:22-cv-06176-RS PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Date: January 18, 2024 Time: 1:30 pm Dept: Hon. Richard Seeborg

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I. A SUMMARY OF THE THEORIES UNADDRESSED IN DEFENDANT'S MOTION

Plaintiffs and Defendant NARA interpret the JFK Records Act quite differently. When interpreting statutes, courts are to "examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Center v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999).

Plaintiffs' Third Amended Complaint provides several new theories for relief that are not addressed in Defendant's Motion to Dismiss. Three of these theories are argued here:

First, Plaintiffs recognize that the court ruled that NARA was not a "successor in function" to the ARRB, finding that the two agencies have "separate statutory functions". ECF 68, 13:1-4. This brief provides a new line of argument - the JFK Records Act places a series of mandatory duties on NARA, described further in Section VI, *infra*. Courts can compel agency action in "carefully circumscribed…situations where an agency has ignored a specific legislative command." *Hells Canyon Pres. Council v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010). A 706(1) claim can proceed when a plaintiff "asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004). The court has determined that NARA's withholding of the postponed records is a discrete final agency action – Plaintiffs adequately show in this brief that NARA's actions are arbitrary and capricious. See ECF 68, 10:11-12. Section 12(b) places a specific, unequivocal command for NARA to certify that "all assassination records" have been made available to the public before the JFK Act is terminated, which mandates that NARA shoulder many ARRB duties. The factual nature of NARA's "discrete agency actions" and whether these actions are "final" in obtaining "all assassination records" should be the subject of discovery.

As a second and independent argument, Plaintiffs expand their contention as to the breadth of Section 11(a) of the Act, contending that it overrides any efforts to cite APA or other law as a defense: "(W)hen this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law…judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure." In the face of this mandate, the APA cannot be used in any manner that would prevent records from being transmitted to the Archivist or disclosed to the public in compliance with the Act. Plaintiffs have every right to bring this action under either mandamus or the APA, while at the same time using the "override" aspect of the statute to block a defense based on judicial decisions, common law, or another aspect of the APA itself. Plaintiffs need not – and will not - repeat this argument.

Thirdly, Plaintiffs reviewed the "siloed structure" described in the 7/14/23 Order in analyzing Section 9 of the JFK Records Act. ECF 68, 21:7-17. Pursuant to this Order, Plaintiffs submit that the President's certification for continued postponement described in Section 5(g)(2)(D) was reached on the "grounds for postponement of public disclosure" in Section 6 of the Act, as well as watered-down, non-statutory standards. Both Sections 5 and 6 have a similar "siloed structure" that is harmonious with Section 9. Plaintiffs expand on this "siloed structure" in Section V, *infra*.

II. PLAINTIFFS SEEK COURT FINDINGS AND ORDERS REGARDING THEORIES MOSTLY UNADDRESSED IN DEFENDANT'S MOTION

The following statements address the relief sought by Plaintiffs in this action.

Plaintiffs seek an interpretation of the Act that ensures a re-review of the names and identities withheld pursuant to Section 5(g)(2)(D).

Plaintiffs seek a finding that NARA has a mandate to obtain "all" assassination records pursuant to Sections 2(a)(1) and 12(b).

Plaintiffs seek a finding that Sections 5 and 7 establish NARA's duty to review possible assassination records when brought to their attention, and to direct government offices to identify and review potential assassination records.

Plaintiffs seek a finding that NARA has a mandatory duty to search for additional assassination records pursuant to the "any uncertainty" standard in 5(c)(2)(F), the "reason to believe" standard in 5(c)(2)(H) and 7(j)(1)(C)(2) and 12(b).

Plaintiffs seek an order for NARA to turn to the agencies (and to the Attorney General, if necessary) to make their best efforts to locate records reported as missing, destroyed, and removed.

Plaintiffs seek an order for NARA to search for the "outstanding assassination record requests", and "final declaration of compliance requests", based on the above statutory scheme, the Memorandum of Understanding, and the Federal Records Act.

Plaintiffs seek a finding that given the improper standards that NARA used in making their recommendations to the President, Section 5(g)(2))(D) does not provide a proper basis for postponements based on privacy of names and identities.

Plaintiffs seek a finding that the postponements be re-reviewed by NARA and the agencies using the JFK Act's standards, rather than the improper standards that provided the basis for NARA's advice to the President prior to his 5(g)(2)(D) certification.

III. NARA PROVIDED IMPROPER STANDARDS TO THE PRESIDENT

The problem with these standards is exemplified by NARA's confusing statement that "an unwarranted invasion of privacy is sufficient to postpone the disclosure of a record under Section 6(3), but not to postpone the 25-year deadline of Section 5(g)(2)(D)". ECF 40, 9:7-9. Confusion has marked the entire procedure of postponement of these records.

In the summer of 2017, NARA contacted the agencies with postponed records and told them that the records would be disclosed pursuant to Section 6 unless the agencies provided support for future postponement. TAC, para. 154.

What happened during the Trump and Biden Administrations is that a variety of standards were used by NARA and the agencies to determine what postponements would be requested for Presidential approval. NARA and the agencies used the Section 6 standard for postponement, a weakened non-statutory "public interest" standard found in 6(a) of the 2022 Biden Memo, and new standards such as "the impact on agency operations" commencing in Feb. 2017 (TAC, para. 68) and "anticipated harm" (TAC, para. 51, fn. 58 - rather than "identifiable harm") as non-statutory bases for postponement and "the date of death of a living person" as a triggering event for disclosure - terms found nowhere in the Act.

