No. 05-16820

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY BERMAN,

Plaintiff-Appellant

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court
Eastern District of California
(No. S-04-2699 DFL-DAD)

APPELLANT'S REPLY BRIEF

Thomas R. Burke
Duffy Carolan
DAVIS WRIGHT TREMAINE LLP
Suite 600
One Embarcadero Center
San Francisco, CA 94111
Tel: (415) 276-6500
Fax: (415) 276-6599

Meredith Fuchs
The National Security Archive
George Washington University
Gelman Library, Suite 701
2130 H Street
Washington, DC 20037
Tel: (202) 994-7000
Fax: (202) 994-7005

Attorneys for Appellant

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I. INTRODUCTION

The mosaic theory and presidential privilege claims asserted by the CIA seek to extend the government's ability to withhold documents from release under FOIA well beyond current law or a reasonable interpretation of that law. That these theories were used to justify withholding every word of the two President's Daily Briefs ("PDBs") without tailoring the claims to the content of these documents demonstrates that this novel approach creates new opportunities for abuse.

The CIA's mosaic theory presents a particularly illusive expansion of governmental power to deny access to public records. This theory is not tied to any portion of the requested PDBs and rests not on the risk of disclosing a source or method but on the risk of disclosing the already public process by which intelligence information is conveyed to the President. If no specificity is required by the Court, the necessarily speculative mosaic theory claims become uncontrovertible: a failsafe means to withhold entire documents – indeed categories of documents – thereby avoiding FOIA's segregation requirements. Because the CIA's showing is insufficient to substantiate this theory, its acceptance by the District Court should be reversed.

The application of the presidential privilege under FOIA to non-advisory agency communications is equally unprecedented and disturbing. The privilege

does not extend to such communications. Even if it did, they do not qualify as interagency communications under Exemption 5 because the President is not an agency under FOIA. The legal analysis employed by the CIA to maneuver around this requirement is not well grounded and is directly contrary to the express meaning of FOIA and Congress' understanding of its applicability. Nor should the Court countenance the CIA's implication that reading FOIA literally – rather than extra-textually – would somehow leave the President's communications unprotected. Presidential records, both historically and in the modern era, have been protected under the law. The PDBs, however, are agency records, that are reviewed for release under the standards of the FOIA. That the CIA believes an agency employee can assert the presidential privilege absent any indication that the President desired confidentiality essentially usurps presidential standing and is yet another reason why the District Court's order should be reversed. The CIA's effort to lead the Court down a slippery slope of finding that factual information can be called deliberative is yet another. In short, the presidential privilege claim adopted by the District Court and advance by the CIA here violates FOIA's narrow construction rule at every turn and is not well supported by current law or a reasonable interpretation for an extension of current law.

The CIA's other national security and deliberative process claims fall flat because they are not supported by the record and the CIA has not shown why its concerns cannot be protected through redaction of the two PDBs.

II. REPLY ARGUMENTS

A. The CIA's National Security Exemptions Are Not Supported By The Record

1. The CIA's Expansive Mosaic Theory Divests the Court of its Role in Reviewing National Security Secrecy Claims

The issue before this Court is not whether the age of the PDBs necessitates their disclosure or whether prior disclosures constitute a waiver, as the CIA would have this Court believe. (CIA Brief at 13.) Rather, the CIA seeks an Exemption 3 ruling that nullifies FOIA's *de novo* judicial review, narrow construction, burden and segregation requirements. Indeed, the CIA asks this Court to adopt one of the broadest applications of the mosaic theory yet proffered by the government. If accepted, the government will never again have to tailor its national security claims to the specific documents being requested under FOIA, as this Circuit as long required, and it will be able to withhold entire documents by merely asserting that disclosure of admittedly innocuous portions of a document (which FOIA normally requires be segregated and released) when pieced together with other information available to U.S. adversaries could disclose methods or sources.

