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August 20, 2021

Honorable Joseph R. Biden, Jr:
The White House
Washington, D.C.

Re: John F. Kennedy Assassination Records Collection Act of 1992

Dear President Biden:

On April 26, 2018, President Trump issued a Presidential Memorandum (2018 Memorandum) [1] postponing until October 26, 2021 the release of records relating to the assassination of President Kennedy. These records were supposed to be disclosed on October 26, 2017 pursuant to the John F. Kennedy Assassination Records Collection Act of 1992 (the "JFK Act").[2]

Over the last 25 years, a broad swath of historians and notable authors,[3] former government officials,[4] and other prominent Americans[5] have advocated for the full release of the records. The Honorable John R. Tunheim (former Assassination Records Review Board chair and now Chief Judge of the U.S. District Court for the District of Minnesota) has also specifically called on the CIA to release its withheld records.[6]

Earlier this year, the Public Interest Declassification Board (PIDB) issued a statement asking the National Archives to challenge all additional requests for postponement except for those records that strictly meet the statutory test for postponement.[7] At the recent May 18th PIDB public meeting, the National Archivist revealed that several Executive Branch agencies have already requested

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[1] *Memorandum of President of the United States, "Certification for Certain Records Related to the Assassination of President John F. Kennedy" (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018*). President Trump had temporarily postponed the October 26, 2017 deadline for six months." *Memorandum of President of the United States, Oct. 26, 2017, 82 F.R. 50307 (10/31/2017).*

[2] 44 U.S.C. § 2107.

[3] "*JFK's Assassination*", New York Review of Books (12/18/2003)

[4] David Belin (former Warren Commissioner attorney); G. Robert Blakey (former chief counsel of the House Select Commission on Assassinations); Dan Hardway, Esq. (former researcher for HSCA); Douglas Horne (former ARRB senior analyst); Judge Burt Griffin (former Warren Commission attorney); former Senator Gary Hart; Edwin Lopez, Esq. (former HSCA researcher); John T. Orr, Esq. (former DOJ national criminal enforcement director), Adam Walinsky (former Department of Justice), and Howard Willens (former Warren Commission assistant counsel)

[5] See https://www.americantruthnow.org/joint-statement .

[6] "Troves of Files on JFK Assassination Remain Secret", *Boston Globe* (11/25/13).

[7] Available at: https://transforming-classification.blogs.archives.gov/2021/05/05/pidb-receives-letter-regarding-the-president-john-f-kennedy-assassination-records-collection/ (May 5, 2021). This followed a PIDB statement in December 2017 where the PIDB members expressed their disappointment that so many records continued to be withheld from public access. https://transforming-classification.blogs.archives.gov/2017/12/18/completion-of-the-jfk-records-rolling-release/ (12/18/2017)

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further postponement of assassination records.

As a long-term member of the Senate, you no doubt shared the frustration of your former colleagues and the American public at how certain Executive Branch agencies have thwarted the will of Congress by failing to strictly comply with the JFK Act. As President, you now have the authority to ensure that the will of Congress is followed.

Accordingly, the undersigned individuals request that you issue an Executive Memorandum or other directive to ensure that the remaining assassination records are released except for those that strictly comply with the criteria for postponement under the "*clear and convincing*" test set forth in the JFK Act. A memo prepared by some of the signatories discussing the requirements of the JFK Act is attached for your convenience.

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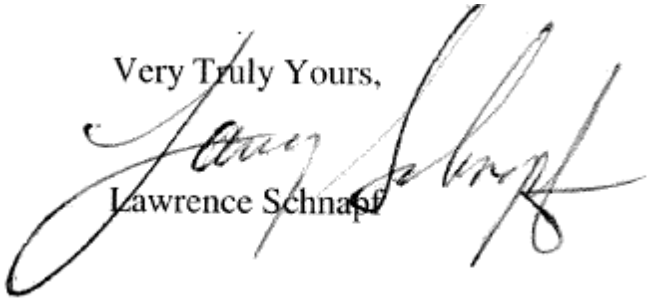
In one of your first press releases, you said: *"My administration has no greater task than restoring faith in American government*." The failure to fully comply with the Act is emblematic of the national crisis of declassification.[8] Last year, the PIDB wrote that that over-classification undermines the American public's confidence in the nation's institutions.[9] Releasing the remaining JFK assassination records would be a big step towards restoring the trust of the American people in the candor of the country's institutions.

