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13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16

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

20 Plaintiffs,

21 v.

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

26 Defendants.
27
28

No. 3:22-cv-06176-RS

REPLY BRIEF RE MOTION TO ORDER
NARA TO COLLECT ALL
ASSASSINATION RECORDS AND TO
HALT ADVISING USE OF FOIA (ECF 91)

Date: January 18, 2024

Time: 1:30 pm

Dept: Hon. Richard Seeborg

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1 **1. Plaintiffs’ § 12(b) motion is designed to protect the integrity of the Act**

2 The second amended complaint was filed on April 10, 2023, the first version of the
3 complaint that addressed the Transparency Plans issued in December 2022. ECF 44. The
4 original motion for injunction was filed on May 25, 2023 (ECF 52), and shortened and re-
5 submitted on June 8, 2023 (ECF 59). The relief sought was to halt implementation of the
6 Transparency Plans; declaratory relief stating that “NARA was the “successor in function” to the
7 ARRB; that it had a mandatory duty to seek additional Assassination Records; that it enforce the
8 MOU; and advise researchers to invoke the JFK Act rather than FOIA...or mandamus as
9 appropriate.” ECF 59, 24:21-25. All aspects of that motion were denied. ECF 59.

10 Plaintiffs then sought leave to amend their complaint in a number of important aspects,
11 which was granted. The new complaint was filed on September 11, 2023. ECF 76, 77.

12 Plaintiffs’ § 12(b) motion is designed to protect the integrity of the Act, and offers a
13 different “lens” than the “successor in function” argument. The obligation to seek additional
14 records and use the MOU also flows from § 12(b).

15 The relief now sought also seeks an order barring NARA advising researchers to use
16 FOIA, rather than to “invoke the JFK Act.” The relief sought is simply for NARA to stop
17 advising the use of FOIA, an instrument that was so ineffective in the JFK records context that it
18 led to the passage of the JFK Act. See § 2(a)(5).

19 **2. NARA’s duties to collect additional assassination records are rooted in § 12(b)**

20 Plaintiffs state that NARA has taken on the duties and obligations of the ARRB
21 throughout the Act, except for the Act’s *administrative functions* in §§ 7(a)-(h) which address the
22 *appointment* of the Board and § 8 which address the *operation* of the Board. ECF 91, 4:27-5:23.
23 § 12(a) states “the provisions of this Act that pertain to the *appointment and operation* of the
24 Board” terminate with the ARRB’s dissolution. NARA states that it has “never disputed” that
25 “the other provisions of the Act continue in effect even after the Assassination Records Review
26 Board has terminated.” ECF 94, 6:6-11, but refuses to cite provisions that “continue in effect”,
27 and claims that any obligation to collect records “falls on agencies themselves.” ECF 94, 9:10.
28

1 NARA's approach is to cite the Act when it favors it; to infer that unspecified provisions
2 of the Act terminated in 1998; and to claim that other provisions such as §§ 5(g)(1), 5(g)(2)(B),
3 6, 9(d)(1) and 9(d)(2) terminated in 2017 when these Congressional statutory provisions
4 interfered with the preferences of NARA and the Executive Office of the President.

5 NARA argues that the postponement determinations made by the ARRB in the 1994-
6 1998 period are 25 years old, that "*their attempt to foist such an obligation on Defendants lacks*
7 *any basis in the Act*", and that there is no longer any need for periodic reviews now that the
8 President has acted under § 5(g)(2)(D). ECF 90, 16:9-22. NARA even wrongly argues that the
9 Plaintiffs are trying to overrule the President.

10 Plaintiffs' argument is simple: § 5(g) is the duty of periodic review – a duty that
11 incorporates all § 5(g) provisions, including § 5(g)(2)(D). § 9(d)(2) makes it plain that "any
12 *executive branch assassination record postponed by the President shall be subject to the*
13 *requirements of periodic review.*"

14
15 The duty of periodic review can only terminate under specific conditions mandated by
16 the Act. The Act's history shows that the determinations for postponement were published in the
17 Federal Register between 1994-1998 (ECF 95-97; also see attached 2nd Supplemental
18 Declaration by Counsel); NARA conducted periodic reviews in 1999 and then stopped for 18
19 years until 2017 when a periodic review occurred under the standards of Section 6; then the
20 Presidents weighed in with several § 5(g)(2)(D) decisions between 2017-2023 without
21 publishing in the Federal Register the "reason for such continued postponement" as mandated
22 in § 5(g)(2)(B) and reaffirmed in § 9(d)(4)(B)'s mandate to publish "an explanation of the
23 application of any standards contained in Section 6" and § 9(e)'s mandate to publish "each
24 ground for postponement". From 2017-2023, Plaintiffs contend that NARA continued to rely
25 on § 6 and engage in periodic review, as shown in the attached documents from 2018. See
26 Second Supplemental Declaration of Counsel.

