Docket No. 05-16820

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

LARRY BERMAN,
Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF AMICI AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, NATIONAL COALITION FOR HISTORY, ORGANIZATION OF AMERICAN HISTORIANS, PRESIDENCY RESEARCH GROUP, SOCIETY OF AMERICAN ARCHIVISTS, SOCIETY FOR HISTORIANS OF AMERICAN FOREIGN RELATIONS, BARTON J. BERNSTEIN, ROBERT DALLEK, LLOYD C. GARDNER, FRED I. GREENSTEIN, GEORGE C. HERRING, JEFFREY P. KIMBALL, STANLEY I. KUTLER, WALTER LaFEBER, ANNA NELSON, AND ROBERT D. SCHULZINGER IN SUPPORT OF APPELLANT

Matthew W.S. Estes
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7227 (Phone)
(202) 661-9064 (Fax)

Attorney for
American Historical Association, American Political Science Association, National Coalition For History, Organization Of American Historians, Presidency Research Group, Society Of American Archivists, Society For Historians Of American Foreign Relations, Barton J. Bernstein, Robert Dallek, Lloyd C. Gardner, Fred I. Greenstein, George C. Herring, Jeffrey P. Kimball, Stanley I. Kutler, Walter Lafeber, Anna Nelson, And Robert D. Schulzinger

January 25, 2006

CORPORATE DISCLOSURE STATEMENT

None of the Amici who are non-governmental corporate entities has any parent corporation or has 10% or more of its stock owned by a publicly held corporation.

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INTRODUCTION

This case involves the question of whether two President's Daily Briefs ("PDBs") prepared by the Central Intelligence Agency ("CIA") 40 and 37 years

ago for President Johnson should be subject to a blanket exemption from disclosure under the Freedom of Information Act ("FOIA") regardless of their contents. Although the FOIA request at issue involves only two specific PDBs, the district court's ruling was not based on the contents of those specific documents, but rather on broad principles that would exempt all PDBs from disclosure under FOIA in perpetuity, regardless of their content.[1]

The district court's broad holdings are not mandated either by FOIA or by any precedents interpreting FOIA. Instead, the court has gone well beyond any previous ruling regarding the applicability of exemptions from FOIA. Indeed, in some respects the court's decision represents a de facto overruling both of applicable Supreme Court precedent and Congressional findings.

It is the broad nature of the district court's holdings that concerns the Amici and causes them to participate here. The Amici have no interest in the disclosure of materials that could threaten the national security or endanger sensitive intelligence sources or methods. The PDBs, however, provide a vital historical record of what issues were important to President Johnson and what information President Johnson consulted as part of his decision-making process. There has

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[1] The district court opinion is reported at Berman v. CIA, 378 F. Supp. 2d 1209 (E.D. Cal. 2005).

been no showing by the CIA that the release of PDBs from the Johnson administration, redacted to prevent disclosure of intelligence sources and methods, would have any material impact on national security.

The Amici concede that it very well could be the case that more recent PDBs could be exempted from disclosure under FOIA for some period of time. However, it is not necessary for this Court to decide that issue, nor to define precisely how long such a blanket exemption should last. This Court need only find that PDBs are not subject to a blanket exemption from FOIA in perpetuity, and that PDBs from the Johnson administration should be released under FOIA, subject to redaction of specific references to intelligence sources and methods.

IDENTITY AND STATEMENT OF INTEREST OF THE AMICI CURIAE

Counsel for the Amici has contacted counsel for both the Appellant and the Appellee and has been authorized to state that all parties consent to the filing of this Brief.

A. Identity of the Amici

The following parties, who are referred to collectively herein as the "Amici," join in this Brief:

1. American Historical Association

The American Historical Association ("AHA") is a non-profit membership organization founded in 1884 for the promotion of historical studies, the collection and preservation of historical documents, and the dissemination of historical research. The AHA is the largest association of professional historians in the United States, with approximately 18,000 individual and institutional members.

2. American Political Science Association

The American Political Science Association, founded in 1903, is the leading professional organization for the study of political science and serves more than 15,000 members in over 80 countries.

3. National Coalition for History

The National Coalition For History ("History-Coalition") is a non-profit educational organization comprised of over nearly 70 historical and archival organizations. The History Coalition advances historical and archival programs in government and throughout the nation.

4. Organization of American Historians

The Organization of American Historians ("OAH") is a non-profit membership organization devoted to the study and teaching of American history. The OAH's 11,000 members in the U.S. and abroad include individual historians

working in a variety of scholarly settings, as well as institutions such as libraries, museums and historical societies.

5. Presidency Research Group

The Presidency Research Group is the premier association of scholars devoted to the study of the presidency and executives. The Presidency Research Group was established in 1979, and currently includes approximately 420 members. Its primary functions are to support the development of professional research on the presidency and to sponsor public understanding of the presidency.

6. Society of American Archivists

The Society of American Archivists provides services to and represents the professional interests of more than 4,300 individual archivists and institutions as they work to identify, preserve and ensure access to the nation's historic record.