When this list of proposed postponements was placed on the President's desk, the President certified all the requested postponements requested by NARA and the agencies pursuant to 5(g)(2)(D) – but he based these postponements and his concurrent Transparency Plans on erroneous standards used by NARA and the agencies as well as the erroneous advice provided by NARA based on those erroneous standards. This issue is fairly preserved in the Third Amended Complaint and in this briefing. If the court feels otherwise, Plaintiffs seek both leave to amend and leave to conduct discovery if further proof of this allegation is needed.

IV. NARA GOT THE BEST OF BOTH WORLDS – THE PRESIDENT POSTPONED RELEASE BASED ON SECTION 5(g)(2)(D), WHILE NARA PROVIDED ITS RECOMMENDATIONS TO THE PRESIDENT BASED ON SECTION 6 AND WATERED-DOWN, NON-STATUTORY STANDARDS

The result was that NARA - and the proponents of postponement - got the best of both worlds. The sweeping powers of Section 5(g)(2)(D) were abused because the President was

relying on NARA's recommendations, which were based on Section 6 and the watered-down, non-statutory standards cited in Section III, *supra*.

The 2023 Biden Memo also attempted to end the periodic review process set forth in Section 9(d)(2), which is mandated to be "periodic" in nature and not driven by "events" or "circumstances' as contemplated by the Transparency Plans. In a periodic review, Section 6 is utilized and the President is called to intervene when NARA and the agencies disagree on a proposed new disclosure.

Defendant NARA has propounded this pattern of error with its argument that "the standards of Section 6 apply only when agencies are requesting postponement in the first instance, not when the President has already certified that continued postponement is necessary under Section 5(g)(2)(D). ECF 40, 10:14-16.

The court's order reflects this error, stating in a footnote that "Sections 6 and 9(d)…apply to postponement after an initial determination by the ARRB. Section 5(g)(2)(D) is a separate authority that applies after the end of the 25-year deadline…" ECF 68, p.7, fn. 4. Plaintiffs provide sufficient facts in the Third Amended Complaint that address this factual error.

Section 6 and 9(d) retain vitality to the present day. Nothing in the JFK Act states an expiration date for these sections - only for matters "that pertain to the appointment and operation of the Review Board" which concluded in 1998.

The only way to cure this error is an immediate re-review of the documents that comply with the grounds for postponement based on either Section 5 or Section 6. It could be a periodic review pursuant to 9(d)(2), or simply a new request by NARA for a new Presidential certification after the errors listed here are corrected.

Such a re-review is necessary to determine what names and identities can be released now. The President has no discretion to consider factors that are not contained in either Section 5 or Section 6. The Plaintiffs ask the court to review the dicta to the contrary at ECF 68, 10:20-22. NARA has the power and the duty to correct these errors.

V. ANALYSIS OF THE LEGISLATIVE FRAMEWORK OF SECTIONS 5, 6 AND 9

Section 9(d)(2) states that "***any*** *executive branch assassination record postponed by the President* ***shall be subject to the requirements of periodic review****...*". Such review is mandatory.

Section 5(g)(1) states that "***all postponed…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)." Again, periodic review is mandatory.

Section 9(c)(3)(B) states that when an assassination record is "postponed pursuant to section 6…the Review Board will create and transmit to the Archivist a report containing a statement "designating a recommended specified time at which or a specified occurrence following which the material may be appropriately disclosed to the public under this Act."

Section 6 review consists of NARA and the agencies making decisions on what documents should be released on a periodic basis, while Section 5(g)(2)(D) is an extraordinary measure designed to be used for high-level security documents in the post-2017 era by the President.

From 1998 to the present, NARA and the agencies have been using Section 6 and various non-statutory standards to analyze what records should be recommended for further postponement. When Section 6 addresses the "grounds for postponement of public disclosure of records", it specifically the grounds that justify the withholding of names and identities. Only after NARA provides its recommendations to the President can Section 5(g)(2)(D) be invoked by

the President in the post-10/26/17 time period. NARA's argument that Section 6 became obsolete on 10/26/17 contradicts its repeated reliance on Section 6 between 2017-2023– again, discovery can resolve this issue, if necessary.

VI. ADDITIONAL DOCUMENTS MUST BE REVIEWED, TRANSMITTED AND DISCLOSED, IN ORDER TO COMPLETE THE COLLECTION

A. NARA has a duty to certify that all assassination records have been made available to the public.

In 1998, the ARRB was out of time and could not finish its work. Plaintiffs presented the court with the additional assassination records identified by the ARRB in the "outstanding assassination record requests", the "requests for compliance", and the MOU. The court ruled that "the JFK Act imposes no 'specific, unequivocal demand' to undertake the remaining averred duties." ECF 68. 13:13-14. Plaintiffs now cite Section 12(b) as a mandatory duty placed directly on NARA, with Section 2(a)(1), 5(c)(2)(F), 5(c)(2)(H), and 7(j)(1)(C)(2) as ARRB duties inherited by NARA. 12(b) placed the remaining duties squarely on NARA's shoulders.