What makes the CIA's mosaic theory particularly subject to abuse is that it rests on a vaguely defined process by which intelligence information is conveyed

to the President, rather than disclosure of an actual intelligence gathering method or intelligence source. This expansive mosaic theory could be used to justify virtually any withholding from a CIA record and renders it nearly impossible for advocates to refute government national security claims. The Sixth Circuit recognized the dangers inherent in a limitless mosaic theory when it rejected the theory as a reason to prevent public access to deportation hearings:

> [T]here seems to be no limit to the Government's argument. The Government could use its "mosaic intelligence" argument as a justification to close any public hearing completely. . .The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security," . . . .
>
> This, we simply may not countenance. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.

Detroit Free Press v. Ashcroft, 303 F.3d 681, 709-710 (6th Cir. 2002).

The limitless nature of the CIA's mosaic theory is aptly illustrated by the conclusory assertions in the CIA's Buroker declaration:

> If significant numbers of individual editions of the PDB (no matter how old) were publicly disclosed, even after redaction of the obvious revelations of specific collection methods and sources, due to regular or even sporadic disclosure (by CIA policy or court order), patterns of application of intelligence methods including those by which the U.S. sets priorities, collects intelligence, and analyzes it would emerge.

(ER at 19 ¶ 38.) This contention is nothing more than a restatement of the mosaic theory itself. That "even portions of the PDBs may provide insights to knowledgeable readers as to the CIA's capabilities, accomplishments,

methodologies, and judgments over time" is similarly generic and could be said of any CIA document. (Id. ¶ 39.) By failing to tailor the concerns to the specific PDBs, the declarations become irrebutable. As such, they violate FOIA's mandate that even national security claims be sufficiently detailed and tailored to allow for effective advocacy. (Berman's Brief at 15-16.) Strict adherence to these burden requirements is essential in every FOIA case where the government is the only party with access to the disputed records. These standards are even more important in cases involving the mosaic theory because it is inherently speculative. See David E. Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 Yale L. J. 628, 663-78 (2005) (reviewing history of mosaic theory and advocating for careful scrutiny).

The need for careful judicial scrutiny of the CIA's claims is illustrated by the content of the already released Johnson-era PDBs. (ER 0089-0119, 0135-0214; 0059-64, ¶¶ 7-30.) They include, for example, information about countries and regimes that no longer exist and virtually verbatim information as disclosed in the same day Central Intelligence Bulletins. These prior disclosures demonstrate the implausibility of the CIA's bald conclusions. Most directly controverting the CIA's sweeping assertions is its own determination during the very month that this lawsuit was filed to release in sanitized form two Johnson-era PDBs – a decision necessarily authorized by its sole declarant. (ER 0131-33 & 0134-36; ER 0001, ¶¶

1 &2.) Rather than question the CIA's assertions in the face of Berman's evidence, the District Court deferred completely to the government's claims. Berman v CIA, 378 F. Supp. 2d 1209, 1216-18 (E.D. Cal. 2005). By doing so, it abdicated its responsibility to review government claims for reasonableness, specificity and plausibility. Indeed, fairly characterized, the District Court's broad deference, if upheld, substitutes Executive Branch prerogative for constitutionally authorized and statutorily mandated judicial review of FOIA denials. See Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 Admin. L. Rev. 131, 159-62 (2006) (describing history of 1074 FOIA amendments which strengthened judicial authority to review national security secrecy claims and origins of judicial deference in secrecy cases); see also Ray v. Turner, 587 F.2d 1187, 1213-14 (D.C. Cir. 1978) (Wright, C.J., concurring) (extensively reviewing the FOIA and the 1974 amendments and warning that a broad presumption favoring government affidavits would contradict statute).

The CIA spends much time and hyperbole warning about the impact a court determination could have on future requests for PDBs. (CIA Brief at 14, 20.) Under FOIA, however, each requested record is individually assessed. A ruling here would never preclude the government from making a sufficient showing in future PDBs cases, especially ones concerning present day intelligence interests.

The government's ability to make a sufficient showing, whether through on-the-record declarations or *ex parte*, is completely within its control.