27 Periodic review means that the agencies and NARA continue to review the documents
28 pursuant to § 6 and invite the President to either accept the decisions or reject the decisions. He

1 can choose to use the post-2017 process as set forth in § 5(g)(2)(D), or he can choose to use the
2 process in § 9(c)-9(f). It does not mean that the President and NARA can fail to comply with the
3 Act by usurping the statutory protections with Executive Orders, or guidance documents that
4 issue “specific commands”. Nor does it create any “untenable scenario” where NARA and the
5 originating agency could “*determine, contrary to the President’s certification, that a record*
6 *should be released.*” ECF 90, 6:8-10.

7 NARA argued that “as this court recognized, see Order at 13-14, there is no statutory
8 duty for NARA to ‘obtain the last of the assassination records.’ Pls. Third PI Mot. at 11.” ECF
9 94, 6:14-15. The Order actually states something quite different - NARA is not the ARRB’s
10 successor in function and thus “*the JFK Act imposes no ‘specific, unequivocal command’ to*
11 *undertake the remaining averred duties.*” ECF 68, 13:12-16. The Order does not address §
12 12(b). At p. 14, the Order states that relief is unavailable “since NARA has no specific,
13 unequivocal command to take the described actions”. *Plaskett v. Wormuth*, 18 F.4th 1072, 1082.

14 Plaintiffs have now placed § 12(b) on the table. NARA is now compelled to act under §
15 706(1), pursuant to *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). “(A) claim under
16 § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency
17 action that it is required to take.” § 12(b) mandates that NARA must take appropriate action.

18 NARA claims that Plaintiffs cited no APA case law to support its FOIA claim. Plaintiffs
19 relied on the five cases based on § 706(1)’s “unreasonable delay” cited at pages 11-12 of its
20 brief, and a commonsense reading of § 706(2)’s arbitrary-and-capricious standard cited at p. 10.
21 Also see Plaintiffs’ previous briefing on both sections of §706. ECF 59, 15:19-22:15. NARA
22 did not rebut any of the five cases cited by Plaintiffs in its 12/14/23 request for equitable relief.

23 NARA places great reliance on its interpretation of the JFK Records Act, but consistently
24 fails to cite the subsections of the Act in the Table of Authorities of its briefs. See ECF 23, 40,
25 46, 58, 61, 78, 90.

26 **3. Plaintiffs’ causes of action state NARA had to stop giving bad advice about FOIA**

27 NARA claimed Plaintiffs never alleged a cause of action stating that NARA had to stop
28

1 giving bad advice about FOIA. ECF 94, 6:19-20. Causes of Action 1 & 2 both properly allege it.

2 As stated in the TAC, at paragraph 119:

3 "Defendants have a custom, practice and policy of failing to apply the proper definition
4 of "assassination records" in response to requests for records alleged to be assassination
5 records...instead of applying the assassination records definition to such requests, **NARA**
6 ***improperly advises citizens to use FOIA to find "assassination records" that are not in the***
7 ***JFK Collection***; of failing to advise citizens seeking to make additional assassination records
8 public to invoke the JFK Records Act rather to file an action based on FOIA or MDR
9 (mandatory declassification of records), and that NARA has also failed to respond to their
10 requests to take action to include and/or review additional assassination records to the JFK
11 Collection. The result has been a 25-year delay in obtaining additional assassination records from
12 1998 to the present, and an equivalent delay in properly advising citizens of the best way to
13 obtain the release of additional assassination records, ***despite NARA's assurance to the public in***
14 ***65 FR 39550 that NARA would maintain and supplement the assassination records***. This
15 failure to apply its own Subpart H regulations to requests involving assassination constitutes
16 arbitrary and capricious action pursuant to 5 U.S.C. 706(2)(A) and is subject to judicial review."

17 The First Cause of Action incorporates para. 119 by reference at paragraph 150. Then...

18 "156. The Biden Memoranda direct Defendant NARA to exercise its authority in ways
19 that are arbitrary and capricious, and contrary to the JFK Act in violation of the APA.

