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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.

TNo. 3:22-cv-06176-RS

PLAINTIFFS' REPLY BRIEF RE MOTION FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, OR MANDAMUS

Date: January 18, 2024
Time: 1:30 pm
Dept: Hon. Richard Seeborg

INTRODUCTION

Plaintiffs' motion (ECF 79) seeks relief not sought in the first motion (ECF 59):

1. Section 6(a) of the 2022 Biden Memo must be set aside, and the documents reviewed under the proper statutory standards of the JFK Records Act;

2. To halt implementation of 2(a)(ii)(2) in the NARA Guidance Document, with re-review as described above;

3. For the agencies and the Archivist to establish a timetable for periodic review of all postponed documents pursuant to Section 9(d)(2) of the JFK Act.

4. For an order for re-review of all of the Transparency Plans.[1]

The court's order states that "an injunction on NARA alone would suffice in addressing the averred injuries caused by implementation of the Biden Memoranda." ECF 68, 6:13-15.

All emphases used in this brief are provided by the Plaintiffs to make their case.

ARGUMENT

1. THE ACT'S STATUTORY PROCEDURE FOR THE DISCLOSURE OF DOCUMENTS CANNOT BE MODIFIED BY THE PRESIDENT OR NARA

a. The history of periodic review between NARA and the agencies

The statutory procedure for the disclosure of documents from 1994 until 2021 was for the agencies to negotiate with NARA pursuant to the postponement standards of Section 6.

Section 6 mandates that continued postponement of documents must be based on:

"…clear and convincing evidence of...(a) threat to the military defense, intelligence operations, or conduct of foreign relations...that ***outweighs the public interest***, and such public disclosure would reveal (A) an intelligence agent whose identity currently requires protection; (B) an intelligence source or method...(C) any other matter...which would demonstrably impair the national security...(2)...the name or identity of a living person...(with) a substantial risk of harm to that person...(3) an unwarranted invasion of personal privacy...(4) confidentiality currently requiring protection between a Government agent and a cooperating individual and a foreign government...(5)...(revelation of) a security or protective procedure...by the Secret Service of another government agency..."

§ 3.10 of the JFK Act defines "*public interest*" as:

[1] Plaintiffs' previous motion for injunctive relief sought "a stay in enforcement". ECF 59, 2:3-5.

"'Public interest' means the ***compelling interest*** in the ***prompt public disclosure*** 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."

As each agency reviewed, identified and transmitted its documents to the Archivist, the agency had a duty to "specify on the identification aid…the applicable postponement provision contained in section 6". Section 5(c)(2)(D)(ii).

Each originating agency and the Archivist have the duty to "review periodically" "all postponed or redacted records". Section 5(g)(1)

§ 9(d)(2) was unaddressed in the Court's 7/14/23 order. § 9(d)(2) is unequivocal in stating that there is no end to the process of periodic review.

"***Any*** executive branch assassination record **postponed by the President *shall be subject to the requirements of periodic review..."***

The court posed a question in its 7/14/23 Order: Is "5(g)(2)(D)...a power designed to conclude the periodic review process described in 5(g)(2)(A)-(C)." ECF 68, 14:3-4.

The answer is no. "Any executive assassination record postponed by the President" is unambiguous. Once an executive assassination record has been postponed, § 9(d)(2) states that periodic review "***shall***" be conducted. Such a review must be conducted in a "periodic" manner. The statute does not say "episodic".

b. For "*each* assassination record" "postponed pursuant to *Section 6*", § 9(c))(3) provides that the Review Board was required to create…"a *statement* designating a recommended *specified time*…or *specified occurrence*" for the records to be "appropriately disclosed to the public".

Now that the Court has been provided with the text of § 9(d)(2), it is clear that all postponed executive branch assassination records must continue to undergo periodic review as described in §§ 5(g)(1) and 9(c)(3) until the Archivist certifies that all assassination records have been obtained. To properly analyze this remedial statute and harmonize its parts, the Court needs to initially review § 5(g)(1):

"**All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist** consistent with the recommendations of the Review Board under section 9(c)(3)(B)."

The next step for the Court is to include § 9(c)(3)(B) in its analysis:

"With respect to *each assassination record* or particular information in assassination records the public disclosure of which is postponed pursuant to *section 6*, or for which only substitutions or summaries have been disclosed to the public, the Review Board shall create and transmit to the Archivist a report containing—(B) a *statement*, based on a review of the proceedings and in conformity with the decisions reflected therein, 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."

To summarize:

For **"*each* assassination record" "postponed pursuant to *Section 6*", "the Review Board shall create…**a ***statement*** designating a recommended specified time…or specified occurrence" for the records to be "appropriately disclosed to the public".