7. Society for Historians of American Foreign Relations

Founded in 1972, the Society for Historians of American Foreign Relations is the leading professional organization in the United States, with over 1,500 members, dedicated to the "study, advancement, and dissemination of knowledge" of the history of U.S. foreign relations.

8. Barton J. Bernstein

Barton J. Bernstein is a Professor of History at Stanford University, where he has taught since 1965. He has written extensively on U.S. foreign policy,

nuclear history, presidential decisions, and international crises, focusing on the end of World War II and the Cold War.

9. Robert Dallek

Robert Dallek has taught history at Columbia, UCLA and Oxford. He retired from Boston University in 2004, where he had been on faculty since 1996. Professor Dallek is a highly-regarded scholar of American history and of the U.S. presidency and is the author of several books, including a two-volume biography of Lyndon Johnson.

10. Lloyd C. Gardner

Lloyd C. Gardner is the Charles and Mary Beard Professor of History and Professor Emeritus at Rutgers University, where he has taught since 1963. A specialist in 20th century foreign policy and diplomatic history, Gardner is the author or editor of 15 books, including a study of President Johnson and the Vietnam war.

11. Fred I. Greenstein

Fred I. Greenstein is Professor Emeritus and director of the Research Program in Leadership Studies at Princeton University. He is the author or editor of eight books on the presidency, and the history of presidential decision-making and has also published numerous articles on the subject. He has served as secretary of the American Political Science Association and President of the

International Society for Political Psychology and is a fellow in the American Academy of Arts and Sciences.

12. George C. Herring

George C. Herring is a Professor of History at the University of Kentucky and Acting Director of the Patterson School of Diplomacy. His field of specialization is U.S. foreign relations, and he has written about the Vietnam War in numerous books, articles, and essays. From 1990 to 1996, Dr. Herring served on the Central Intelligence Agency's Historical Review Panel, during which time he reviewed many historic, high-level intelligence documents.

13. Jeffrey P. Kimball

Jeffrey P. Kimball has been Professor of History at Miami University since 1968, researching and teaching about U.S. Foreign Relations, the U.S.-Vietnam War, War, Peace, and Society, and American Presidents. He has written several major histories of the U.S. and Vietnam. Dr. Kimball is a former president of the Peace History Society, a former Nobel Institute Senior Fellow, and a former Woodrow Wilson International Center Public Policy Scholar.

14. Stanley I. Kutler

Stanley I. Kutler is Professor Emeritus of History and Law at the University of Wisconsin, where he has taught since 1964. He is the founder and editor of the

journal *Reviews in American History* and the author of many books and articles on U.S. history and American presidents, including President Nixon.

15. Walter LaFeber

Walter LaFeber is Andrew H. and James S. Tisch Distinguished University Professor and Marie Underhill Noll Professor Emeritus of American History at Cornell University, where he has been a member of the History Department since 1959. He is past president of the Society for Historians of American Foreign Relations and has served on the Advisory Committee to the Historical Division of the Department of State. He has written major studies on the history American foreign policy.

16. Anna Nelson

Anna Nelson is the Distinguished Historian in Residence at American University. She has done extensive research on foreign relations, U.S. presidents, and the national security process. She has been a member of the State Department Historical Advisory Committee and received a presidential appointment to the John F. Kennedy Records Review Board.

17. Robert D. Schulzinger

Robert D. Schulzinger is Director of the International Affairs Program and Professor of American Diplomatic and Recent U.S. History at the University of Colorado, Boulder. He is the Editor-in-Chief of *Diplomatic History*, and author of

numerous articles and major studies on American diplomacy. He was a member of the State Department's Advisory Committee on Historical Diplomatic Documentation from 1996 through 2005.

B. Interest of the Amici in this Proceeding

1. The Amici's General Interest in the Accurate and Complete Presentation of Historical Events

As professional historians and organizations that represent the interests of professional historians, the Amici have a strong interest in the accurate and complete presentation of historical events. The Amici believe that accurate and complete history is essential to the public interest.

The Amici are not alone in their belief that the establishment of a complete and accurate historic record is vitally important in our free democratic society. The law has well-recognized the important public interest in making Presidential documents available for the historical record. This was best expressed in the landmark proceeding regarding the constitutionality of the Presidential Recordings and Materials Preservation Act.[2] This Act provided for the preservation of and public access to President Nixon's papers, and was enacted in response to his post-

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[2] 44 U.S.C. § 2111 note.

resignation efforts to assert control over access to all of his papers and tape recordings and his expressed intention to destroy certain of his tapes. As the district court stated:

> First and most broadly, the Act serves the national interest by preserving materials upon which historians must draw in order accurately to recount and to judge the political history of our time.
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> * * *
>
> It would serve little purpose to recount all of the ways in which the ability of a nation's citizens to understand their past enriches their lives and helps them to evaluate and perhaps to shape the present and future. It should suffice to say that promotion of such understanding could hardly be more integral to a society based on democratic principles and devoted to freedom of expression in the political sphere as well as others.