The CIA also misrepresents Berman's argument, which is not that in Exemption 3 cases the passage of time "robs the declaration of force" but that the declarations should not be given force because they lack substance. (CIA Brief at 21-23.) The cases relied on by the CIA support this point. For example, in Assassination Archives and Research Center v. CIA, 334 F.3d 55, 57-58 (D.C. Cir. 2003), the CIA showed that the requested documents consisted of a compilation of personality profiles on Cuban individuals and included "the pool in 1962 of potential intelligence sources or targets of CIA intelligence collection." Id. at 58. The CIA's declarant specifically noted the records would "reveal those individuals in whom CIA had an intelligence interest and would provide leads to identifying the intelligence sources who or which acquired the information." Id. The stated intelligence purpose of this information was "to identify Cuban nationals who could lead the country if Castro was ousted." Id. at 57. The CIA also publicly explained that release of the information "would provide key insights into current CIA intelligence targeting and analytic processes." Id. at 58. From this, it is not difficult to see how disclosure of the identities of those whom the CIA believed might replace Castro could harm current intelligence efforts or reveal sources and methods of collection. Here, however, the CIA's declarations reveal nothing about

the content of the PDBs or how their disclosure would harm national security interests beyond the vaguely defined process of conveying intelligence to the President.

Moreover, when confronted with evidence of prior disclosures of similar information, the CIA in Assassination Archives countered with a declaration making clear it had never released the information in any form. Id. at 59. In contrast, the CIA here failed to dispute that information in the two PDBs already has been made public through the same day CIBs, and its brief in the lower court suggests this is the case. (CR 28 at 6.)

The CIA's reliance on Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993), also illustrates why the Buroker declarations, standing alone, are insufficient to establish the exemption. (CIA's brief at 22.) In Maynard, the appellate court only deferred to the CIA's predictions about possible harm from disclosure of documents from 1961 after those predictions were tested through *in camera* review and the submission of *ex parte* declarations, in addition to public ones. Id. at 553 & 555. The District Court's acceptance of the CIA's conclusory declarations presents a marked contrast to the measures employed by the Maynard court to ensure a fair adversarial process. (Berman Brief at 23-25 (contrasting other cases cited by CIA).)

Lastly, the CIA attempts to divert attention away from the insufficiency of its declarations by presenting a myriad of possible harms stemming from disclosure of intelligence sources. (CIA Brief at 23-24.) Yet, the CIA has not claimed that disclosure of the requested PDBs will lead to disclosure of any intelligence source or identified any portion of the PDBs where sources are even implicated. Instead, it presents the consequence of disclosure in the alternative – that disclosure, directly or indirectly, will reveal a source or method, which Buroker defines as including the process by which the CIA briefs the President. (ER 0016-17, ¶¶ 34-37.) By casting the entire PDB as an intelligence method, the CIA seeks to avoid FOIA's segregation requirements. Yet, without the risk of disclosing sources, the harms described by the CIA simply are not implicated.

In summary, this Court should reject the CIA's expansive mosaic theory and reinforce FOIA's *de novo* review, narrow construction, burden and segregation requirements by holding that the Buroker declarations are insufficient to establish an Exemption 3 claim and ordering the District Court to engage in a more probing review of the CIA's contentions.

2. The Buroker Declarations are not Sufficient to Establish an Exemption 1 Claim

The CIA does little to advance its Exemption 1 claim before this Court; instead, seeking substantial deference. (CIA Brief at 29.) Below, the CIA did nothing in its declarations but recite portions of the Executive Order on

classification and generalized harms that could flow from disclosure of sources, methods and foreign government information. Its failure to tailor these claims to specific portions of the two PDBs alone requires reversal. Wiener v. FBI, 943 F.2d 972 (1991), 979, 983 (FBI's index "provides no information about particular documents and portions of documents that might be useful in contesting nondisclosure"); Powell v. U.S. Dep't of Justice, 584 F. Supp. 1508, 1512 (N.D. Cal. 1984) (coded symbols next to each deletion keyed to generalized discussions of why a particular category of information is exempt and which were not tied to "the content of the specific deletions" deemed inadequate).

For example, the CIA claims that PDBs "contain explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships." (ER 27 ¶ 49.) The CIA makes no attempt to specify which portion of the PDBs contain "foreign government information," which would be important given the PDBs are internally categorized by various countries. Moreover, there is no contention, as there must be, that this information was provided by a foreign government "with the expectation that the information, the source of the information, or both, are to be held in confidence." EO 13292 § 6.1 (r). While the CIA recounts the harms that could flow from exposure of liaison relationships in general, it fails to specify the harms that disclosure of any part of the two PDBs here could cause. (ER 27 ¶ 52.)