Very Truly Yours,



Lawrence Schnapf

cc:
Dana Remus,
Assistant to the President and White House Counsel
Jonathan Cedarbaum,
Deputy Counsel to the President and National Security Council Legal Advisor (via email)
David S. Ferriero,
Archivist, NARA (via e-mail)

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[8] In its 2020 Report to the President, the PIDB reiterated its view that over-classification may undermine public confidence in the Federal Government. Available at: https://www.archives.gov/files/declassification/pidb/recommendations/pidb-vision-for-digital-age-may-2020.pdf .

[9] Available at: https://www.archives.gov/files/declassification/pidb/recommendations/pidb-vision-for-digital-age-may-2020.pdf

MEMORANDUM IN SUPPORT OF REQUEST TO ORDER EXECUTIVE AGENCIES TO COMPLY WITH THE JFK RECORDS COLLECTION ACT

August 20, 2021

This memorandum is submitted in support of the undersigned's request to President Biden to (1) issue an Executive Order to the responsible Executive Branch agencies to properly comply in a timely manner with the public disclosure requirements set forth in the President John F. Kennedy Assassination Records Collection Act of 1992 (the "JFK Act" or "Act"),[1] (2) direct all agencies requesting postponement to provide evidence, for each individual record, of the existence of an ***"identifiable harm"*** so that the President may carry out his statutory duty to determine, on a document-by-document basis, if the stated harm is of such gravity that it outweighs the public's interest in its disclosure under the "*clear and convincing*" standard of proof established by the Act,[2] and (3) revoke the memorandum issued by President Trump on April 26, 2018 (the "April 2018 Memorandum)[3] allowing various executive agencies an additional forty-two (42) months to comply with the JFK Act.

I. BACKGROUND

Congress enacted the JFK Act to establish an "enforceable, independent and accountable process"[4] to ensure the expeditious public disclosure of records related to the assassination of President John F. Kennedy.[5] As evidence of its commitment to full public disclosure of these records, Congress expressly stipulated that the JFK Act would "*take precedence*" over any other law, judicial decision construing such law, or common law doctrine that would otherwise prohibit such disclosure.[6]

In 1992, Congress found that legislation was necessary because the implementation of the Freedom of Information Act (FOIA)[7] and Executive Order 12356 [8] had prevented timely public disclosure of records relating to the assassination of President Kennedy.[9] In response, the Act established a *presumption for immediate disclosure* under section 2(a)(2). At the time of the passage of the JFK Act in 1992, Congress also stated that most of the records related to the assassination of President

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[1] Pub. L. 102-526, 106 Stat. 3443 (1992), codified at 44 U.S.C. 2107 note, as amended by the "President John F. Kennedy Assassination Records Collection Extension Act of 1994", Pub. L. 103–345, § 1, 108 Stat. 3128 (Oct. 6, 1994).
[2] *Id*.
[3] Memorandum of President of the United States, "Certification for Certain Records Related to the Assassination of President John F. Kennedy" (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018).
[4] 44 U.S.C. 2107 note, § 2(a)(3).
[5] *Id*. at § 2(b)(2).
[6] *Id*. at §11(a). The only exceptions to this mandate were records subject to 26 U.S.C. § 6103 and deeds governing access to or the transfer / release of gifts and donations of records to the United States Government.
[7] 5 U.S.C. § 552.
[8] 47 Fed. Reg. 14874 (April 6, 1982) (the threshold standard for classification of information as "confidential" was modified from "identifiable damage" to "damage"). The JFK Act restored the original standard for evaluating if assassination records presented *identifiable damage*, and further an unclassified disclosure of that identifiable harm or damage.
[9] 44 U.S.C. § 2107 note, § 2(a)(5)-(6). *See also* 138 Cong. Rec. S 10361 (July 27, 1992).

John F. Kennedy were already almost 30 years old, and that "*only in the rarest cases is there any legitimate need for continued protection of such records.*"[10]

To accomplish these goals, Congress (1) required the National Archives and Records Administration ("NARA" or the "Archivist") to establish the John F. Kennedy Assassination Records Collection ("JFK Collection"),[11] (2) instructed each government office to identify and organize assassination records in its possession or custody[12], and (3) to transmit such records to the JFK Collection for public disclosure.[13]

The JFK Act established a stringent process and legal standard for postponing the release of a record.[14] Congress established such a high standard for postponement to make certain that records that may otherwise have remained secret under FOIA and Executive Orders governing declassification would eventually be disclosed to the public under a statutorily enforceable process.[15]

Congress established a short-list of specific reasons that federal agencies could cite as a basis for requesting postponement of public disclosure of assassination records. A government office seeking postponement was required to specify, for <u>each</u> record sought to be postponed, the applicable grounds for postponement.[16]