Nixon v. Administrator of General Services, 408 F.Supp. 321, 349-50 (D.D.C. 1976)(footnotes omitted)(emphasis added). In upholding the district court's ruling that the Act was constitutional, the Supreme Court cited to this discussion approvingly and noted that "the public interests served by the Act could be merged under the rubric of preservation of an accurate and complete historical record." Nixon v. Administrator of General Services, 433 U.S. 425, 453 n.14 (1977).

American Presidents also have recognized the important public interest in making their papers available to the public. The district court in the Nixon v. Administrator case quoted the following statement by President Truman that is inscribed at the entrance to his Presidential Library:

> The papers of the Presidents are among the most valuable sources of material for history. They ought to be preserved and they ought to be used.

Whistle Stop: The Harry S. Truman Library Institute Newsletter, Vol. 3, No. 2, Spring, 1975, at 1 (emphasis added)(quoted in Nixon v. Administrator, 408 F.Supp. at 349).

Congress also has recognized the value of retaining historical presidential papers and records. In 1978, Congress enacted the Presidential Records Act, 44 U.S.C. §§ 2201-07, to govern the treatment of all presidential records from the time of President Reagan and forward. Under Section 2202, Congress provided that all such presidential records are owned by, and under the complete control of, the United States. Under Section 2203(c), Congress provided that the President may not dispose of any presidential records that have historical value, as determined by the Archivist of the United States.

2. The Amici's Interest in the Historical Documents from the Johnson Administration

The Amici's interest in this case is not limited to preserving general rights of access to important historical Presidential documents. The Amici also are more specifically interested in access to historical documents regarding the Johnson administration. Historians who specialize in the 1960s recognize the importance of the intelligence reporting that the CIA and other agencies prepared for President

Johnson and other top officials. The Johnson administration, like other presidencies during the Cold War, was one plagued by crises – most notably Vietnam, but also the Six-Day Arab-Israeli war, U.S. intervention in the Dominican Republic and the 1964 riots at the Panama Canal. To understand President Johnson's decisions during those crises, it is important to understand the information that he had at hand when he made his decisions and how he viewed the impact of those decisions. Sound historical analysis of foreign policy decisions depends on the availability of as much as possible of the intelligence information that was available to President Johnson and his chief advisors.

The CIA's intelligence reporting during the 1960s included a variety of products, from specially prepared memoranda on specific issues to periodicals such as the Central Intelligence Bulletin ("CIB"). The CIA has partly declassified many intelligence memoranda and issues of the CIB. More elusive, however, has been an especially significant component of the regular reporting – the PDB – which the CIA's Office of Current Intelligence prepared every morning, Monday through Saturday, for the President and a few close advisors. Through the PDB, a compilation of the latest intelligence and diplomatic reporting, the CIA kept the President informed of the latest international developments.

A number of PDBs from the Johnson administration already have been declassified, which gives the Amici an understanding of the types of information

contained in these documents and why the PDBs are important historical documents. The PDBs show what information was available to President Johnson regarding events around the world at particular points in time as decisions were made and reflect what information regarding world events President Johnson and the CIA believed was important for the President to have. This is significant historical information that cannot be obtained from any other source.

For example, included in the 10 PDBs that were attached as Exhibits A and B to Berman's complaint in the district court were the PDBs delivered to President Johnson during the Arab-Israeli Six Days' War, as well as from selected days when information was provided to President Johnson about developments in the Middle East that led up to the war. These documents provide an important record of what President Johnson knew about the war and the events leading up to the war as they occurred.

A great deal of the intelligence information that was specifically prepared for Presidents Truman, Eisenhower and Kennedy has been made available to the public as part of the historic record. Substantial numbers of the Daily Summary and Central Intelligence Bulletin, the daily briefings provided to Presidents Truman and Eisenhower, have been made available to the public, as have copies of the notes of the oral intelligence briefings given to President Eisenhower. Similarly, a large number of the daily President's Intelligence Checklists ("PICL"),

the equivalent briefing document given to President Kennedy, have been made public.

The Amici's interest in this proceeding is to ensure that similar information can be made available about the Johnson and, ultimately, other administrations. To this end, the Amici have a strong interest in ensuring that the PDBs are not subject to a perpetual blanket exemption from disclosure.

3. The Amici Are Not Interested in the Disclosure of Sensitive Intelligence Sources or Methods

The Amici want to stress that they are not interested in the disclosure of genuinely sensitive intelligence sources or methods, but only in the historical information that is not related to such intelligence sources or methods. The Amici believe that these interests are not mutually exclusive. Based on their review of the existing PDBs that have been included in the record, it is apparent that most of the information provided in the PDBs would not reveal current intelligence sources or methods. Furthermore, to the extent that such information was included in the PDBs that have been released, that information has been properly redacted to prevent public disclosure.