See Wiener, 943 F.2d at 977 (rejecting 'categorical' approach of listing the 'types of harms' that generally result when a 'type' of information is disclosed); see also Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995). Nor is there any explanation why information specifically provided by foreign governments, to the extent it exists in the requested PDBs, cannot be segregated from non-exempt information contained in the PDBs. In short, the CIA's evidence falls far short of that required to establish an Exemption 1 claim for foreign government information.

While the CIA lumps its source and method arguments under its Exemption 3 analysis in its brief, thereby skirting any analysis of the passage of time on this separate exemption, it is clear that this aspect of its showing fails under Exemption 1 as well. To begin with, the CIA's declarations never state that an intelligence source is actually revealed in any portion of the two requested PDBs. Moreover, there must be a showing that "the source was truly a confidential one and why disclosure of the withheld information would lead to exposure of the source." Wiener, 943 F.2d at 980. The CIA never made this required showing.

Similarly, the CIA's method claim is not tied to any portion of the two PDBs. This may be because the only method its seeks to protect is the already public one involving the process by which the PDB is used to inform the President. (ER at 0006-11, ¶¶ 16-25; 0068; 0071-87.) And, it fails to explain why individual

methods contained in the PDBs, if they exist, cannot be protected through segregation.

The CIA also fails to answer critical questions in Exemption 1 analysis such as, "[i]s it realistic to expect disclosure of a [thirty-five] year old investigation to reveal the existence of a current intelligence investigation?; Are intelligence methods used in [1965] still used today, justifying continued secrecy?"; "whether the source [if there is one] is still useful as an informant, or even alive." Id. at 981 n. 14 & 15. In Powell, 584 F. Supp. at 1517, for example, the court found inadequate a CIA special agent's declaration offered to justify an Exemption 1 withholding of twenty-two and twenty-five year old documents. The court stated that the CIA failed to "address the crucial questions of whether each particular intelligence source is still alive, is still functioning as a source, has already been revealed, or can possibly be identified by places, dates, capabilities, or other information supplied thirty years after the fact." Id. The Buroker declarations do not address any of these questions.

For these reasons, and those more fully addressed in Berman's opening brief, the CIA's Exemption 1 claim should be rejected by this Court.

B. The CIA's Exemption 5 Claims Are Not Supported By The Record Or A Reasonable Interpretation Of The Law

1. The Presidential Privilege does not Protect the PDBs

CIA's presidential privilege arguments should be rejected for at least the following reasons: (a) the presidential privilege was never intended to extend beyond top officials with direct recommendatory or advisory roles to the President; (b) disclosure of the PDBs will not reveal the decisionmaking process of the President; (c) the PDBs do not qualify as interagency documents because Congress implicitly exempted the Office of the President from the definition of "agency"; and, (d) low-level agency employees cannot invoke the constitutionally based presidential privilege absent, at the very least, some indication that confidentiality has been requested by the President.

a. The presidential privilege does not extend to every communication with the President

The presidential communications privilege was never intended to cover every communication between the President and other executive branch officials, and it most certainly was not intended to cover communications from those with non-advisory roles to the President. Our courts have not extended the presidential communication privilege beyond that necessary to provide "[a] President and those who assist him . . . [with] freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." In re Sealed Case, 121 F.3d 729, 743 (D.C. Cir. 1997)

(quoting United States v. Nixon, 418 U.S. 683, 708) (1974); see also Nixon v. Adm'r of General Services, 433 U.S. 424, 446 (1977) n. 10 (1977)). Clearly, "the presidential privilege is based on the need to preserve the President's access to candid advice. . . ." Id. at 745 (emphasis added).

Notwithstanding the CIA's legal arguments, belatedly characterizing the CIA's role vis-à-vis the President as an advisory one (Brief at 33), the CIA decidedly does not have an advisory role to the President, or in any manner make recommendations regarding foreign policy, either through the PDB briefing process or otherwise. (ER at 0068; 0041, ¶ 5; 0043, ¶ 5.)