The JFK Act also established an independent body known as the Assassination Records Review Board (ARRB).[17] Among the duties of the ARRB was to determine if a record constituted an "assassination record''[18] and to determine if any record sought to be postponed from public disclosure by a government office qualified for postponement under the Act.[19] The ARRB was directed to sustain postponement requests under Section 6 of the Act only in the "rarest cases" and based on *clear and convincing evidence*.[20]

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[10] *Id*. at § 2(a)(7). *See also* 138 Cong. Rec. S. 10361 (July 27, 1992).
[11] 44 U.S.C. 2107 note, § 4.
[12] *Id*. at § 5(a)-(c).
[13] *Id*. at § 5(e).
[14] Final Report of the Assassination Records Review Board, page xxi (1998) (hereinafter "ARRB Final Report").
[15] *Id*. at page 8.
[16] 44 U.S.C. 2107 note, § 5(c)(2)(D)(i) and (ii). The applicable grounds for postponement were to be specified on the identification aid form established by NARA pursuant to § 5(d).
[17] *Id*. at § 7.
[18] *Id*. at § 7(h)(2)(i)(2)(A).
[19] *Id*. at § 7(h)(2)(i)(2)(B).
[20] The "clear and convincing" evidentiary standard means that the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is **highly probable**. *Colorado v. New Mexico*, 467 U.S. 310 (1984)[emphasis added]. In other words, the "clear and convincing" evidence standard is more rigorous than the "preponderance of evidence" standard usually required for civil actions. To satisfy the "clear and convincing" standard, evidence **not only needs** to be greater than a 50% likelihood of being true (the preponderance of evidence standard), but it **must also be substantially greater** than a 50% likelihood of being true. The "clear and convincing" is a relatively difficult standard to satisfy since it requires that the evidence be "substantially" more probable to be true.

As the ARRB explained in its Final Report:

> This **exacting standard**, borrowed from the criminal law, was not only a **new declassification criterion**, but it placed the **burden on the agency** to explain why information should remain shrouded in secrecy.[21] [Emphasis Added]

Section 6 of the Act enumerated five (5) grounds to overcome the presumption of full and immediate public disclosure of an assassination record or information contained in such a record. For each record (or information therein) that a government office desired to postpone from public disclosure, the government office would have to establish, based on a standard of proof of "*clear and convincing evidence*," that one or more of the five (5) grounds for postponement were applicable.[22]

The JFK Act also requires that all records or information that qualified for a postponement under section 6 are to be periodically reviewed "*by the originating agency and the Archivist*" to determine if the justifications for postponement remain valid after a decision by the ARRB.[23] The purpose of the periodic review obligation is to *downgrade and declassify each record*, such that all or nearly all assassination records were to be disclosed to the American public no later than October 26, 2017.[24]

Congress further mandated in section 5(g)(2)(D) of the Act:

> **Each** assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act [October 26, 2017], unless the President certifies as **required by this Act** that-
>
> A. continued postponement is made **necessary** by an **identifiable harm** to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and
> B. the **identifiable harm** is of **such gravity** that it **outweighs the public interest** in disclosure. [25] [Emphasis added]

In Paragraph 9(d)(2) of the Act titled "*Periodic Review*", Congress provided that any executive branch assassination record postponed by the President:

> shall be subject to the requirements of period review, downgrading and declassification of classified information, and public disclosure in the collection set forth in section 4 (sic).[26]

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[21] ARRB Final Report, *supra* note 17, at 172.
[22] 44 U.S.C. 2107 note, § 6(1)-(5).
[23] *Id*. at § 5(g)(1)–(2).
[24] *Id*. at §9(d)(2).
[25] A Presidential certification requires an unclassified and record-specific written statement for postponement of each record under Sections 5, 6 and 9 of the Act.
[26] *Id*. at §9(d)(2).

In order words, Paragraph 9(d)(2) demonstrates that the President's authority under section 5(g)(2)(D) cannot be read in isolation. Rather, section 5(g)(2)(D) of the Act is inextricably intertwined with the other sections of the Act.

The ARRB issued its Final Report in September 1998, with recommendations to NARA, Congress and federal agencies to continue the effort to downgrade, declassify and disclose assassination records pursuant to the provisions of the JFK Act.[27]

Notwithstanding the clear Congressional mandate for agencies and the Archivist to periodically review postponed records, only a handful of assassination records were reviewed and released between 2003 to 2016. Although NARA sent notices to all agencies between September 2014 and November 2015 in order to remind them of their obligations under the Act, tens of thousands of records or portions of records remained postponed without a proper response to the Archivist under section 6 of the Act.[28] In February 2017, NARA sent follow-up letters to the various agencies to request a summary of agency review efforts and ask if any records could be immediately released.[29]

In addition, the National Security Council's Records Access and Information Security Interagency Policy Committee instructed each affected agency to provide by May 1, 2017, a memorandum either advising that the agency would not ask for further postponement or that it was requesting the President to certify further postponement pursuant to section 5 of the JFK Act.[30] Instead of complying with their statutory duties under the JFK Act, the agencies ran out the clock until the October 26, 2017 deadline, and at the eleventh hour, sought postponements from the President.