The "Section 6 documents" that Plaintiffs found published in the Federal Register are attached as Exhibit A to the Supplemental Declaration. These documents contain the RIF numbers, the numbers of releases or postponements for each document, and the date that each such document should be subjected to a periodic review to see if it is time for disclosure.

c. §5(g)(2)(B) mandates "an unclassified written description of the reason for such continued postponement" to be "published in the Federal Register" – this "reason" is the "identifiable harm" cited in § 5(g)(2)(D)

The attached Supplemental Declaration of Counsel states that although the "Section 6 Statements" were published in the Federal Register, Plaintiffs discovered these documents did not comply with § 5(g)(2)(B)'s mandate for "the ***reason*** for the continued postponement to be…published in the Federal Register". As these "Section 6 statements" provided no "reason" for continued postponement, the § 5(g)(2)(B) mandate that the "reason" be published went unfulfilled from 1994 to the present day. The full text of § 5(g)(2)(B) states:

"***All postponed assassination records*** determined to require continued postponement ***shall require an unclassified written description of the reason*** for such continued

postponement. Such description shall be provided to the Archivist ***and published in the Federal Register*** upon determination."

The failure of both NARA and the agencies to publish the ***"unclassified written description of the reason for such continued postponement"*** explains why Defendant's theory of § 5(g)(2)(D) is inapplicable. Until the ***"reason"*** pursuant to 5(g)(2)(B) is ***"published in the Federal Register"*** for ***"all postponed assassination records"***, there is no ***"identifiable harm"*** as mandated in 5(g)(2)(D) to justify the President's withholding of these documents.

This court held that Section 6 and 9(d) standards "*apply to postponement after an initial determination by the ARRB. § 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.

However, the order did not address the nature of an "***identifiable harm***" as stated in 5(g))(2)(D). Nor did the order state that Section 5 is "wholly separate" from Sections 6 and 9.

Plaintiffs contend that however the Court ultimately identifies the nature of an "***identifiable harm***", it must be "identifiable" – in other words, disclosed to the public. Section 2(a)(3) states that "*legislation is necessary to create an enforceable, independent, and accountable process for the public disclosure of records*". It is not accountable, independent or enforceable for a President to conceal the nature of a supposedly "***identifiable harm***". We ask this court to enforce the JFK Act to ensure an independent and accountable process.

d. The Section 6 procedure must be completed before the President can certify under Section 5(g)(2)(D)

Thus, the President cannot certify the existence of ***"identifiable harm"*** re § 5(g)(2)(D) until § 5(g)(2)(B)'s ***"reason for such continued postponement"*** has been 1) ascertained by use of the "Section 6 standards" rather than an agency's own standards; and 2) ***"published in the Federal Register upon determination"*** as mandated by § 5(g)(2)(B).

Any argument that the Transparency Plans issued in December 2022 provide the "reason for such continued postponement" must fail for the same two reasons as stated above – 1) these Plans were not developed by using the Section 6 standards, but rely on less stringent, non-statutory standards created by each of these agencies; and 2) no Federal Register publication.

e. The President's 2022 Biden Memo waters down the JFK Records Act by using less-stringent, non-statutory criteria

§ 6(a) of the 2022 Biden Memo states that "in applying the statutory standard (of § 5(g)(2)(D)), agencies shall: (i) accord ***substantial weight to the public interest in transparency*** and full disclosure of any record that falls within the scope of the Act; (ii) give due consideration that some degree of harm is not grounds for continued postponement unless the degree of harm is of ***such gravity that it outweighs the public interest in disclosure***."

NARA claims that the 2022 Biden Memo does not water down the public interest aspect of the JFK Act. ECF 90, 14:26-15:13. NARA only offers one paragraph to support its argument, claiming that President Biden had no § 6(a) duty to specifically refer to the Act's § 3(10)'s definition of public interest that offers a "compelling interest standard".

NARA also denied that it was trying to substitute "the substantial weight to the public interest in transparency" as an alternate standard within § 6(a). ECF 90,14:25-15:13.

NARA's intent, of course, is irrelevant. What is relevant is that JFK Act § 3(10) ordering the President, NARA, and the agencies to construe public interest as "***the compelling interest in the prompt public disclosure*** of assassination records for historical and governmental purposes about ***the history surrounding the assassination***" is much stronger and much more specific than President Biden's order to ***"accord substantial weight to the public interest in transparency"*** in any procedure that ***"(weighs) the public interest in disclosure."***[2]

The statutory standard and the process adopted by the Executive Office of the President has been for the agencies to negotiate with NARA pursuant to the postponement standards of

[2] Note that the "Executive Office of the President" is defined within 3(4) of the Act as "an Executive agency".