4. The Implications of this Proceeding on the Amici's Interests

The Amici's interest is not limited to the two PDBs that are at issue in this proceeding. Rather, the Amici's primary interest is in the broad nature of the

district court's holdings that would provide for a blanket exemption from FOIA of all PDBs, regardless of content or date. In particular, the Amici are interested in the following three holdings of the district court:

- That the PDBs themselves represent an intelligence method and therefore are exempt from release under FOIA. 378 F.Supp. 2d at 1222.
- That the PDBs should be exempt from release under FOIA in their entirety under the "mosaic" theory, regardless of their age. Id. at 1217-18.
- That the PDBs should be exempt from release under FOIA in their entirety due to the presidential privilege, regardless of their age. Id. at 1221-22.

The Amici believe that each of these holdings is erroneous as a matter of law and imprudent as a matter of policy. The legal arguments with respect to each of these holdings are set forth in detail below.

ARGUMENT

I. THE PDBs SHOULD NOT BE DEEMED TO BE AN "INTELLIGENCE METHOD"

One of the arguments made below by the CIA was that the PDBs should be considered an "intelligence method" subject to protection under the National Security Act, which charged the Director of the CIA with "protecting intelligence sources and methods from unauthorized disclosure." See 50 U.S.C. §§ 403-3(c)(7),

403g (2004).[3] If accepted, this argument would entitle the CIA to withhold PDBs in response to FOIA requests under Exemption 3 of FOIA – which applies to information "exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Consequently, the CIA would be able to withhold PDBs in perpetuity, regardless of the age of the PDBs and regardless of their content.

Although the district court noted this argument in its discussion of whether FOIA Exemption 3 applies, 378 F.Supp. 2d at 1215, the court never specifically ruled whether the PDBs are an intelligence method in that section of its opinion. Instead, the district court addressed both this claim and the CIA's "mosaic theory" (discussed below), and concluded that Exemption 3 applies, without ever specifically stating which of the two CIA theories it adopted. 378 F. Supp. 2d at 1215-18. However, in a subsequent section of its opinion, the court stated that "the PDB is itself an intelligence method," to support its finding that the PDBs are exempt from disclosure in their entirety, regardless of their content Id. at 1222.

Because the district court never specifically articulated why it agreed that the PDBs should be considered to be an intelligence method, it is difficult to discern

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[3] Subsequent to the date of Berman's FOIA request, the responsibility for protecting intelligence sources and methods has been transferred to the Director of National Intelligence. See Berman, 378 F.Supp 2d at 1214 n.5.

the exact basis for the court's conclusion. However, based on the record – principally the affidavit submitted by the CIA – it is clear that this finding is erroneous, whatever the court's reasoning.

The CIA's theory that the PDBs represent an intelligence method is presented at Paragraphs 35-37 of the Terry Buroker affidavit attached to the CIA's Motion for Summary Judgment. Mr. Buroker presents therein three reasons to support his conclusion: (1) the PDBs represent the process by which the CIA advises the President and by which the President provides feedback to the CIA regarding its intelligence priorities (Buroker Aff. ¶ 35); (2) the PDB process affects the conduct of intelligence both on a daily and more long-term basis (Id. ¶ 36); and (3) the PDB is no less an intelligence method than the CIA budget, which one district court has found to constitute an intelligence method (Id. ¶ 37 (citing Aftergood v. CIA, 355 F.Supp. 2d 557, 562 (D.D.C. 2005)).

The Amici recognize that the CIA's decision regarding the disclosure of information is entitled to deference. See, e.g., CIA v. Sims, 471 U.S. 159, 180-81 (1985); Hunt v. CIA, 981 F.2d 1116, 1119-20 (9th Cir. 1992). Nevertheless, it remains the CIA's burden to demonstrate that the material it wishes to exempt from disclosure is subject to an exemption. See Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996); Hunt, 981 F.2d at 1119. Here, even if the CIA's assertions are to be given deference, none of the three reasons advanced in the Buroker Affidavit support a

generic finding that the PDBs themselves are an intelligence method and that they are entitled to a perpetual exemption regardless of their content.

The first two arguments advanced in the Buroker Affidavit on their face do not support a finding that the PDBs represent an intelligence method. There is a clear and apparent distinction between the process of advising the President on intelligence matters and the method of collecting the information that is provided to the President as part of the briefing process. Similarly, that the PDBs may "affect the conduct of intelligence" does not mean that they represent a method of collecting intelligence.

The CIA's third reason, that a district court has found the CIA budget to represent an intelligence method, also fails to support a finding that PDBs constitute an intelligence method. The CIA cannot meet its burden of demonstrating that an exemption applies to a certain class of documents simply by noting that another court found another type of information to be subject to an exemption. Rather, the CIA must demonstrate why the documents that are the subject of this proceeding – the PDBs – should be considered an intelligence method. This the CIA has failed to do.