The mandatory October 26, 2017 deadline was supposed to represent the end of the decades-long mandate to release all of the records related to the assassination of President Kennedy.[31] Absent any legitimate request by an Executive Branch agency under the JFK Act to legally seek to certify postponement, NARA was to have released the remaining assassination records by that date. Although NARA released six batches of records in advance of the October 26, 2017 deadline, certain Executive Branch agencies asked President Trump to postpone the disclosure of approximately 31,000 records either in whole or in part.[32] President Trump then issued a memorandum authorizing the continuing postponement of public disclosure of these assassination records on grounds that did not comply with the explicit requirements of the Act.

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[27] The JFK Act remains in force until the Archivist certifies to the President and Congress that all assassination records have been disclosed to the public. *Id.* at §12(b).

[28] Review of JFK Assassination Records Collection Act of 1992, Special Report No. 18-SR-07(OIG 3/29/2018).

[29] *Id*. The letter reminded the agencies that the JFK Act does not require waiting until the deadline to release records, and that NARA would prefer to release records on a rolling basis.

[30] 44 U.S.C. 2107 note, § 5(g)(2)(D).

[31] CRS Insight "President John F. Kennedy Assassination Records Collection: Toward Final Disclosure of Withheld Records in October 2017" (May 26, 2017). Available at: https://fas.org/sgp/crs/secrecy/IN10709.pdf.

[32] Memorandum for John A. Eisenberg, Legal Adviser to the National Security Council, from John P. Fitzpatrick, Senior Director for Records, "Access and Information Security Management, National Security Council, Department and Agency Requests for Continued Postponement of Records under the JFK Assassination Records Collection Act" (Oct. 25, 2017) ("NSC Memorandum").

A. President Trump's October 26, 2017 Certification Postponing Release of Withheld Records for Six Months Was Based on "The Gannon Memo."

On October 12, 2017, the Archivist of the United States wrote to the President expressing "significant concerns" about the proposed postponements. The Archivist expressed doubt that agencies had properly applied the statutory standard for postponing disclosure and concluded by saying:

> there is insufficient time for NARA and the pertinent agencies to further consider our concerns and identify those certain, specific instances where information could warrant continued postponement.[33]

On October 26, 2017, President Trump issued a memorandum allowing agencies to temporarily withhold from full public disclosure until no later than **April 26, 2018 (**the "October 2017 Memorandum") any records proposed for continued postponement.[34] The President said that the purpose of the temporary postponement was to allow **sufficient time** to determine if such information warranted further postponement.[35] [Emphasis added]. However, there is no authority under the JFK Act for a "temporary postponement" or a "temporary certification" past October 26, 2017.

In issuing his October 2017 Memorandum, President Trump relied on a legal opinion prepared by Curtis E. Gannon, who was then an Acting Assistant Attorney General in the Office of Legal Counsel (the "Gannon Memo").[36] As discussed in more detail below, the Gannon Memo essentially re-wrote the Act in concluding that the President was authorized to certify further postponement of tens of thousands of withheld records *en masse* and without regard to the specific requirements of section 5(g)(2)(D) and other sections of the Act.

B. President Trump Issued an April 2018 Memorandum to Authorize Further Postponement of Withheld Records Until October 26, 2021.

As discussed in the preceding section, there was no authority under the JFK Act for a "temporary certification." In his October 2017 Memorandum, President Trump said that at the end of this 180 day period, he would order the "*public disclosure of any information that the agencies cannot demonstrate meets the statutory standard for continued postponement of disclosure under Section 5(g)(2)(D) [of the Act]*."

In the same October 2017 Memorandum, President Trump ordered agencies seeking further postponement to notify the Archivist by March 12, 2018, of the "*specific information within*

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[33] Memorandum for the President, from David S. Ferriero, Archivist of the United States, "Re: Concerns Regarding Agency Proposals to Postpone Records Pursuant to Section 5 of the President John F. Kennedy Assassination Records Collection Act of 1992" at 1 (Oct. 12, 2017). This letter is not publicly available and the public is aware of its existence only because of the fleeting reference to the letter in the Gannon memo.

[34] Memorandum of President of the United States, Oct. 26, 2017, 82 F.R. 50307 (10/31/2017).

[35] *Id*.