Section 6 (citation). There must be "clear and convincing evidence of...(a) threat to the military defense, intelligence operations, or conduct of foreign relations...that outweighs the public interest, and such public disclosure would reveal (A) an intelligence agent whose identity currently requires protection; (B) an intelligence source or method...(C) any other matter...which would demonstrably impair the national security...(2)...the name or identity of a living person...(with) a substantial risk of harm to that person...(3) an unwarranted invasion of personal privacy...(4) confidentiality currently requiring protection between a Government agent and a cooperating individual and a foreign government...(5)...(revelation of) a security or protective procedure...by the Secret Service of another government agency..."

As summarized by William Bosanko, the CEO of NARA (Bosanko Memo, p. 3):

"The standard set by the JFK Act and the Assassination Records Review Board during their deliberations 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."

In 2017, these standards were changed by one factor: Pursuant to Section 5(g)(2)(D), the President now had the power to "(certify), as required by this Act, that - (i) continued postponement is made necessary by an **identifiable harm** to the military defense, intelligence operations, law enforcement, or conduct of foreign policy; and (ii) the **identifiable harm** is of such gravity that it outweighs the public interest in disclosure."

The 7/14/23 ruling of this Court did not address the nature of § 5(g)(2)(D)'s "identifiable harm", or the duty to publish § 5(g)(2)(B)'s "reason for continued postponement".

In pertinent part, § 6(a) of the 2022 Biden Memo states that "in applying the statutory standard (of 5(g)(2)(D)), agencies shall…accord ***substantial weight*** to the public interest in transparency and full disclosure of any record that falls within the scope of the Act." Such a Presidential statement constitutes less stringent, non-statutory criteria than § 3(10) of the Act.

f. ***Review of factors that show how the 2022 Biden Memo has watered down the Act***

The 2022 Biden Memo implements a "*presidential policy...in a manner prescribed by the President*", rather than a "*congressional policy...in a manner prescribed by*

Congress." *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579, 588 (1952). Presidential directives are invalid when they are issued in contradiction to the expressed intent of Congress and Congress does not ratify the policy or acquiesce in the decision promulgated by the order. *Youngstown*, *supra*, at 588. The Constitution does not independently authorize such a legislative action by the President absent a direct Congressional authorization. *Bldg & Constr. Trades Dep't v. Allbaugh,* 172 F. Supp. 138, 160 (D.D.C. 2001). The less-stringent, non-statutory factors relied on by the President in the 2022 Biden Memo are listed below.

1. The JFK Act's § 3(10) definition of public interest is far more demanding and rigorous than the watered-down 2022 Biden Memo. § 6(a)'s use of "substantial weight" and "due consideration" was used, instead of evaluating whether the "identifiable harm is of such gravity that it outweighs the public interest in disclosure." § 5(g)(2)(D)(ii). "Substantial weight" means "considering" the public interest, not a showing that the identifiable harm "outweighs" the public interest. There is no evidence in the Biden Memos that the President, the agencies or NARA performed the full statutory analysis set forth in § 5(g)(2)(D)(i)-(ii).

2. From 1994 to the present, the agencies and NARA claim to have made their decisions based on § 6 of the Act but did not comply with § 5(g)(2)(B)'s mandate to publish in the Federal Register ***"an unclassified written description of the reason for each continued postponement."***

3. Now, in § 3 of the 2021 and 2022 Biden Memos, President Biden has ordered the agencies to make at least some of their decisions based on § 5(g)(2)(D) of the Act. The President's actions attempt to protect the agencies for not publishing the reasons for all postponed assassination records between 1994 to the present, and thus to hide the fact that not all of the § 5(g)(2)(D) postponements were initially tested by § 6 standards to see if there was "clear and convincing evidence" that these documents should be postponed.

4. Contrary to the 7/14/23 Order, the agencies' Transparency Plans do not establish events that provide for automatic declassification. Instead, they only identify events or circumstances that will trigger a future review by the relevant agency and the NDC as to "when that postponement will end", as stated in the 7/14/23 Order, 7:6-7. In addition, the Transparency

Plans provide no role for the President in any such future postponement decisions in contradiction of §§ 9(d)(1) (non-delegable duty) and 5(g)(2)(D). The President's approval of the Transparency Plans was *ultra vires* and constitutes a breach on his part that violates the APA (note that the Executive Office of the President is an "executive agency" pursuant to 3(4) of the Act), although Plaintiffs believe that NARA is the responsible party. (Thus, if NARA were to be removed as a Defendant for whatever reasons, these activities constitute grounds for an APA action and a cause of action for "nonstatutory review" against the President in an amended complaint if the court is inclined to modify its previous ruling prior to any Rule 59 motion by the Plaintiffs to modify the order to roll back the court's decision to dismiss the President without leave to amend.)