20 "157. Defendant NARA cannot implement the Biden Memoranda without violating the
21 JFK Act from which it derives its authority over Assassination Records and the APA.

22 "158. Plaintiffs and their members have no adequate remedy at law and have and will
23 suffer irreparable injury if Defendant NARA continues to comply with the Biden Memoranda.

24 "159. The public interest favors entry of an injunction barring Defendant NARA from
25 implementing the Biden Memoranda that violated the express terms of JFK Act. Implementation
26 will result in unlawful delayed release of Assassination Records in contravention of Congress'
27 express command for prompt disclosure.

28 "160. Because the Biden Memoranda direct agencies to violate the law and is contrary to
congressional intent, this Court should declare that Defendant NARA's implementation of the
Biden Memoranda withholding assassination records is unlawful and enjoin Defendant NARA
from continuing to implement the Biden Memoranda."

On the Second Cause of Action, after incorporating these allegations at paragraph 161:

"162. Defendant NARA has ministerial non-discretionary duties pursuant to the JFK Act
as follows:

"...d. The JFK provides for periodic review for "additional assassination records."

"...f. Section 9(d)(1) of the JFK Records Act mandates that in the aftermath of any
disclosure or postponement findings of the ARRB, the President has the 'sole and non-delegable
duty to require the disclosure or postponement of such record or information under the standards
set forth in section 6.

"...h. NARA cannot permit the use of less stringent standards for the postponement of
the release of assassination records than the standards promulgated by the JFK Records Act.

1 “163. Defendant NARA must be enjoined from issuing any certification to Congress that
2 all Assassination Records have been obtained and that all obligations under the JFK Act
3 completed until Defendant NARA completes the outstanding Assassination Records search
4 requests to ensure that all Assassination Records have been provided by all the agencies. Any
5 certification made without such a search and review would be arbitrary and capricious...”

6 **4. Defendant’s three-page argument constitutes a “partial motion to dismiss”**

7 Defendant filed a three-page argument in its Motion to Dismiss, best characterized as a
8 “Partial Motion to Dismiss”. ECF 78, pages 5-7. See *Wade v. United States*, 745 F. Supp. 1573,
9 1575 (D. Hawaii 1990). As seen below, virtually none of the issues addressed in the three pages
10 include the issues for which Plaintiffs seek equitable relief in this round of briefing. NARA is
11 the party engaging in piecemeal litigation. NARA not only failed to address the “bad advice on
12 FOIA” discussed above, but also failed to address:

13 a. Section 12(b) mandatory duties shouldered by NARA in replacing the ARRB, as
14 applied in paragraphs 61 and 163 to ensure “*NARA completes the outstanding Assassination*
15 *Records search requests to ensure that all Assassination Records (are) provided*”; also see TAC
16 paragraphs 156 and 160 stating that NARA is “violating the JFK Act” and “contrary to
17 Congressional intent”; and incorporated into Causes of Action 1 & 2 by paragraphs 150 and 161.

18 b. The duty to apply periodic review in a periodic manner pursuant to 5(g)(1) and
19 9(d)(2), that it has been applied from 1994-2023 for original assassination records, and that there
20 is a duty to apply it to “additional assassination records” TAC paragraphs 5, 111, 162(d); also
21 see TAC paragraphs 156 and 160 as described in section a, above; and incorporated within
22 Causes of Action 1 and 2 pursuant to paragraphs 150 and 161.

23 c. The right to statutory override pursuant to Section 11(a) (TAC paragraph 38 (citing §
24 11(a) to “*take precedence over any other law*”), references to paragraphs 155, 160 (re “violating
25 the Act”), 164(e) (“NARA cannot permit less stringent standards” than the Act), and
26 incorporated into Causes of Action 1 & 2 by paragraphs 150 and 161;
27
28

1 d. The failure to comply with the mandatory duty of publishing in the Federal Register
2 the grounds for the postponement decision for each record. TAC paragraphs 50d & 51 (duty to
3 publish summary of each record); 123 (duty to establish “how” the “identifiable harm”
4 outweighed the public interest on a record-by-record basis); 154 (no law allows NARA to use
5 “procedures that contravene the Act”); 162e (duty exists pursuant to § 5(g)(2)(B) – also see the
6 duties to publish in §§ 9(e) and 9(c)(4)(B)); TAC 163 (duty to complete all JFK Act obligations);
7 paragraph 164d (duty to release names in Section 6(2) of the Act); and incorporated into Causes
8 of Action 1 & 2 by paragraphs 150 and 161.
9