[36] See Curtis E. Gannon, Memorandum Opinion for the Counsel to the President, "Temporary Certification Under the President John F. Kennedy Assassination Records Collection Act of 1992" (Office of Legal Counsel, 10/26/2017).

particular records that meets the statutory standard for continued postponement of disclosure under Section 5(g)(2)(D) of the Act."

However, on March 26, 2018, the Archivist recommended to President Trump that 13,922 documents of the Central Intelligence Agency, Federal Bureau of Investigation, the Department of Defense, Department of State and the Drug Enforcement Agency be further postponed under Section 5(g)(2)(D) of the JFK Act.[37] In so doing, the Archivist recommended that any further requests for postponements be made in writing to the Archivist and contingent **on a document-by-document basis** by April 26, 2021.[38]

President Trump then issued his April 2018 Memorandum adopting the recommendation of the Archivist to continue withholding a group of unspecified records until October 26, 2021, and directing all agencies to re-review each record to determine if any redactions were necessary (the "2018 Memorandum" or the "April 2018 Memorandum").[39]

In issuing his certification for an additional forty-two (42) month postponement in April 2018, President Trump's April 2018 Memorandum not only undermined the rule of law but attacked the key commitments made by Congress to the American people when it enacted the JFK Act.[40]

II. IN CONCLUDING THE PRESIDENT WAS AUTHORIZED TO FURTHER POSTPONE DISCLOSURE OF AN UNSPECIFIED GROUP OF WITHHELD ASSASSINATION RECORDS, THE GANNON MEMO REWROTE THE JFK ACT BY INSERTING WORDS THAT DO NOT APPEAR IN THE ACT AND BY ADDING AN EXEMPTION THAT IS NOT CONTAINED IN THE STATUTE.

In adopting the recommendations of the Gannon Memo, particularly the recommendation that the President could further postpone a large group of withheld records based on newly created criteria and a new and lesser standard of proof that simply does not appear in the JFK Act, President Trump created new law that was contrary to Congressional intent.

Congress clearly set out in section 5(g)(2)(D) of the JFK Act the criteria that the President must apply to each assassination record before he may certify further postponement of any assassination record. Presidential certification for continued postponement under section 5(g)(2)(D) requires the President to certify that each record contains information that represents (i) an identifiable harm, and (ii) that the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

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[37] 44 U.S.C. 2107 note, § 5(g)(2)(D).

[38] Memorandum for the President, from David S. Ferriero, Archivist of the United States, "Recommendations Concerning Certification of Certain Records Related to the Assassination of President John F. Kennedy" (March 26, 2018) ("2018 Archivist Memorandum").

[39] Memorandum of President of the United States, "Certification for Certain Records Related to the Assassination of President John F. Kennedy" (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018).

[40] David M. Driesen, President Trump's Executive Orders and the Rule of Law, 87 UMKC L. REV. 489, 515 (2019) ("failure to consult fully with the Office of Legal Counsel shows that the first Travel Ban attacked the rule of law.") (hereinafter "Rule of Law").

However, these are not the grounds that the Gannon Memo cited when concluding that President Trump could issue a temporary certification postponing disclosure for an entire unspecified "group" of tens of thousands of records.

A. The Gannon Memo Replaces the Statutory Criterion of "Identifiable Harm" With *Strong Likelihood of Sensitivities.*

The Gannon Memo concluded that the President could certify postponement because "there is a **strong likelihood** that many of the records in question might implicate the **kinds of sensitivities** about national security, law enforcement and foreign affairs contemplated by the statute."

One must take notice that the terms "strong likelihood" and "kinds of sensitivities" do not appear anywhere in the express language of the Act. The test established by Congress was "identifiable harm" (i.e., concrete injury) which had to be weighed against the strong public interest in disclosure of the records. The Gannon Memo imposed a new lower threshold for withholding the records in utter disregard to the requirements of the Act, that "*potential harm to those interests resulting from prematurely disclosing a batch of records that appears to contain sensitive information*." The Memo then dispensed with the notion of "identifiable harm" and replaced it with the concept of a "strong likelihood" of "potential harm" due to a purported appearance of "sensitive" information.

The JFK Act is devoid of any such "standard" for postponement of records, as suggested in the Gannon Memo. Indeed, Congress had explicitly rejected a less exacting standard, such as "substantial evidence" (similar to "strong likelihood") for determining when records could be postponed.[41]

The Gannon Memo also relied on the purported "significant concerns" of the Archivist. However, contrary to the express requirements of the JFK Act mandating record-specific justifications, the Gannon Memo did not discuss the Archivist's concerns in any detail, nor did it provide the complete written report or findings of the Archivist. The JFK Act places the burden of proving that withheld material fits within the statutory exemptions on the government office seeking postponement.