Discovery may be needed to show that additional documents can and must be found before NARA can satisfy its 12(b) mandatory duty to certify that "all assassination records have been made available to the public in accordance with the Act." But there is nothing "voluntary" about obtaining assassination records designated by the ARRB in face of 12(b)'s mandate for NARA to obtain "all assassination records".

Plaintiffs recognize that the court rejected Plaintiffs' contention that NARA was the successor in function to the ARRB, specifically ruling that NARA has not "assumed all legal duties erstwhile attached to the ARRB." Order, 13:1-3.

The court pointed out that "neither NARA nor any other executive agency, can, by its own *ipse dixit*, legally assume obligations so terminated by Congress." (Order, 13:10-11)

In the light of that ruling, Plaintiffs offer a different analytical framework.

The first step is to turn to JFK Records Act Section 12(a): *The provisions of this Act that pertain to the appointment and operation of the Review Board shall cease to be effective when the Review Board and the terms of the members have terminated pursuant to section 7(o).*

Plaintiffs submit that the statutory sections that "pertain to the appointment and operation of the Review Board" are limited to Sections 7(a)-(h) - "Appointments to Review Board" and Section 8 - "ARRB Personnel".

The reason is because NARA retains the duty to continue all the work that does not pertain to the appointment and operation of the Review Board.

The next step addresses the "specific, unequivocal command" cited in *Plaskett*, 18 F.4th at 1082 to comply with Section 12(b): *"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 the Act."*

NARA retains all of the ARRB's duties, except for some of the duties under Section 7 and all of the duties under Section 8. NARA avoids discussion of the "remaining provisions: of the Act. Several of NARA's most important mandatory duties will be addressed here.

One duty is to honor the Act's "*remaining provisions*", as stated in Section 12(b).

A second duty, stated above, is for "the Archivist" to certify that "*all assassination records* have been made available to the public in accordance with the Act."

A third duty is that "all postponed or redacted records shall be *reviewed periodically by the originating agency and the Archivist* consistent with the recommendations of the Review Board…", as stated in Section 5(g)(1). Jeremy Dunn, general counsel of the ARRB, wrote that "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."* ECF 36, Amended Declaration, Exhibit C, p. 18. In the 1998 MOU, the CIA and NARA stated their joint intention to engage in periodic review. ECF 51, Exhibit A, para. 7.

A fourth duty is that "*any executive branch assassination record postponed by the President shall be subject to the requirements of periodic review*, downgrading and declassification of classified information, and public disclosure", as stated in Section 9(d)(2).

B. NARA has mandatory duties to review, obtain, and transmit all assassination records.

The JFK Records Act is a remedial statute that must be broadly construed to achieve its Congressional objections. ECF 49, 7:1-9:15.

When interpreting statutes, courts are "to examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Center*, 188 F.3d 1090, 1096 (9th Cir. 1999).

Besides the 12(b) mandate to search for "all assassination records", NARA ignores the mandate in Section 2(a)(1) that "all assassination records related to the assassination...should be preserved for historical and governmental purposes...(and) eventually disclosed to enable the public to become fully informed about the history surrounding the assassination."

36 CFR 1290.1 defines the broad scope of an assassination record:

"includes but is not limited to all records, public and private, regardless of how labeled or identified, that document, describe, report on, analyze or interpret activities, persons or events **reasonably related to the assassination of President John F. Kennedy** and investigations of or inquiries into the assassination."

In contrast, NARA claims it has no duty to seek any additional records: "To the extent that the JFK Act creates any duty to search for records, the Act squarely places that obligation on agencies, not on NARA or the ARRB." ECF 46, 21:7-9.

NARA also ignores the mandates in Sections 5(c)(2)(F), 5(c)(2)(H), and 7(j)(1)(C)(2) to obtain these records. Defendant initially claims that these statutes have "ceased to be effective", without offering any framework of the "effective" portions of the JFK Act. Defendant's next argument is to claim that these statutes "do not impose obligations on NARA". ECF 61, 22:18-23:4.

It is unquestionable that NARA has taken on some of the ARRB's functions – such as maintaining and reviewing redactions to the Collection. (Sections 4, 5, 6 and 9). NARA refuses to admit that it has taken on other functions such as supplementing the Collection or reviewing to add additional assassination records to the collection – actions conducted pursuant to Sections 7(i), 7(j)(1)(C), and 12(b). See 65 FR 39550 and its unequivocal language:

"NARA continues to ***maintain and supplement*** the collection under the provisions of the Act…***Agencies continue to identify records that may qualify as assassination records and need to have this guidance available***."

VII. PLAINTIFFS' THREE CAUSES OF ACTION ARE PROPER

A. PLAINTIFFS' FIRST CAUSE OF ACTION PROPERLY ALLEGES THAT THE BIDEN MEMOS EXPRESSLY VIOLATE THE JFK ACT

Plaintiffs' Third Amended Complaint (TAC) seeks "to enjoin NARA from implementing the Biden memoranda" because "express terms of Act are violated" and "the withholding of records is based on less stringent criteria not appearing in the act." (TAC, para. 155). NARA offers two arguments:

1) Defendant argues that Plaintiffs' claim that that the Biden Memos are unlawful because they violate the Act's express terms was rejected by the court: "Section 5(g)(2)(D) of the Act gives the President substantial discretion... (Biden) exercised that discretion in accordance with the JFK Act." 7/14/23 Order, ECF 68, 10:13-14.