10
11 e. The relaxation of the standards of §§ 5(g)(2)(D) and 6 of the Act, pursuant to the
12 2022 Biden Memo §§ 5(c)(iii) and 5(d)(i)-(iv) – as stated in TAC paragraphs 50(c)-(d) and that
13 only required “*anticipated harm*” for continued postponement. Also see TAC paragraphs 154
14 (NARA is barred from using “less stringent criteria...or procedures that violate the Act”); 160
15 (“contrary to Congressional intent”); TAC paragraph 163 (duty to complete all JFK Act
16 obligations), and incorporated into Causes of Action 1 & 2 by paragraphs 150 & 161.
17

18 f. The § 9(d)(1) violation of delegating Presidential duties to the NDC. TAC paragraph
19 122, 154, 160, 162(f) (“President has the sole and non-delegable duty”), and incorporated into
20 Causes of Action 1 and 2 by paragraphs 150 and 161.
21

22 Plaintiffs in other cases have made motions to take the default of those who file “partial
23 motions to dismiss”. See Scott L. Cagan, *A “Partial” Motion to Dismiss Under Federal Rule of*
24 *Civil Procedure: You Had Better Answer*, 39 Fed. B. News & J. 202, 202 (1992).
25

26 **5. Plaintiffs sought injunctive relief six weeks after amending their complaint upon**
27 **uncovering the text of the Transparency Plans issued two months after suit filed**

28 Plaintiffs acted promptly after learning that the JFK Act was available as a remedy, and

1 after learning about the underlying facts that made such a suit possible. Plaintiffs also
2 reasonably relied on NARA's claims of "supplementing the records" to their detriment.
3 Defendants argue that "Plaintiffs and the public have been waiting since 1998 for NARA to
4 obtain the last of the assassination records. Pls.' Third PI Mot. at 1." Plaintiffs reasonably relied
5 on NARA's statement in 2000, which would lead any reasonable person to believe that NARA
6 was supplementing the Collection with agency assistance:
7

8 *"NARA continues to maintain and **supplement** the collection under the provisions of the*
9 *Act...**Agencies continue to identify records** that may qualify as assassination records and need*
10 *to have this guidance available."* 65 FR 39550.

11 This suit is based on a remedial statute, based on the public interest to obtain information
12 that was previously assumed was being supplemented on a continuing basis, until the Plaintiffs
13 learned otherwise. Plaintiffs also assumed that President Biden would correct President Trump's
14 difficulties in sorting out if any records were appropriate for further postponement, until it
15 became apparent the problem was deeply-engrained within the shifting rationales for
16 postponements used by NARA, the agencies, and the President, illustrated upon receipt of the
17 2021 Biden Memo during October of that year. (TAC, paragraph 48). Plaintiffs' written
18 complaints to NARA's archivist and general counsel as recently as February 2022 were ignored.
19 (TAC, [paragraph 100) This remedial case is not based on personal injury or economic damage,
20 where time is of the essence to protect life and limb. Plaintiffs needed to marshal the facts and
21 the law before bringing such a case forward – especially when NARA, NARA counsel Gary
22 Stern and the President stated repeatedly since 2013 that they were struggling with a huge
23 number of non-JFK documents that needed declassification – and then the shutdown of NARA
24 and other government facilities caused by COVID-19.
25
26
27

28 Some of the operative facts remain unknown to this day – Defendant NARA claims that

1 all government actors acted reasonably and diligently complied with the law in the 1990s, and
2 Plaintiffs relied on Defendant's claim in this regard except for the cessation of periodic review
3 and the failure to see large numbers of documents released between 1999-2017.

4
5 However, Plaintiffs discovered in the course of this latest round of briefing that although
6 "Section 6 statements" stating the reasons for the continued postponements made by ARRB,
7 NARA and the agencies occurred in a haphazard manner during 1994-1998 and afterwards, there
8 was never any occasion during the 1994-1998 that the reasons for the continued postponement
9 for each of those documents were ever published in any compilation in the Federal Register. See
10 Second Supplemental Declaration of Counsel. This practice – going back to the 1990s – violated
11 the mandate for publication of "each ground for postponement" as mandated by Section 9(e)
12 and "the reason for such continued postponement" as mandated by Section 5(g)(2)(B).