The legislative history makes clear that records cannot be postponed based on "conceivable or speculative harm to national security." [42] Instead, Congress said that "in a democracy the demonstrable harm from disclosure must be weighed against the benefits of release of the information to the public." [43]

The Gannon Memo is also devoid of any detail that would explain how there was a "strong likelihood" that disclosing the postponed records would implicate the purported "sensitivities" that

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[41] Congress selected the **clear and convincing evidence** standard because "*less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation's stated goal*" of prompt and full release. See House Committee on Government Operations, Assassination Materials Disclosure Act of 1992, 102d Cong., 2d sess., H. Rep. 625, pt. 1, at 25.
[42] *Id.* at 26.
[43] *Id.*

might allow for further postponement. Was this conclusion based on the unclassified written explanations required from agencies under the JFK Act? If so, the Act stipulates that the American public is entitled to those written explanations.[44]

A broad and unsubstantiated assumption that a group of tens of thousands of withheld records *could* contain sensitive information not only conflicts with the goals and spirit of the Act, but essentially unlawfully returns the disclosure standard to what existed before the Act became law. In Section 2 of the JFK Act, Congress expressly found that the prior standards for declassification were inadequate and that the JFK Act was intended to replace those mechanisms.[45]

As the ARRB explained in its Final Report:

> "**clear and convincing evidence of harm**" required **specific reasons** for protection. **General concepts** of "national security" and "individual privacy" were **insufficient**. If harm were to be caused by release, the Board insisted on understanding the harm….the specific standard resulted in greater fidelity to the law.[46] [Emphasis added]

Moreover, the Gannon Memo did not explain why postponement of records was "necessary" to address the possibility of a future harm, except to say that the agencies *believed* postponement was necessary. Congress specifically provides in the Act that it is the President, and not the agencies, who are to determine if postponement is necessary for <u>each</u> assassination record. Congress adopted this approach because allowing the agencies to make postponement decisions had resulted in tens of thousands of records being withheld from the American public in "perpetual secrecy."[47]

The ARRB regulations interpreting the JFK Act required that agencies submit specific facts to support each postponement request.[48] As the body authorized by Congress to implement the JFK Act, the ARRB interpretation is entitled to significant deference. The Gannon Memo adopted a postponement standard that conflicts both with the express language of the Act, the goals of Congress and the regulations implementing the Act. As the legislative history states:

> There is no justification for perpetual secrecy for any class of records. Nor can the withholding of any individual record be justified on the basis of general confidentiality concerns applicable to an entire class. **Every record must be**

[44] NARA has received several requests for this information but has declined these requests under the deliberative process privilege of 5 U.S.C. §552(b)(S). The regulations adopted by the ARRB to implement the Act provide that "All documents used by government offices and agencies during their declassification review of assassination records" along with "All training manuals, instructional materials, and guidelines created or used by the agencies in furtherance of their review of assassination records" are subject to the Act. *See* 36 C.F.R. 1290.2(a)-(b).
[45] 44 U.S.C. 2107 note, §2(a)(5)-(6).
[46] ARRB Final Report, supra note 17, at 172.
[47] House Committee on Government Operations, Assassination Materials Disclosure Act of 1992, 102d Cong., 2d sess., H. Rep. 625, at 16.
[48] 36 C.F.R. 1290 et seq.

judged on its own merits, and every record will ultimately be made available for public disclosure."[49] [Emphasis added]

B. The Gannon Memo Concluded the President Did Not Have to Articulate Record-Specific Justifications for Further Postponement in Contravention of the Statute.

The Gannon Memo concluded that President Trump was authorized under Section 5(g)(2)(D) of the JFK Act to issue a temporary postponement of a "group" of records without articulating record-specific justifications for further postponement. The rationale in the Gannon Memo was that Section 5(g)(2)(D) of the Act was "silent" as to whether the President must make a certification regarding each individual record, or whether he may make a certification applicable to a group of withheld records.

This argument, however, ignores the express terms of the very provision on which it relies, Section 5(g)(2)(D), which begins with the phrase, *"**Each assassination record***." Since this phrase appears at the beginning of the section, the rules of statutory interpretation require that it also applies to subsections (i) and (ii) providing the criteria for presidential certification of further postponement.

Moreover, the initial sentence of section 5(g)(2)(D) ends with the further requirement, "***unless the President certifies as required by this Act***". This phrase "***as required by this Act***" means that Section 5(g)(2)(D) must be read in context with the rest of Section 5 as well with the rest of the JFK Act, in accordance with the Harmonious-Reading[50] and Rule Against Surplusage[51] canons of statutory construction. In other words, Section 5(g)(2)(D) of the Act cannot be interpreted in a vacuum.