Despite this, the CIA now asks the court to broaden the privilege to all executive branch communications with the President. This would be a radical departure from the narrow construction courts have given to this privilege. For example, in In re Sealed, where the government sought to have the privilege extended beyond communications actually received by the President, the court explained that the privilege applies "[o]nly [to] communications [that] are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers" and thus constrained the privilege to communications between presidential advisors only if those advisors are members of the White House staff. In re Sealed, 121 F.3d at 752; see also Judicial Watch, Inc. v. U.S. Dep't of Justice, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (rejecting expansion of

presidential privilege to all documents prepared by those within Justice Department).

Tellingly, each one of the cases relied on by the CIA for broadening the privilege involves records documenting recommendations and advice to the president or his close advisors, facts that are not at issue here. See Judicial Watch, Inc. v. U.S. Dep't of Energy, 412 F.3d 125 (D.C. Cir. 2005) (involving National Energy Policy Development Group ("NEPDG") whose sole function was to advise the President on energy policy); Lardner v. U.S. Dep't of Justice, 2005 WL 758267 (D.D.C. 2005) (involving letters of advice of Pardon Attorney who makes recommendations about pardon applications to the Attorney General who, in turn, advises the President regarding this non-delegable duty); Binion v. U.S. Dep't of Justice, 695 F.2d 1189 (9th Cir. 1983) (same); EPA v. Mink, 410 U.S. 73 (1973) (involving recommendations of Under Secretaries Committee which was part of the National Security Council system organized by the President to provide advice on national security matters); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (involving independent assessment containing recommendations and conclusions about government's program for development of a supersonic transport aircraft solicited by President and prepared by a panel of experts at the direction of the Director of the Office of Science and Technology).[1]

[1] Of these cases, only the unpublished disposition in Lardner actually

Thus, neither the record before the Court nor existing case law governing the scope of the presidential privilege warrant expanding the presidential privilege to all executive branch communications to the President.

b. The PDBs do not reveal the decisionmaking processes of the President

The privilege also is not supported because the CIA has not shown that disclosure of PDBs generally or the two at issue here will disclose the decisionmaking processes of the President. That the CIA may in certain instances provide factual information in response to a presidential inquiry – a fact that has not been shown to be true for the requested PDBs – does not mean that the PDBs are deliberative or would reveal the mental processes of the President. In the context of the deliberative process privilege, this Court has clearly rejected the notion that a report becomes deliberative "simply because it contains only those facts which the person making the report thinks material." National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988) (quoting Playboy Enterprises, Inc. v. U.S. Dep't of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982).

Thus, even if some factual information contained in the PDBs was actually in response to an inquiry by President Johnson, that fact would not transform the

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involves an assertion of the presidential communications privilege.

PDB into a deliberative document. Under these circumstances, the privilege serves no purpose, thus once again illustrating how the CIA's theory has drifted beyond the privilege's original moorings.

c. Agency communications with the President, a non-agency under FOIA, do not meet Exemption 5's "inter-agency" requirement

Agency communications with the President, a non-agency under FOIA, do not satisfy Exemption 5's "inter-agency" requirement, which the United States Supreme Court has held to be a prerequisite to the application of Exemption 5. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001). The CIA does not dispute that the President is not an agency under FOIA. Instead, it argues that Exemption 5 should apply anyway because the PDBs are intra-executive branch communications. In casting aside the "inter-agency" requirement, the CIA relies on a flawed decision from the D.C. Circuit, which itself misstates prior case law. To be clear, in holding that the deliberative process privilege attached to pre-decisional deliberations of the NEPDG, a non-agency under FOIA, the court in Judicial Watch relied on Mink and Soucie, cases that supposedly "expressly" refused to draw the distinction "between the decision-making activities of an 'agency' subject to FOIA and those of the President and his staff, who are not subject to FOIA." Judicial Watch, 412 F.3d at 129.