13
14 **6. If the court finds for some reason that it needs more facts, Plaintiffs ask for this**
15 **motion to be continued while discovery is conducted**

16
17 Plaintiffs believe they have made their case, and that resolving issues unaddressed in
18 NARA's "partial motion to dismiss" aids judicial economy. If more facts are needed, Plaintiffs
19 seek the following discovery while this motion is continued:

20 a. The factual basis for NARA's actions that may show whether these actions
21 should be construed "final" in attempting to obtain "all assassination records" (ECF 87, 2:27-28)

22 b. More documents that show that the Biden Memoranda based its continued
23 postponements and the concurrent Transparency Plans on erroneous standards used by NARA
24 and the agencies as well as the erroneous advice provided by NARA based on those erroneous
25 standards. (ECF 87, 5:14-21)

26
27 c. More documents that show that only after NARA provides its § 6
28

1 recommendations to the President can § 5(g)(2)(D) be invoked by the President in the post-
2 10/26/17 time period. NARA’s argument that § 6 became obsolete on 10/26/17 contradicts its
3 repeated reliance on Section 6 between 2017-2023 (ECF 87, 7:26-8:2)

4
5 d. Discovery may be needed to show that additional documents can and must be found
6 before NARA can satisfy its § 12(b) mandatory duty to certify that “all assassination records
7 have been made available to the public in accordance with the Act.” (ECF 87, 8:17-19)

8 e. As Defendant bears the burden at the pleading stage, discovery is appropriate.

9
10 **7. Court intervention is appropriate, as Defendant and the President consider the
11 issues resolved and plan no further review for many years**

12 President Biden stated in his 2023 Biden Memo that he considered his role in the JFK
13 document releases and postponements to be completed. The Transparency Plans of the agencies
14 state that they do not intend to review these documents for periods of five years or more – in
15 some cases, decades from now. It is a ripe moment for the court to supervise a process that has
16 distinguished itself in failing to follow the strict standards of the remedial JFK Act.

17
18 **8. It is “idle ceremony” to expect researchers to ignore NARA’s bad advice**

19 It is unreasonable delay for NARA officials like Martha Murphy to keep urging JFK
20 researchers to use FOIA. In the multiple decisions in *Morley v. CIA* that began at 2006 U.S.
21 Dist. 6848 (D.C.D.C. 2006) and ended at 894 F.3d 389 (D.C. Cir. 2018), improper “FOIA
22 guidance” by NARA resulted in fourteen decisions over 12 years with 44 documents about a top
23 CIA official involved in the Oswald drama buried in a *Vaughn* index from 2003 to today.

24
25 In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court found plaintiffs
26 entitled to judicial review as the grievance fell within the zone of interests protected by the
27 statutory provision or constitutional guarantee invoked in the suit. In this case, plaintiffs are
28 American citizens and researchers entitled under the JFK Records Act “to become fully informed

1 about this history surrounding the assassination.” § 2(a)(2). NARA’s approval of Transparency
2 Plans that violate the express terms of the JFK Act culminates a multi-year process that is
3 sufficiently direct and immediate to make the issues appropriate for judicial review.
4

5 There is no danger of the Court getting “*entangl(ed) in abstract disagreements over*
6 *administrative policies*”, as warned against in *Abbott Labs v. Gardner*, 387 U.S. 136, 149
7 (1967). This case satisfies *Abbott’s* “fitness test” because it presents a clear-cut legal question,
8 i.e., whether NARA properly construed the Act when it approved the Transparency Plans. The
9 facts as alleged show that NARA conducted the functional decision-making for these Plans. The
10 President waving his wand over the Transparency Plans constitutes an idle ceremony.
11

12 **Conclusion**

13 The executive orders of the President cannot impinge on a Congressional statute. Section
14 11(a) is a separate basis to set aside the Biden Memos. Plaintiffs re-cite *Youngstown Sheet &*
15 *Tube Co. v. Sawyer*, 343 U.S. 579, 585-589 (1952) for the basic proposition that the statute does
16 not grant the President the explicit power to change the specific terms of the JFK Records Act.
17 Plaintiffs also rely on *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) and
18 *Sierra Club v. Trump*, 963 F.3rd 874, 879-887 (9th Cir. 2020), and discussion at ECF 39, 11-17.
19 This is a classic case of unreasonable delay and “administrative keep-away.” *In re Am. Rivers &*
20 *Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004). The remedy is for NARA to receive
21 researchers’ requests and to exercise its discretion as to whether to make a JFK Records Act
22 request for these documents.
23
24

25 Dated: January 4, 2024

26 _____
27 /s/
28 William M. Simpich
Lawrence P. Schnapf
Attorneys for Plaintiffs