2) Defendant also argues that Plaintiffs' claim that President's postponement authority is constrained by Section 6 is not applicable, as Section 6 applies only "to postponement after an initial determination by the ARRB". ECF 79, 5:24-6:1, quoting ECF 78, p. 7, footnote 4.

Plaintiffs' response to both arguments is that the Transparency Plans (see TAC, paras 82-82d) contain less-stringent and non-statutory criteria.

Note the considered opinion stated in the ARRB Final Report, p. 46: "For each recommended postponement, the JFK Act requires an agency to submit 'clear and convincing evidence' that one of the specified grounds for postponement exists…JFK Act 6, 9(c)(1)."

NARA and the agencies used watered-down and non-statutory standards in the process that led to NARA's recommendations to the President. The 5(g)(2)(D) certifications flowed directly from those watered-down, non-statutory standards used from 2017-2023, such as the aforementioned "impact on agency operations", "anticipated harm", and "the date of death of a living person" discussed in Section III of this brief, *supra*.

NARA also failed to use the Act's "public interest" standard set forth in Section 3(10) in approving the Transparency Plans. Instead, NARA relied on 6(a) of the 2022 Biden Memo.

NARA also has a mandatory duty to comply with 9(d)(2) and engage in periodic review. NARA conducted such reviews in 1999 and 2017-2023, but claims it has no duty to conduct such reviews anymore despite the clear language of the Act. The President recognized that NARA would be conducting such periodic reviews in Section 6 of the 2022 Biden Memo.

B. PLAINTIFFS' SECOND CAUSE OF ACTION PROPERLY STATES THAT THE DEFENDANT HAS A SECTION 6 DUTY TO RELEASE THE NAMES AND IDENTITIES OF INDIVIDUALS AND A SECTION 12 DUTY TO COMPLETE OUTSTANDING RECORDS SEARCHES AND CONTINUE TO COLLECT RECORDS UNTIL "ALL ASSASSINATION RECORDS HAVE BEEN OBTAINED"

1. NARA's mandatory duties are spelled out in the Second Cause of Action

Pursuant to the Second Cause of Action, Defendant NARA has a duty to release names of individuals unless Section 6 is satisfied, as well as a duty under Section 12 to complete outstanding assassination records searches and to continue to collect assassination records until "all assassination records have been obtained".

On releasing names, NARA argues that the court held that "the President (did not) delegate his authority to postpone the release of records." Def. MTD, 7:14-15. What the 7/14/23 Order states is that "(i)t is the Biden Memoranda themselves that postponed the release of each record; the Transparency Plans merely set forth when that postponement will end." Order, 7:5-7

However, the complaint alleges that the "Transparency Plans do not merely set forth when a postponement will end', rather, the Transparency Plans identify Transparency Events or conditions that will trigger an evaluation or risk assessment to determine if a particular record can be released." (TAC, para. 154a)

The complaint also alleges that Section 6 remains applicable; that NARA has the duty to release the names of individuals under Section 6 standards; and that no less stringent standards can be used in the Biden memos or the Transparency Plans (TAC, para. 164c-164e).

A specific allegation is that NARA stated in an 8/21/17 letter to the FBI that "…it is difficult to imagine circumstances under which an individual could be harmed by the release of their name in a file in the JFK Collection. The standard set by the JFK Act…is a high one: there has to be 'clear and convincing evidence' of a 'substantial risk of harm' and any invasion of privacy is 'so substantial that it outweighs the public interest'. Barring specific document-level justifications for continued postponements, NARA recommends that appeals of this type of information be denied." (TAC, para. 82b)

The complaint also alleges that although Section 9 confers only upon the President the "sole and non-delegable power" to make postponement decisions, because leaving the disclosure decisions to government agencies had resulted in unwarranted secrecy. As currently designed, the Transparency Plans return the power to make postponement decisions to the agencies and NARA in violation of the goals and express terms of the Act. (TAC, para. 82c)

On Section 12(b), the complaint seeks to enjoin NARA from issuing any certification to Congress that all assassination records have been obtained until NARA completes outstanding search requests and periodic review of additional assassination records (TAC, paras 58-61, 163).

The Second Cause of Action brings together four different duties:

1) the Section 6 standards for the release of names and identities; and

2) the Section 12 mandatory duty to obtain all assassination records before the Act is completed, which incorporates two additional duties:

3) NARA's duty to refrain from "arbitrary and capricious" conduct by failing to obtain documents after stating that it will seek them, as with the outstanding 1998 ARRB research requests and from the recalcitrant agencies that had not completed the ARRB compliance program, as documented in the 1998 MOU signed by CIA, ARRB and NARA. (TAC, paragraph 120; ECF 51, Second Simpich Declaration, Ex. A) ONI had refused to review its documents under the JFK Act all, but insisted on using Executive Order 12958. (TAC, para. 46). These compliance programs were created pursuant to the JFK Act's mandate at Section 2(a)(3) "to create an enforceable, independent and accountable process for public disclosure" of records on the JFK assassination. (TAC, paras. 60, 120)

4) NARA's duties to obtain missing, destroyed, and otherwise "removed" documents under the Federal Records Act.