5. The approval of the Transparency Plans by NARA was a final agency action. The agencies were bound by the approval of the Transparency Plans by NARA.

Since the Transparency Plans ignored the Section 6 Statements, Plaintiffs ask the court to halt the implementation of the Transparency Plans and order the agencies and NARA to conduct a re-review using the Section 6 Statements and harmonizing with §§ 5(g)(2)(B) and 6.

6. The Biden Memos ordered the agencies and NARA to jointly review the documents with a view to "disclosing all information...except when ***the strongest possible reasons counsel otherwise***". 2022 Biden Memo in both § 1 (policy) and Sec. 6(a). This is another example of a less-stringent, non-statutory standard used by the President. With these actions, Defendant not only waters down the JFK Records Act, but re-writes the statutory criteria of the Act. NARA cannot use less stringent criteria without approval from Congress.

7. An "identifiable harm" is not whatever the President thinks in his mind - just like President Trump cannot declassify a document by "thinking about it". The President has the duty to identify the harm. Otherwise, there is no reason for the word "identifiable" to be in the statute - it would just state "harm".

No identifiable harm has been provided as a basis to withhold these names. Plaintiffs state that while some of these names were analyzed under the basis of § 6 and with a "reason"

pursuant to § 5(g)(2)(B), others were analyzed under § 5(g)(2)(D) alone. Regardless, publication in the Federal Register did not occur as mandated by Section 5(g)(2)(B).

Under either theory, Defendant has violated the Act, and the court should order for these documents to be re-reviewed under the proper standards of §§5(g)(2)(B), 5(g)(2)(D) and 6.

8. § 9(d)(2) provides the mandate for "periodic review, downgrading, and declassification". When Biden said on 6/30/23 that this order was the final certification under the Act, he ignored § 9(d)(2), as well as § 12(b) as stated above. His delegation of further postponement decisions to the agencies and the Archivist was *ultra vires*.

9. Plaintiffs seek to halt implementation of § 2(a)(ii)(2) in NARA's JFK Guidance. This section stated that each agency had to submit information on why a postponement was consistent with the criteria of § 5(g)(2)(D), plus the "***impact of disclosure on current agency/department operations***". The latter factor is nowhere in the Act and constitutes another example of NARA violating 706(2) by using less stringent, non-statutory criteria.

In defense, NARA pointed to the court's order stating that the recommendation was not a final agency action under the APA, and that "even if NARA's tentative recommendation informed the President's decision, it was ultimately the President who possessed the authority to postpone disclosure - and the President's decisions, not NARA's recommendations, created the legal consequences of postponing the release of the records at issue." ECF 90, 3:9-14, referring to the Order at ECF 68: 9:24-27.

NARA also argued that the Court has recognized that "the President's approval of the Transparency Plans is not, as Plaintiffs claim, a delegation of the President's authority to postpone the release of records - it is the Biden Memoranda themselves that postponed the release of each record; the Transparency Plans merely set forth when that postponement will end." Order, ECF 68: 7:4-7.

In reply, as stated above, approval of the Transparency Plans was a final agency action since the agencies were bound by the approval of the Transparency Plans between NARA and the agencies. The Biden Memos simply directed the agencies to do what they had already agreed

to do when NARA approved their Transparency Plans in much the same way that NARA's 2017 guidance imposed binding obligations on the agencies.

Plaintiffs' newly-filed TAC alleges that 2(a)(ii)(2) contains a "non-statutory criterion" by mandating "impact of disclosure on current agency/department operations", and that "NARA acted arbitrarily and capriciously by approving and implementing the guidance document JFK records using nonstatutory criteria in violation of Section 5 U.S.C. 706(2)(A)." TAC, paragraph 69. This ***implementation*** of the guidance document remains unaddressed in the court's order.

CONCLUSION

Plaintiffs have now spelled out how § 5(g)(2)(D)'s "identifiable harm" is one and the same as § 5(g)(2)(B)'s "reason for continued postponement" that was never published in the Federal Register for "all postponed assassination records". NARA failed to provide the public with proper notice why all of these records have been postponed from 1994 until now.

The "reason for continued postponement" for all such records must be complied with in a new periodic review, and then published in the Federal Register pursuant to § 5(g)(2)(B).

_____/s/_____
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Dated: December 28, 2023