Moreover, even if the Aftergood decision relied upon by the CIA were correctly decided, there is an important distinction between the CIA budgets and the PDBs. As the Aftergood court explained, "the methods of clandestinely

providing money to the CIA and the Intelligence Community for the purpose of carrying out the classified intelligence activities of the United States are themselves congressionally enabled intelligence methods." Aftergood, 355 F.Supp. 2d at 562. The funding of clandestine intelligence activities is at least part of the process of collecting intelligence. There is a material difference, however, between the funding of intelligence and the advising of the President as to the results of intelligence. Depending on its contents, a PDB may or may not reveal sources or methods of intelligence, but in no event does a PDB represent a method of intelligence in and of itself.

Furthermore, the process and use of the PDB is officially acknowledged by the CIA. In addition to prominent disclosure of PDBs and references to PDBs in the recent reports of the National Commission on Terrorist Attacks Against the United States ("9/11 Commission") and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission"), the CIA has published and released histories describing the way PDBs are created and the use of PDBs by the Agency. See, e.g., John L. Helgerson, "Getting to know the President," Chapter 3 (1996) (describing evolution from the PICL for President Kennedy to the PDB for President

Johnson).[4] Unlike the hidden CIA budgets, the process and use of the PDB has been officially acknowledged and disclosed by the CIA.

This issue need not be considered in a vacuum. Although the two PDBs that are the subject of this proceeding are not included in the record, there are numerous other Johnson-era PDBs that were submitted as part of the record. Eight PDBs were attached as Exhibit A and two PDBs were attached as Exhibit B to Berman's Complaint. Several other PDBs, as well as PICLs and excerpts from PDBs and PICLs that have been made publicly available, are attached to the Declaration of Thomas Blanton submitted in Opposition to the CIA's Motion for Summary Judgment. The Amici urge this Court to review these materials in evaluating the CIA's claim – something the district court gave no indication of ever having done. Such a review of these PDBs and PICLs would show that they merely contain reports of events occurring around the world and, in a few instances, the CIA's estimation of what might occur in the future. It is clear that these documents do not constitute an intelligence method.

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[4] Available at http://www.odci.gov/csi/books/briefing/cia-6.htm.

II. THE AGE OF THE PDBs SHOULD BE CONSIDERED IN DETERMINING WHETHER THEY SHOULD BE EXEMPT FROM DISCLOSURE UNDER THE "MOSAIC THEORY"

The second theory advanced by the CIA for applying a blanket exemption to the PDBs under FOIA Exemption 3 is the "mosaic theory." Under this theory, "intelligence agencies collect 'seemingly disparate pieces of information and assembl[e] them into a coherent picture.'" 378 F.Supp. 2d at 1215 (quoting Buroker Aff. ¶ 27). Accordingly, making the PDBs available could "allow enemies of the United States to construct an accurate picture of U.S. intelligence sources, methods, targeting priorities and capabilities." Id. This theory was accepted by the district court as an additional ground for the application of FOIA Exemption 3 to the PDBs. Id. at 1217.

The Amici do not contest the district court's finding that the mosaic theory could apply to PDBs. Rather, the Amici challenge the court's finding that the mosaic theory applies regardless of the age of the PDBs. If upheld, this finding also could lead to the blanket exemption of the PDBs from disclosure in perpetuity.

In rejecting arguments that it should take the age of the PDBs into account, the district court quoted from cases holding that "the mere age of intelligence information" does not rule out the application of Exemption 3. 378 F.Supp. 2d. at 1218 (quoting Maynard v. CIA, 986 F.2d 547, 555 n.6)(emphasis added). The court also relied on the assertion in the Buroker affidavit "that intelligence

information does not automatically lose its need for protection after a period of thirty years because sources may be alive and in position." Id. at 1217-18.[5]

The Amici agree that age alone should not eliminate the need for protection. However, that principle should begin the analysis, not end it. The district court next should have analyzed whether the passage of time in fact has ended the need for protection, taking into account the specific facts in question. For example, a document from 1961 that identifies a high-ranking Cuban official as an intelligence source might still need to be protected, whereas an identically-dated document that references the then eminent invasion of Cuba at the Bay of Pigs no longer would be secret.

The district court therefore should have analyzed the Buroker affidavit and other materials presented by the CIA to determine whether it had met its burden of demonstrating why the mosaic theory requires keeping the 40 year old PDBs secret in order to prevent the disclosure of intelligence sources and methods. However, the court failed to conduct any significant inquiry in this regard that would justify

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[5] The district court also cited Fitzgibbon v. CIA, 911 F.2d 755, 764 (D.C. Cir. 1990) to support its ruling regarding the impact of the age of the PDBs on the application of Exemption 3. Id. As discussed below, that case involved the release of the specific names of sources, and thus is not applicable here.

the application of a blanket FOIA exemption to the PDBs, regardless of their content.

It is true, as the court found, that the Buroker affidavit explains why specific information identifying sources should be kept confidential even after 40 years. That concern can be addressed, however, by redacting from the PDBs any specific information that would lead to the identification of such sources – as was done with the PDBs that already have been made publicly available and which are included in the record. The concern about revealing sources, however, does not justify granting a blanket exemption to 40 year old PDBs, regardless of content, based on the mosaic theory.