2. NARA's continuing duty to obtain "assassination records" pursuant to the JFK Records Act.

A plain reading of the 7/14/23 ruling indicates that the court did not reach a final ruling on the extent of "periodic review" described in Section 5(g)(2)(A) between NARA and the agencies. The ruling agreed that periodic review was conducted by NARA until at least 2017, when "the President's power further to postpone record releases is described in a subsequent provision, JFK Act Section 5(g)(2)(D), which was a power seemingly meant to conclude the periodic review process described in Sections 5(g)(2)(A)-(C)." Docket #68, 14:1-4.

Plaintiffs respectfully state that the record reflects that "periodic review" between NARA and the agencies has been conducted between 2017-2023, and that the court's ruling should not be construed to mean that NARA had no power to conduct periodic review after 2017. The conditional language used in the order indicates that the Court left the issue of "periodic review" open for further interpretation.

Plaintiffs also state that NARA assumed the ARRB's power to identify and review additional assassination records from agencies, pursuant to 12(b), 5(g)(2)(A), 5(C)(2)(F) and 7(j)(1)(C). The basis for this power is found in Section 12(b) stating that "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."

3. Sections 5 6, and 9 provide a "siloed structure."

a. The court issued no final opinion on the continued vitality of periodic review.

In analyzing the 7/14/23 court order, note that the court agreed that the JFK Act imposed a duty on NARA to conduct periodic reviews. At 7:7-9, the court held: "Finally, although the JFK Act imposes a duty on the "originating agency" and the Archivist to perform periodic

reviews of the postponed releases, JFK Act § 5(g)(1), it imposes no such duty on the President."

The court put great weight on whether NARA had a "specific, unequivocal command placed on that agency to take a discrete agency action, and the agency had failed to take that action." (Order, 11:14-16) and questioned whether periodic review still existed while refraining from resolution:

...while the JFK Act required an unclassified written description of the reasons for continued postponement to be "provided to the Archivist" and "published in the Federal Register," it did so in the context of "periodic review[s]," JFK Act § 5(g)(2)(A). The President's power further to postpone record releases is described in a subsequent provision, JFK Act § 5(g)(2)(D), which was a power seemingly meant to conclude the periodic review process described in Sections 5(g)(2)(A)–(C). It would therefore make little sense for Sections 5(g)(2)(A)– (C) to modify the President's power under Section 5(g)(2)(D). Since NARA has no "specific, unequivocal command" to take the described actions, Plaintiffs fail to state a § 706(1) or mandamus claim with respect to these actions." (ECF 68, 7/14/23 Order, 13:21-14:7)

In response, Plaintiffs provide the court with a portion of the statute to show that NARA does have a "specific, unequivocal command" to conduct a periodic review pursuant to 9(d)(2) of the JFK Records Act: "**Any** executive assassination record postponed by the President **shall** be subject to the requirements of periodic review, downgrading, and declassification of classified information, and public disclosure..."

As the reader can see, the court was pondering whether Section 5 "seemingly" concluded the periodic review process that uses the "grounds for postponement" set forth in Section 6. The court resolved this question by holding that Section 5 and Section 6 are separate authorities:

Plaintiffs argue that standards for the President's postponement authority are outlined in Sections 6 and 9(d), but those sections apply to postponement after an initial determination by the ARRB. Section 5(g)(2)(D) is a separate authority that applies after the end of the 25-year deadline and is the authority invoked by the President here. ECF 68, page 7, fn. 4.

A fair reading of the 7/14/23 order is that since "Section 5(g)(2)(D) is a separate

authority", Section 6 and 9(d) continue to "apply to postponement" up to the present day, decades after 9(d)(1)'s "initial deliberation by the ARRB", and NARA is "failing to act" pursuant to the mandates of Section 6 and 9(d)(1), as well as 3(10)'s mandate for NARA to act in alignment with "the *compelling interest* in the prompt public disclosure of assassination records...(to) *fully inform the American people about the history* surrounding the assassination of President John F. Kennedy."

Even this court is apparently unaware that the House of Representatives made a finding of "high probability" that JFK was shot by two gunmen. To avoid the proliferation of speculation and conspiracy theories, a fully informed public needs the truth free of mythology and "with the bark off".

Section 9(d)(1) imbues the President with the "sole and nondelegable authority to require the disclosure or postponement" of records that are either: (1) "an executive branch assassination record" or (2) "information contained in an assassination record, obtained or developed solely within the executive branch," but no others. This siloed structure—requiring notification to the executive and legislative bodies, respectively, and cabining the President's ability to override the ARRB's determinations regarding postponement to executive branch records—comports with basic separation of powers principles. ECF 68, 12:11-17

Thus, the most reasonable interpretation of the 7/14/23 order is that there is a "*siloed structure*...comport(ing) with basic separation of powers principles" that provides two separate paths to continued postponement of assassination records: A Section 5(g)(2)(D) certification by the President that certain records must continue to be postponed; or Section 6 periodic review by the originating agencies and the Archivist, with 9(d)(1) imposing on the President with a "sole and nondelegable duty to require...postponement of such record or information under the standards set forth in Section 6."

b. The Transparency Plans fail to mention the "legally required" periodic reviews by NARA and the agencies, which constitutes "failure to act" under 551(13)

As stated in *Wildearth Guardians v. Chao* 454, F.Supp.3d 944, 952 (D. Mont. 2020), analyzing *Norton v. Southern Utah Wilderness Alliance*, 542 US 55 (2004)):

"A "failure to act" differs from a "denial." *Id.* at 63. The Supreme Court equated a "denial" with the agency's act of saying no to a request. *Id.* By contrast, a "failure to act" constitutes "the omission of an action without formally rejecting a request," such as the "failure to promulgate a rule or take some decision by a statutory deadline." *Id.* The Supreme Court emphasized that "a failure to act" properly must be understood to be limited, similar to the other items in § 551(13), "to a *discrete* action." *Id.* (emphasis in original).