The Mink Court, however, did not address the issue of whether Exemption 5 applies to agency communications to the President, though the case did involve documents prepared for the President. The Mink Court merely described a range of classified and unclassified documents as "inter-agency or intra-agency" records. Id. at 85. The classified documents were held to be protected under Exemption 1. And, while the Court unnecessarily considered the application of Exemption 5 to all the documents, the yet unprotected, unclassified documents on their face qualified as inter-agency memoranda given that the recipient of the documents, the National Security Council, was at the time considered an "agency." Id. at 77 n. 3, 85. In Mink, there was no analysis whatsoever about whether communications to the President, a non-agency under FOIA, were inter-agency documents under Exemption 5, as suggested by the CIA. Accordingly, Mink does not support the determination for which it is cited in Judicial Watch that agency communications with executive branch entities that are not agencies under FOIA are nevertheless protected as inter-agency communications.

More troubling is the Judicial Watch court's reliance on Soucie, which the court said "held" that Exemption 5 protects "'the decisional processes of the President and other executive officials with policy-making functions.'" Judicial Watch, 412 F.3d at 129 (quoting Soucie, 448 F.2d at 1078). This was not the holding in Soucie. In fact, the court expressly declined to reach the issue of

whether the President was an agency subject to the Administrative Procedure Act, and thus FOIA. Soucie, 448 F.2d at 1073 and n. 17. Instead, the court resolved a very different issue – whether the Office of Science and Technology ("OST") operating within the Executive Office of the President with dual functions of advising the President and evaluating federal programs was an agency under FOIA. Id. at 1075. "By virtue of its independent functions of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." Id. Thus, the actual holding in Soucie does not support the CIA's contention here, or advance the holding in Judicial Watch.

Moreover, the Judicial Watch quote from Soucie, purporting to be its holding, comes from *dicta* in Soucie where the court provides guidance to the district court on remand based on its view that Exemption 5 "seems the most likely to be relevant." Id. at 1077; Judicial Watch, 412 F.3d at 129. Thus, the holding in Soucie, involving a then-agency under FOIA, does not support the Judicial Watch court's determination that agency communications with non-agencies are protected under Exemption 5 so long as those communications are inter-branch communications. Indeed, by raising the specter of a separate constitutional privilege claim on remand, the Soucie court appeared to recognize that the presidential privilege is distinct from Exemption 5, not encompassed within it.

Soucie, 448 F.2d at 1071-72 & n 12. This is a view Congress shares, as explained below.

The CIA next argues that in amending FOIA in 1974, to implicitly exclude the Office of the President from the definition of agency, Congress sought to address separation of powers concerns and to minimize the interference with the president's daily operations. (CIA Brief at 36.) From this, the CIA suggests that Congress must have intended to include the President within FOIA's protections to avoid "the type of constitutional concerns it had sought to avoid." Id. at 37. But the quote from the Armstrong case cited by the CIA for this proposition comes not from FOIA legislative history but from an earlier Armstrong case addressing whether the Presidential Records Act precludes judicial review of the President's compliance with the PRA, which that court held it did. (Armstrong v. Executive Office of President, 1 F.3d 1274, 1292 (D.C. Cir. 1993) ("Armstrong II") (citing Armstrong v. Bush, 924 F.2d 282, 289, 290 (D.C. Cir. 1991)). Quite the opposite from supporting the notion that Congress sought to give the President the protections of FOIA, these cases make clear that Congress gave the President the protections of the PRA precisely because presidential records fall outside the scope of FOIA's protections for "agency records." Indeed, the court in Armstrong II made this point clear:

> The term 'presidential records' is intended . . . to encompass all White House and [EOP] records . . . which . . . fall outside the scope of the

> FOIA because they are not agency records. In other words, that which is now subject to FOIA would remain so and that which is [not] now subject to FOIA would be subject to the [PRA,] including those provisions of [PRA] which in specified circumstances specially apply FOIA to these non-agency records after a President leaves office.