The Gannon Memo conflicts with the interpretation of the ARRB, the Archivist and even President Trump's April 2018 Memorandum. The ARRB required agencies to provide specific evidence for each record supporting their postponement claims[52] and to submit specific facts in support of each postponement.[53] According to the ARRB Final Report, the record originating agencies argued that the *clear and convincing* evidence standard could be satisfied by a general explanation of those agencies' positions in support of postponements. However, to the contrary, the ARRB determined that the *clear and convincing evidence* standard was document-specific. Thus, the ARRB required agencies to present evidence that was tailored to individual postponements or information within each individual record, as required by the Act.[54]

Concurring with the ARRB's finding above, the Archivist recommended in his March 26, 2018 letter, that the President certify continued postponement of withheld records past October 26, 2021, contingent on the agencies conducting a document-by-document review of the records that

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[49] House Committee on Government Operations, Assassination Materials Disclosure Act of 1992, 102d Cong., 2d sess., H. Rep. 625, at 16.
[50] Antonin Scalia & Bryan R. Garner, "Reading Law: The Interpretation of Legal Texts" (2012) at 180.
[51] *Id*. at 174.
[52] ARRB Final Report, *supra* note 17, at 30.
[53] *Id*. at 46.
[54] *Id*.

allegedly warrant continued postponement under 5(g)(2)(D). President Trump's April 2018 Memorandum adopted the Archivist's recommendation.

For any records postponed as part of a periodic review, Section 5 of the Act requires that an unclassified written description of the reason for continued postponement be published for each record determined to meet the standard for continued postponement.[55] This record-specific justification is supposed to be published in the Federal Register.[56]

As previously discussed, section 6 requires that any postponement be based on "*clear and convincing evidence*". The Gannon Memo and the President's October 2017 Memorandum lack any record-by-record justification for postponement much less any explanation based on *clear and convincing evidence* supporting such a certification for postponement, as required by the Act.

C. The JFK Act Does Not Authorize Postponement for Reasons of "Insufficient Time" To Review Records.

The Gannon Memo stated that the Archivist had advised the President that there was "**insufficient time**" for NARA and the agencies to identify those certain, specific records where continued postponement was appropriate. The Gannon Memo postponement was purportedly necessary to provide **"sufficient time"** to resolve which specific records warranted postponement under section 5(g)(2)(D) despite the fact that the agencies already had 25 years to complete their periodic review obligations.

While the Gannon Memo acknowledged that the public interest in full access to assassination records was significant, it attempted to reason that a temporary delay in disclosure of a **few months** would still allow that interest to be vindicated. Again, there is no authority in Section 5 of the JFK Act, nor any other part of the statute, for a "temporary certification" authorizing postponement, and there is certainly no authority for a postponement due to "insufficient time."

As explained above, the President only has authority to postpone release of records past the October 26, 2017 statutory deadline, with a written certification for each record, "as required by this Act."[57] The notion of "insufficient time" to review and identify records for continued postponement is not a criterion under the JFK Act. In 1992, Congress mandated the immediate review obligation, and that only in the rarest of cases was continued postponement warranted. Agencies then had twenty-five (25) additional years to fulfill their periodic review and final disclosure obligations under the JFK Act. There is no question that the implicated agencies and NARA were all well aware of the statutory deadline of October 26, 2017, and their respective responsibilities under the Act, during the twenty-five (25) intervening years since the passage of the JFK Act in 1992. Despite knowing of the deadlines and the periodic review requirements, only a handful of records were released between 2003 and 2017 and there is no publicly accessible information indicating how the originating agencies complied with their obligations under the Act for this period.

[55] 44 U.S.C. 2107 note, § 5(g)(2)(B).
[56] *Id.*
[57] *Id.* at § 5(g)(2)(D).

Regardless of the good-faith efforts by NARA to work with the originating agencies over several years, various government agencies have been permitted to disregard their statutorily mandated responsibilities under the JFK Act and have been allowed to postpone disclosure of approximately 31,000 identified records and numerous missing records. Instead of enforcing the Congressional mandate for expeditiously disclosing assassination records, the President rewarded recalcitrant government agencies with a forty-two (42) month extension in contravention of the Act.

President Trump could not have relied on the Gannon Memo to support his forty-two (42) month postponement because the Gannon Memo was limited to the circumstances of a temporary postponement of only a **few months**. As discussed above, the Gannon Memo recognized there was a significant public interest in full access to assassination records, but that a temporary delay in disclosure of a **few months** would still allow that interest to be vindicated. An authorization of a 42-month delay was an abuse of the already unlawful "temporary" rationale set forth by the Gannon Memo.