The Supreme Court added a final requirement to its analysis of "failure to act" claims. Action "legally *required*" represents the only agency action that can be legally compelled pursuant to the APA. *Id.* (emphasis in original). Section 706(1)'s authorization for courts to "compel agency action *unlawfully* withheld" supports this interpretation. *Id.* (quoting 5 U.S.C. § 706(1)).

Following this logic, a periodic review is "legally required" as the type of agency action that can be legally compelled pursuant to the APA. "Failure to act" on the duty to conduct a periodic review has occurred here, as the failure by NARA and the agencies to schedule any further periodic reviews in response to the President's order indicates that NARA has "omitted an action without formally denying the request".

4. Agency action is the failure to act on an agency rule

Note that "agency action" is defined as "the failure to act" on an agency rule. JFK Act Section 9(a)(2) is a rule that governs NARA.

"...The Supreme Court noted that agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent thereof, *or failure to act*." *Id.* at 62 (emphasis in original) (quoting 5 U.S.C. § 551(13)). The Supreme Court cited the definitions of these categories to conclude that they "involve circumscribed, discrete agency actions." *Id.*

"Periodic review" is not only applicable pursuant to JFK Act Sections 6 and 9(d), but failure to conduct periodic review is actionable under the "failure to act" component of 551(13) and the mandate to "compel agency action *unlawfully* withheld" pursuant to 706(1) of the APA.

5. NARA has a mandatory duty to conduct periodic review under Section 9(d)(2)

NARA also has a mandatory duty to engage in periodic review under 9(d)(2) of the Act, not citing in the previous briefing in this case. It is a matter of record that NARA has conducted such reviews in 1999 and 2017-2023. See ECF 36, Amended Declaration of Willliam Simpich, paragraph 4. Jeremy Dunn, general counsel of the ARRB, wrote that "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." ECF 36, Amended Declaration, Exhibit C, p. 18.

6. Event-based review or circumstance-based review is not periodic

The NDC cannot characterize event-based review or circumstance-based review as "periodic". The Collins Dictionary defines "periodic" as "events or situations (that) happen occasionally, at fairly regular intervals." A circumstance-related review is "irregular". The circumstances could happen in rapid succession, or not occur in a hundred years.

7. Differing interpretations with no explanation are arbitrary and capricious

As seen above, Defendant NARA has watered down the statutory standards, allowing the agencies and the President to obtain whatever postponements they desire.

NARA CEO William Bosanko initially rejected proposed postponements but went on to approve Transparency Plans that contained standards that contradicted NARA's interpretation. Bosanko explained that the FBI was attempting to protect "specific named foreign law enforcement and other foreign government sources" based on its "Foreign Government Information Classification Guide", stating that "the application of this standard runs counter to the 'clear and convincing evidence' standard and ignores the balancing test written into JFK Act Section 6(4), which concerns the relationship between government agents and cooperating foreign governments." ECF 79-2, page 4-5.

NARA has now adopted different interpretations of the same statutory duties, pursuant to its approval of the agencies' Transparency Plans, which weaken the standards of the JFK Records Act in several respects.

Differing interpretations without any explanation - much less a rational explanation - constitutes arbitrary and capricious decision-making. 5 USC Section 706(2)(A).

Unlike Section 5, Section 6 states that assassination records can be postponed "if there is clear and convincing evidence that...public disclosure would reveal an intelligence agent whose identity currently requires protection...(or) the name and identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person...(or) an unwarranted invasion of personal privacy, and that interest is so substantial that it outweighs the public interest...(or) an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual...and public disclosure would be so harmful that it outweighs the public interest."

NARA engaged in unlawful decision-making by approving the Transparency Plans based on standards that violate Section 6 and the opinion of its CEO William Bosanko himself. The proper standard is found in the JFK Act at Section 3(10) that defines "public interest": "(T)he *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."

The DOJ briefs fail to address 3(10)'s "*compelling interest in prompt public disclosure*", or 2(a)'s finding that "*all records* should eventually be disclosed to enable *the public to become fully informed about the history surrounding the assassination.*"

How can the public be fully informed about a 60-year-old event when the members who remember the event are either elderly or dead?

The clear import of the Act is full disclosure as soon as possible. The standards applied by the Transparency Plan and these memos are designed to water down the statutory standards.

Section 6 is the floor of this Act. Its title is "grounds for postponement of

public disclosure of records." NARA tried to address the issue of "identifiable harm" by creating subcategories of PIIs (personal identifiable information) for each of the four categories of Section 5. However, the manner that these subgroups were created violates the Act by adding a requirement for "the impact of disclosure on current agency/department operations". See ECF 77, TAC 11:2-12:22.