Id. at 1292 (quoting H.R. Rep. No. 1487 at 11, 95th Cong., 2d Sess. 11 (1978), 1978 U.S.C.C.A.N. 5732, 5742). By concocting a congressional intent argument that is not supported by any published case and by dragging presidential records back into the judicially enforceable FOIA through a hybrid "inter-agency" argument, the CIA in effect creates the very separation of powers argument that Congress expressly sought to avoid in enacting the PRA. As the court in Armstrong II explained, "Congress preserved the critical role of judicial review under the FOIA, and avoided a conflict between the PRA and the FOIA, by explicitly exempting records subject to the FOIA from the scope of the PRA and allowing judicial review of guidelines defining presidential records under the rubric of substantive FOIA law." Armstrong II, 1 F.3d at 1292. This legislative history confirms it is the CIA not Berman who has matters backwards. (CIA Brief at 36.)

That Congress viewed Exemption 5 as not incorporating the presidential privilege also is expressly set out in the legislative history of the PRA. The PRA provides that after the mandatory and permissive restrictive periods for presidential records following the expiration of a President's term in office, beginning with

President Ronald Reagan, presidential records become publicly available through the FOIA's procedures governing agency records. 44 U.S.C.A. § 2204(b)(2), (c)(1) (West 1991 and Supp. 2005). At this time, public disclosure of presidential records is required unless the records fall within an exemption under FOIA *other than Exemption 5* (for example, the exemptions for materials that are properly subject to national security classifications), or unless there is some "constitutionally based" right or privilege that prevents public release. 44 U.S.C.A. § 2204(c)(2) (West 1991 and Supp. 2005). The reason for this structure is that Congress recognized that presidential records, by definition, could not possibly satisfy Exemption 5's requirement that records be "intra-agency or inter-agency":

> [T]hese confidential communications would be publicly made available upon the termination of the mandatory restrictive period set by the former president, unless an appropriate FOIA exemption other than (B)(5) were available. This is because the materials falling within the scope of the provision here, section 2205(A)(5) of the Presidential Records Act, would not qualify as an agency record for protection under the FOIA's exemption for inter- and intra-agency memorandums. As noted elsewhere, the term agency is defined for FOIA purposes as not 'including the president's immediate staff or units in the executive office whose sole function is to advise and assist the president.'

See H.R. Rep. No. 1487, at 14 (emphasis added); see also id. (distinguishing the protections for "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers" under the PRA

from the protections afforded under Exemption 5 for inter-agency and intra-agency communications).

The CIA's congressional intent/separation of powers argument also ignores the one case that specifically decided the application of Exemption 5 to "non-agencies" under FOIA – Dow Jones & Company, Inc. v. U.S. Dep't of Justice, 917 F.2d 571 (D.C. Cir. 1990). (Berman Brief at 35.) That case specifically rejected the arguments advanced here: (1) that Exemption 5's "inter-agency" requirement can be read to include "inter-branch communications," (2) that a "strict reading" of the "inter-agency" requirement would frustrate the purpose of exempting entities from FOIA's reach, and (3) that the rationale in Ryan v. U.S. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980), holding that non-agency communications made to assist agency deliberations are "intra-agency" communications, can be stretched to include within the definition of "inter-agency" communications by agencies to non-agencies. Id. at 574-75. Rejecting the argument that by excluding Congress from FOIA's reach Congress could not have intended that agency communications to it for its own deliberations fell outside of Exemption 5's protections, the Court said:

> It is an appealing argument. It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include Executive Branch communications to Congress, such as the letter sought here. But Congress did not, and the words simply will not stretch to cover this situation, because Congress is simply not an agency.

Id. at 574. Further rejecting the consultant/intra-agency model espoused in Ryan, the Dow Jones court noted, "[n]one of our cases have extended the notion, however, to the protection of deliberations of a non-agency either as an interpretation of 'intra-agency' or 'inter-agency.'" Id. at 575. The holding and reasoning in Dow Jones is directly applicable here.

Because the CIA's interpretation of Exemption 5's inter-agency requirement, adopted by the District Court, is contrary to the express meaning of FOIA and Congress' understanding of its applicability it should be rejected.

d. The CIA cannot invoke the presidential communications privilege

Lastly, the CIA's contention that the constitutionally-based presidential privilege can be invoked by agency employees without any direction from the Office of the President or other presidential advisor should not stand. Invocation of this unique privilege – without any showing that any President, past or present, actually considers the communications confidential or desires continued confidentiality – by an agency with independent interests and duties allows an extra-constitutional delegation of authority.