In addition to this apparent disregard of the rule of law, President Trump's April 2018 Memorandum violated the express terms of the JFK Act by failing to identify for each record the harms that would be posed by the disclosure of such record and by failing to explain how the gravity of such harms outweighed both the strong public interest in disclosure, and the presumption of disclosure that the JFK Act attaches to *each* record.

Instead, President Trump's April 2018 Memorandum simply stated that the Archivist had reviewed requests for postponement from originating agencies and wrote, in conclusory fashion, that the Archivist believed that the information proposed to be withheld was "*consistent with the standard of section 5(g)(2)(D)* [of the Act]." Critically, agencies had no authority under the JFK Act to make their own postponement decisions or certify postponement under section 5(g)(2)(D) of the JFK Act. In enacting the JFK Act, Congress expressly ended the authority of agencies to unilaterally decide when assassination records could be disclosed by first establishing the ARRB and then imposing periodic review obligations that were subject to a stringent process and disclosure requirements.

However, as the Archivist's March 26, 2018 letter explained, the recommendation to continue postponement for forty-two (42) months was not based on a review of each record that was requested to be further postponed, but on a sample of those records. Specifically, the Archivist advised the President that his staff reviewed only "**approximately ten percent of the records from CIA and approximately 25 percent of the records from FBI**." [Emphasis added.]

President Trump's April 2018 Memorandum references the statutory criteria but there is no indication that the President actually conducted the mandated statutory review of even a single assassination record, let alone a review of each record proposed for further postponement. Instead, it appears that President Trump simply relied on a recommendation from the Archivist that was based on a very small sample of the records proposed to be withheld. This clearly violated the express terms of section 5(g)(2)(D) of the Act which applies to "**each**" record. Had the President consulted with the OLC, he might have realized that he could not issue a blanket postponement of tens of thousands of records based on review of a handful of those records.

Moreover, in accepting the recommendation of the Archivist, the President simply said:

> I agree with the Archivist's recommendation that the continued withholdings are necessary to protect against identifiable harm to national security, law enforcement, or foreign affairs that is of such gravity that it outweighs the public interest in immediate disclosure.[58]

As discussed above, the April 2018 Memorandum failed to comply with the strict requirements of the JFK Act for postponement of records for public disclosure. The President Trump did not rely on record-specific justifications from the originating agencies as required by the Act but, instead, he relied on a recommendation of the Archivist that was based on a review of a small sample of the records.

Moreover, in both of his October 2017 and April 2018 memoranda, President Trump failed to identify the specific harms posed by each record that he authorized for further postponement and failed to explain how those unparticularized harms were so grave that they outweighed the public interest, as specifically required by section 5(g)(2)(D) of the Act. Instead, he simply recited a handful of words from one section of the Act governing postponement of records that he was required to apply to each record and then referenced generalized and vague harms that might or might not apply to national security, law enforcement and foreign affairs.

III. CONCLUSION

Since the ARRB ceased operations in 1998, there has been a clear breakdown in the periodic review process and downgrading and declassification requirements set out in the Act. There has been no congressional oversight of the post ARRB period, nor the manner in which President Trump postponed the disclosure of tens of thousands of assassination records. In sum all of the institutions of American government have failed the American public by not ensuring the full disclosure of all records related to the assassination of President Kennedy as demanded by the People and as statutorily required by the Act.

It is respectfully requested that President Biden comply with the clear provisions of the John F. Kennedy Assassination Records Collection Act 1992, and issue his own Executive Order that would supersede the April 2018 Memorandum of President Trump, and instruct originating agencies to strictly comply with the terms of the JFK Act in a timely and expeditious manner.

In the rare and extraordinary event that a particular record qualifies for further postponement, the Act requires that any certification for continued postponement by the President specify the identifiable harm that would occur if that record were to be publicly disclosed and explain how the gravity of that identifiable harm overcomes the presumption of disclosure as well as the strong public interest in full disclosure. Any such certifications from the President should be in written unclassified form and published in the Federal Register.[59] Fifty-eight (58) years after the

[58] Memorandum of President of the United States, "Certification for Certain Records Related to the Assassination of President John F. Kennedy" (Apr. 26, 2018), 83 F.R. 19157 (05/02/2018).
[59] 44 U.S.C. 2107 note, § 5(g)(2)(B) and § 9(d).

assassination of President Kennedy, and thirty (30) years after Congress made its intention very clear on the issue of full public disclosure of assassination records, President Biden should ensure maximum and timely disclosure of all assassination records finally becomes a reality.

~~~~~ RESPECTFULLY SUBMITTED ~~~~~

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