Privacy standing alone cannot be a factor. The Defendant agrees, stating: "*An unwarranted invasion of privacy is sufficient to postpone the disclosure of a record under Section 6(3), but not to postpone the 25-year deadline of Section 5(g)(2)(D).*" ECF 40, 9:7-9.

The 2022 Biden Memo states at paragraph 6: "…until May 1, 2023, relevant agencies and NARA shall jointly review the remaining redactions…any information that agencies propose for continued postponement of public release beyond June 30, 2023, shall be limited to the absolute minimum under the statutory standard."

Since the President relied on this unlawful decision-making by NARA in approving the Transparency Plans of the various agencies, the President acted *ultra vires*. As recognized by this court, NARA has the duty to correct any *ultra vires* actions by the President.

If the Court agrees with the Plaintiffs that the Transparency Plans violate the standards of the JFK Act, the Court should order the agencies to revise the Transparency Plans.

8. As confederates and associates of NARA, nonparties such as CIA and DOD can be ordered by this court to revise their Transparency Plans

Nonparties such as CIA and DOD are confederates and associates of NARA, and can be ordered by this court to revise their Transparency Plans. See *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-437 (1934), where the Supreme Court explained that "persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate." Learned Hand put the point in similar terms: "(T)he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the

respondent must either abet the defendant or must be legally identified with him." *Alemite Mfg. Co. v. Staff*, 42 F.2d 832, 833 (2nd Cir. 1930)

C. ON THE THIRD CAUSE OF ACTION, PLAINTIFFS HAVE A LONG LIST OF DESTROYED, MISSING AND REMOVED RECORDS PURSUANT TO THE FEDERAL RECORDS ACT

1. Defendants' argument

Defendants argue that Plaintiffs lack standing to challenge destroyed records. Plaintiffs must show it is "likely as opposed to merely speculative that injury will be redressed by a favorable decision. *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018), quoting *Lujan v. Defs. of Wildlife*, 504 US 555, 561 (1992). In the context of the Federal Records Act, Plaintiffs must show a "substantial likelihood" that the Attorney General could find some federal records. *Cause of Action Inst. v. Pompeo*, 319 F.Supp. 3d 230, 234 (DDC 2018). Defendants admit that in *ACLU of Florida v. ICE*, 2023 WL 6461053 at *6, plaintiffs adequately addressed redressability with "an adequate allegation" that 'deleted' videos could be recovered.

2. Investigators can rarely determine whether a document absent from the files is "missing, destroyed, or removed."

Plaintiffs generally cannot determine if the documents not in the file are "missing, destroyed or removed." Occasionally an admission is made by a government employee, but not often. Plaintiffs assume, as they must, that a document not in the file fits into one of these categories.

3. Previous versions of the complaint seek "missing" and "destroyed" documents.

Plaintiffs filed their Second Amended Complaint on 4/10/23. This version sought both "missing" and "destroyed" documents. ECF 44, 55:19-56:9. Plaintiffs also included a claim for NARA's failure to follow up on the "outstanding ARRB assassination searches". Id. 56:11-13.

The 7/14/23 Court Order only denied the "outstanding ARRB assassination searches claim". ECF 68, 16:12-13.

Plaintiffs filed a Third Amended Complaint that included all the categories contained in 44 U.S.C. 2905 – which are listed in the statute as "removal, defacing, alteration or destruction" - referring to them in one portion of the complaint as "2905 violations". ECF 77, paragraphs 129-149, 167. Later, in the body of the Third Cause of Action, they were referred to as "missing, destroyed, and/or removed". Defendant mistakenly claims that the Plaintiffs are only seeking the intervention of the Attorney General. Plaintiffs' initial request is simply that NARA request the agencies to conduct a reasonable search for these documents. See ECF 77, para. 169-170.

4. Defendant's claim that "removal" is not the same as "missing" is unreasonable.

Defendant claims 44 USC 2905 is not applicable when it is alleged that records are "missing". ECF 78, 10:12-15. This argument stretches the bounds of credulity. A reasonable interpretation of the statute is that a "removed" document is a document "missing" from the file.

5. The Joannides and Marcello documents have been "removed" in a special way.

Plaintiff agrees that the Joannides documents have been "removed" in a special manner. TAC, paras. 61(a), 129. In this case, 44 Joannides files were withheld by the CIA, which continues to withhold these files in defiance of the JFK Records Act. According to former ARRB members, these files are entitled to "the presumption of immediate disclosure", but CIA refused to submit them directly to NARA as part of the Assassination Records. ARRB Chair John Tunheim wrote "by its actions, the CIA has thus destroyed the integrity of the probe made by Congress and cast additional doubt upon itself."

A similar type of "removal" has occurred with the tapes of the Mafia chief Carlos Marcello which belong in the National Archives as an assassination record. Marcello claimed to be involved in the JFK assassination. Although the tape transcript is in the National Archives, researchers have been unable to listen to the actual tapes and evaluate their significance and veracity, because most of them remain sealed.