The Buroker affidavit does not address in any detail the need to protect aged materials under the mosaic theory. Instead, Mr. Buroker's discussion of the issue is as follows:

> Although the intelligence included in the requested PDBs is over 30 years old, its disclosure would reveal to educated observers information about the application of intelligence methods in use at the time of the Requested PDBs and subsequently. The effective collection, analysis and exploitation of intelligence requires the CIA to prevent disclosure of such information to foreign governments, intelligence services or other entities hostile to the United States who could use it to undermine the current collection and analysis of foreign intelligence.

Buroker Aff. ¶ 63 (emphasis added).

Whatever this paragraph says about how the PDBs could be used to undermine the collection and analysis of foreign intelligence "at the time of the Requested PDBs," there is no real explanation in the affidavit as to how the release of 40 year old PDBs could, under the mosaic theory, undermine the collection and analysis of foreign intelligence today. The only attempt to relate the release of 40 year old PDBs to the present is the bald, unsupported statement that "disclosure would reveal to educated observers information about the application of intelligence methods in use at the time of the Requested PDBs and subsequently."

Mr. Buroker makes no effort to explain how the disclosure of 40 year old information would lead to the disclosure of current intelligence methods. Nor is self-evident that this would be the case. World events, technologies, and intelligence methodologies have changed dramatically since the 1960s. Moreover, much information about intelligence sources and methods of the 1960s has been declassified, such as the U-2 and Corona Satellite reconnaissance programs. It simply is not a credible argument that someone could use PDBs from the Johnson administration to gain an understanding of the current strengths and gaps in the United States' intelligence capabilities.

In any event, neither this Court nor the district court should have to speculate about this issue. Rather, as the district court acknowledged, it was the CIA's burden to describe, "with reasonably specific detail," why disclosure of a

document should be exempt under FOIA Exemption 3. See 378 F.Supp. 2d. at 1214 (citing Hunt, 981 F.2d at 1119). Here, there is no reasonably specific detail explaining how the mosaic theory would apply to 40 year old documents, only the conclusory statement that disclosure would reveal information regarding intelligence gathering activities "subsequent" to the date of the PDBs. Such bald, unsupported statements do not satisfy the CIA's burden. See Weiner v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991); Allen v. CIA, 636 F.2d 1287, 1294 (DC Cir. 1980).

Review of the Maynard and Fitzgibbon cases relied upon by the district court shows that these cases do not require a different result. Maynard involved a situation where materials were produced, but specific information – one name and one paragraph – were redacted from those materials. 986 F.2d at 552. The Amici believe that a similar path should be followed here, where the PDBs are produced but specific information regarding intelligence sources and methods is redacted.

Fitzgibbon involved a request for specific information regarding sources. The entire discussion regarding the age of the material related to the need to assure existing and future sources that their identities would not be revealed at any time in the future. 911 F.2d at 763-64. Here, by contrast, the Amici are not requesting that names of sources be revealed, no matter how old. The issue here is whether

the mosaic theory allows a blanket exemption from disclosure of 40 year old documents, regardless of content.

Again, a review of the publicly available PDBs that were placed in the record is helpful in addressing this issue. Such a review reveals the obvious historic value of the documents. At the same time, it also shows that, as redacted, the documents do not reveal any sources and would not be of value in identifying the United States' intelligence sources and methods today.

The Amici recognize that it may be necessary at some point to draw lines as to exactly when the mosaic theory would justify granting a blanket exemption under FOIA to the release of PDBs. However, it is not necessary to do so here. It is clear, based on the PDBs in the record, that release of PDBs from the Johnson administration, redacted to exclude specific references to sources or methods of intelligence, would not disclose any intelligence sources or methods. More importantly, the bald statement in the Buroker Affidavit regarding the applicability of the mosaic theory to 40 year old documents is conclusory and does not satisfy the CIA's burden of demonstrating that a blanket exemption under FOIA Exemption 3 should apply to Johnson-era PDBs.

III. THE PDBs SHOULD NOT BE SUBJECT TO BLANKET EXEMPTION AS A RESULT OF THE PRESIDENTIAL PRIVILEGE

In addition to finding that FOIA Exemption 3 applies to the PDBs, the district court found that Exemption 5 also would apply. The Supreme Court has held that this exemption, which applies to materials "which would not be available to a party by law other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), protects "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The district court found that Exemption 5 applies here because the PDBs would be exempt from discovery in commercial litigation under the presidential communications privilege, also known as the presidential privilege. 378 F.Supp. 2d at 1219-1222.