6. The Plaintiffs should be allowed to conduct discovery to prove their claim.

Initially, the burden should be on the defendant, not the plaintiffs, at the pleading stage. In *Citizens for Responsibility & Ethics in Wash. v. Exec. Office of the President,* 587 F.Supp.2d 48 (D.D.C. 2008), the court held that citizen watchdog groups had standing to sue when alleging that the Executive Office of the President and Archivist of the United States failed to preserve five million White House e-mails created between 2003-2005, because destruction of White House e-mails was an injury-in-fact subject to redress under the Federal Records Act. The court held "for the purposes of surviving this Motion to Dismiss, Plaintiff raises sufficient questions regarding the (agency's) failure to undertake actions for the recovery of records to support a claim by a private litigant…the court will thus not foreclose at this early stage of the litigation the possibility that such private action may be appropriate."

Also see *Armstrong v. Bush*, 924 F.2d 282, 296 (DCA 1991), a Federal Records Act case where a motion to dismiss for lack of standing was sought against citizen-Plaintiffs' contentions of 44 USC 2905 violations: "On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review."

American Friends Service Committee v. Webster, 720 F.2d 29, 57 states that "the legislative history of the (FRA) supports a finding that Congress intended, expected and positively desired private researchers and private parties whose rights may have been affected by governmental actions to have access to the documentary history of the federal government." Plaintiffs, as researchers and historians who make extensive use of government documents, are within the zone of interests of the records management provisions of the FRA. *Armstrong v. Bush*, supra at 924 F.2d 288.

Secondly, William Simpich provides a declaration that contains a "substantial likelihood" that the Attorney General could find some federal records that had been destroyed.

This declaration points to the January 1995 destruction of Secret Service presidential protection survey reports for some of JFK's trips in the fall of 1963, after the passage of the JFK Records Act in 1992. Other files destroyed included protective intelligence files on threats to JFK in the Dallas area and on the infamous Fair Play for Cuba Committee (ARRB Final Report, p. 149); CIA HTLINGUAL documents destroyed in 1990 (after the HSCA hearings) that would have included references to the CIA's mail cover on Lee Harvey Oswald (ARRB Final Report, p. 83; and the admitted destruction of 1965-1970 Secret Service documents by James Mastrovito (TAC, para. 134, 139). As to all other documents, Mr. Simpich believes it is equally likely that they are either "missing" or "destroyed" and that any recovery effort would use the same methods.

Furthermore, based on the number of methods available to locate destroyed or missing documents, it is likely that many of them could be found. One simple method is to ask other agencies who were copied on the correspondence if they still have a copy. A second simple method is to ask the chief information officer who created the document if there is a computerized version of the document. A third, less-simple method is to interview the "chief information officer" for each agency and ask them about the different databases available.

The CIA, for example, is famous for being proprietary about their information. In regards to only the CIA, a more complete search would include:

1. The Executive Registry, which was in 1963 the central document file for the Office of the Director and its Chief is responsible for the control and location of all papers throughout the office. It is understood to be the destination and location of all documentation disseminated

within CIA for the attention of the Office of the Director as well as the office of the Deputy Director of Plans (a high-ranking officer of operations). ER (Executive Registry) files are held in storage at the Agency Archive Record Center in Alexandria, Virginia. Each file has a Job # and commences with the two initials "ER".

2. Operational files, defined as "certain files of the Directorate of Operations, the Directorate for Science and Technology, and the Office of Personnel Security that contain sensitive information about CIA methods." *ACLU v. Dep't of Def.*, 351 F. Supp. 265, 270 (S.D.N.Y. 2005)

3. Database systems and search strategies used by the National Clandestine Service ("NCS") which is "responsible for the clandestine collection of foreign intelligence from human sources", and the Directorate of Support ("DS") which "houses the personnel and physical security functions of the CIA and would be the most likely to contain records of individuals who were applicants, contractors or employees of the CIA." *Bothwell v. CIA*, 2014 LEXIS 144151, *11 (N.D. Ca. 2014).

Thirdly, the burden should be on the defendant, not the plaintiffs, at the pleading stage. In *Citizens for Responsibility & Ethics in Wash. v. Exec. Office of the President,* 587 F.Supp.2d 48 (D.D.C. 2008), the court held that citizen watchdog groups had standing to sue when alleging that the Executive Office of the President and Archivist of the United States failed to preserve five million White House e-mails created between 2003-2005, because destruction of White House e-mails was an injury-in-fact subject to redress under the Federal Records Act. The court held "for the purposes of surviving this Motion to Dismiss, Plaintiff raises sufficient questions regarding the (agency's) failure to undertake actions for the recovery of records to support a

claim by a private litigant…the court will thus not foreclose at this early stage of the litigation the possibility that such private action may be appropriate."

Finally, Defendant's claim of lack of standing to challenge destroyed records is a new claim, and, if necessary, Plaintiffs seek leave to amend the complaint to address this new and unanticipated claim. Plaintiffs rely on the cases cited above, as well as the principle enunciated in *Valencia-Lucena v. US Coast Guard, FOIA/PA Records*, 180 F.3d 321, 325 (DCA, 1999): "Congress determined the ultimate policy of open government should take precedence…this court has required agencies to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents." At this point, Defendant NARA has provided no evidence that it has ever looked for any of the documents at issue – a vitally important factor. See *ACLU of Florida v. ICE*, 2023 WL 6461053 *15.

CONCLUSION

The Defendants' motion should be denied in all respects.

Plaintiffs should be provided an opportunity to make their case, and engage in reasonable discovery.

If any portion of the complaint is stricken, Plaintiffs respectfully seek leave to amend.

Dated: November 22, 2023

_____/s/_____
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