A. Applicable Precedent Makes Clear That The Presidential Privilege Erodes Over Time

In holding that the presidential privilege applies to the PDBs regardless of their age, the district court in effect overruled the Supreme Court's holding in Nixon v. Administrator of General Services, 433 U.S. 425, 450-51 (1977). In that case, the Supreme Court considered a claim of presidential privilege by former President Nixon. In addressing that claim, the Court noted:

> [T]here never has been an expectation that the confidences of the Executive Office are absolute and unyielding. . . . The expectation of the confidentiality of executive communications has always been

> limited and subject to erosion over time after an administration leaves office.

Id. (emphasis added).

The district court gave short shrift to this holding, finding that the confidentiality of the PDBs should be absolute and unyielding, regardless of the age or contents of the documents at issue. Rather than make any effort to analyze the impact of the passage of 37 and 40 years respectively for the two PDBs at issue, the court limited itself to noting that "no court has put a specific time limit on this privilege," and asserting that it was not aware of any case "where documents within the scope of the presidential communications privilege have been released in civil discovery due to their age." 378 F.Supp. 2d at 1221.

As an initial matter, the district court overlooked the facts in the very cases it cited in its presidential communications privilege discussion. For example, the court quotes Nixon v. Freeman, 670 F.2d 346, 356 (D.C. Cir. 1982), as holding that "there is no fixed number of years that can measure the duration of the privilege." (quoted at 378 F.Supp. 2d 1221). What the district court ignores is that, in the exact same sentence quoted in its opinion, the D.C. Circuit goes on to note – in finding that the presidential privilege does not prevent the release of certain tapes – that "it is significant that no public access will occur until at least eight years after the event disclosed." 670 F.2d at 356 (emphasis added). Thus, while

not establishing a fixed period of years in which the presidential privilege will stay effective, the Freeman Court did hold that the privilege applicable to President Nixon's taped conversations no longer applied after only 8 years – which is approximately one-fifth of the amount of time that has lapsed here.

Moreover, President Nixon did not claim in the Freeman case that the materials should be protected by the presidential privilege in perpetuity. Instead, he proposed that materials could be made public after 25 years or earlier upon the death of the participants in the communication. 670 F.2d at 357-58. Thus, even if the most extreme proposal advanced in the Freeman case were applied to the PDBs that are the subject of this proceeding, the presidential privilege would have expired with respect to the PDBs at issue here in 1990 and 1993, respectively.

The district court also cited Lardner v. Department of Justice, 2005 WL 758267 (D.D.C. March 31, 2005). See 378 F.Supp. 2d at 1221. In that case, however, the Department of Justice initially withheld, on presidential privilege grounds, documents dating from 1974 to 1989. Later, however, the government withdrew its objection to the release of documents dating prior to the Reagan administration, and released on a blanket basis all documents from the Carter and Ford administrations. Id.

The PDBs at issue here are from before the Carter and Ford administrations, and date 13 and 16 years respectively before the 1981 cutoff date used by the

Department of Justice for asserting the presidential privilege in Lardner. That case therefore represents a perfect example of a proceeding where documents that arguably were subject to the presidential privilege were routinely produced as a consequence of their age.

B. There Can Be No Reasonable Expectation That Communications From The Johnson Administration Would Remain Confidential

Moreover, the district court's stated purpose for finding the privilege to be applicable to the PDBs was in "protecting frank exchange between the leadership of the CIA and the President." 378 F.Supp. 2d at 1221. This rationale completely ignores the point made by the Supreme Court quoted above in Nixon v. Administrator. As the Nixon Court noted, there is no expectation that communications between the President and his advisors will remain confidential in perpetuity. 433 U.S. at 451. If there is no such expectation of confidentiality, application of the presidential privilege in perpetuity will not have any impact in protecting the frank exchange between the President and his advisors, including the CIA.

If the district court had bothered to conduct any analysis of the impact of time on the expectation of confidentiality, it necessarily would have come to the conclusion that no one could expect confidentiality to apply today to communications between President Johnson and his advisors. In the Nixon v.

Administrator case cited above, which was decided over 28 years ago in 1977, the Supreme Court noted that more than 99% of all nonsecurity classified documents in the Johnson Library had been made available to the public on an unrestricted basis. 433 U.S. at 451 n.12.

It therefore is not surprising that numerous communications between President Johnson and his security advisors have been made public, including more than 400 hours of tapes of conversations that contain, inter alia, extensive discussions regarding the Vietnam war, the Soviet Union, and other national security and intelligence matters.[6] Given the large number of internal communications that have been made available, there can be no reasonable expectation that communications between President Johnson and his advisors will remain confidential 40 years after the end of the Johnson administration.

C. The Presidential Records Act Governs The Confidentiality Of Presidential Communications In Current and Future Administrations

Presidential advisors today also can have no reasonable expectation that their communications to the President will remain shielded by the presidential privilege forever. Under the Presidential Records Act ("PRA"), 44 U.S.C. §§

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[6] A representative sample of these tapes can be found at http://www.c-span.org under the C-Span Radio link.

2201-07, all Presidential records are declared to be the property of the United States. Id. § 2202. The PRA does not apply to Presidential records prior to the Reagan administration but, to the extent that the district court's ruling was intended to have an impact on future communications between the President and his advisors, the PRA has an important role in defining the expectations that such communications will be kept confidential in perpetuity.

Under the PRA, documents received by the President must be preserved and cannot be disposed of unless the Archivist of the United States ("Archivist") agrees that the documents no longer have administrative, historical, informational, or evidentiary value. Id. § 2203. The PRA specifically deals with public access to "confidential communications requesting or submitting advice, between the President and his advisors," i.e. communications that are subject to the presidential privilege. See Id. § 2204(a)(5). Under the PRA, public access to such communications may be restricted for no longer than 12 years after the conclusion of a Presidential term. This means that public access to the communications is restricted for at most 20 years in the case of communications taking place in the first year of a two-term President. Id. § 2204(a).

After the conclusion of the restricted period, the PRA provides that public access to the documents is governed by FOIA. Id. § 2204(c)(1). Importantly for this case, however, the same provision of the PRA provides that "paragraph (b)(5)

of [FOIA] shall not be available for purposes of withholding any Presidential record." Id. As discussed above, it is through paragraph (b)(5) of FOIA that the presidential privilege can be invoked to exempt documents from disclosure under FOIA. As a result, because paragraph (b)(5) does not apply to restricted presidential materials after the 12-year period has expired, public access to those materials no longer can be restricted under the PRA.

Therefore, no President or Presidential advisor today could realistically expect that public access to their communications will be restricted in perpetuity. Whether this is a wise policy or not is not a determination for the district court or this Court. Because the restrictions on public access to these communications will expire no later than 12 years after expiration of the President's term of office,[7] there is no public interest served by holding that such communications are exempt from

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[7] In 2001, President Bush issued Executive Order No. 13,233, 68 Fed. Reg. 15315 (March 28, 2003) which, among other things, attempts to extend the time period over which presidential records will be exempt from release. However, this Executive Order does not keep records confidential in perpetuity, but instead makes them subject to release consistent with Supreme Court precedent regarding the presidential privilege. As noted above, the Supreme Court has held that the presidential privilege does not last in perpetuity.

disclosure under Exemption 5 of FOIA for any longer period of time.[8] To the contrary, such a holding is directly contrary to Congress' stated intent that the presidential privilege not apply longer than 12 years after the term of a President has expired.

CONCLUSION

The Amici are concerned that the district court's overly broad rulings will unduly restrict access to the historic record of the Johnson administration without adding anything to our national security. The Amici request that this Court reverse

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[8] The PRA also provides that it is not intended to "confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." However, in order for a past President to prevent communications with advisors from being produced under the presidential privilege, that President would have to personally assert the privilege when a request for documents is made – as noted above the PRA prohibits the Archivist from refusing to turn over documents on the grounds that they are subject to the presidential privilege. Moreover, the President would have to convince a court that the privilege continued to apply after the passage of more than 12 years' time, a very questionable proposition under the cases cited above. Under these circumstances, no one today could have any reasonable expectation after the effective date of the PRA that their communications with a President would be entitled to an absolute and unyielding protection from public disclosure.

the district court and hold that the PDBs should be released, subject to redaction of specific references to intelligence sources or methods.

Respectfully submitted,

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Matthew W.S. Estes
1440 New York Avenue, N.W.
Washington, DC 20005

Attorneys for
American Historical Association, American Political Science Association, National Coalition For History, Organization Of American Historians, Presidency Research Group, Society Of American Archivists, Society For Historians Of American Foreign Relations, Barton J. Bernstein, Robert Dallek, Lloyd C. Gardner, Fred I. Greenstein, George C. Herring, Jeffrey P. Kimball, Stanley I. Kutler, Walter Lafeber, Anna Nelson, And Robert D. Schulzinger

January 25, 2006

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have this day: (1) served a copy of the foregoing brief by hand delivery, or by first-class mail, postage prepaid, as indicated, upon all parties shown on the attached service list; and (2) dispatched the required number of copies of this brief to a third-party commercial carrier for delivery to the clerk for delivery in no more than 3 calendar days.

Dated at Washington, D.C. this 25th day of January, 2006

Matthew W.S. Estes
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

SERVICE LIST

COUNSEL FOR APPELLANT LARRY BERMAN	Thomas R. Burke Duffy Carolan DAVIS WRIGHT TREMAIN LLP Suite 600 One Embarcadero Center San Francisco, CA 94111 By First Class Mail Meredith Fuchs The National Security Archive The George Washington University Gelman Library, Suite 170 2130 H Street, N.W. Washington, D.C. 20037 By First Class Mail
COUNSEL FOR APPELLEE CENTRAL INTELLIGENCE AGENCY	Mark B. Stern Alisa B. Klein Department of Justice, Civil Division Appellate Staff, Room 7531 950 Pennsylvania Ave., N.W. Washington, DC 20004 By Hand Delivery

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-16820

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January 25, 2006

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Matthew W.S. Estes