The District Court justified its ruling that the CIA could stand in the President's shoes by considering only factual content and purpose of the requested documents. See Berman, 378 F. Supp. 2d at 1220. It relied on a statement in the

Dow Jones decision that "application of Exemption 5 'depends on the factual content and purpose of the requested documents' as opposed to other variables.'" Id. (quoting Dow Jones, 917 F.2d at 575). Yet nothing in the Dow Jones decision supports the notion that courts are limited to considering the content and purpose of records in resolving the applicability of Exemption 5. Indeed, the statement relied on was from that part of the Dow Jones decision discussing the department's withholding under Exemption 7, not Exemption 5. 917 F.2d at 575. And, there, the court was merely contrasting the analysis under Exemption 5 where courts look to content and purpose to determine whether a document is deliberative with that under Exemption 7 where courts look beyond the document to ascertain whether a source was truly a confidential one. Id.

Recognizing that the inquiry goes beyond content and purpose, the Mink Court itself stated that Congress must have "legislated against the backdrop" of case law allowing, among other things, for the examination of documents *in camera* "in order to determine which should be turned over or withheld." Mink, 410 U.S. at 88; see also id. at 85. Thus, other considerations normally at play in litigation, such as the proper invocation of a privilege by an entity with standing to invoke it, should not be cast aside in the Exemption 5 analysis. See, e.g., Landry v. Federal Deposit Insurance Corp., 204 F.3d 1125, 1135 (D.C. Cir. 2000) (recognizing procedural requirements for invoking deliberative process claim in

civil litigation and holding supervisory personnel of sufficient rank to assert privilege).

These procedural requirements are designed to "ensure that the privilege[s are] presented in a deliberate, considered, and reasonably specific manner." Landry, 204 F.3d at 1135. Allowing the privilege to be asserted by agency employees without being directed to do so by the President or any of his advisors, fails to protect the integrity of the presidential privilege. This concern is no less important in FOIA litigation, which is designed to ensure an accountable government.

The CIA's burden argument is similarly unconvincing. (CIA Brief at 41-42.) Indeed, this same argument was rejected by the court in Dow Jones, as explained above. Dow Jones, 917 F.2d at 574. Moreover, the substantial and direct burdens imposed on incumbent presidents or their designees and former presidents for withholding documents under the PRA following the twelve-year restrictive period, belie any claim that burden should be a determinative factor here. 44 U.S.C.A. § 2204 (West 1991 and Supp. 2005) & Executive Order 12667 (republished at id.); see also Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon's Shadow, 83 MINN. L. REV. 1069, 1085, 1094, 1102, 1117 (1999) (reviewing executive orders and memoranda from Presidents Carter,

Reagan, George H. W. Bush, and Clinton that state that the President must invoke or authorize invocation of the privilege).

It is no more burdensome to require specific, deliberate invocation of the privilege by the president or his advisors than that required under the PRA for invocation of constitutional privileges for records of a more recent vintage.

Because the District Court's ruling applies an unduly restrictive interpretation of the Exemption 5 inquiry, contrary to public policy, and is not supported by case authority, it should be reversed.

2. The Deliberative Process Privilege does not Apply to the PDBs

In addition to its inability to establish that agency communications with the President are "inter-agency" communications under Exemption 5, the CIA did not and cannot establish the remaining two prongs of the deliberative process privilege – that the PDBs are predecisional and deliberative.

The CIA does not contest that the PDBs are final documents submitted to the President, not "draft versions of subsequently finalized CIA documents." (CR 28, p. 23.). Thus, the PDBs are not predecisional within the CIA. Instead, the CIA's argument rests entirely on its claim that as a brief to the "ultimate decisionmaker" PDBs are necessarily predecisional. (CIA Brief at 46.)

To support its argument, the CIA cites Bureau of National Affairs, Inc. v. U.S. Dep't of Justice ("BNA"), 742 F.2d 1484 (D.C. Cir. 1984). That case

concerned certain budget recommendations submitted by one agency, the Environmental Protection Agency, to another agency, the Office of Management and Budget. Id. at 1496-97. In holding that those records were subject to the deliberative-process privilege, the court simply concluded that the privilege covers an agency's own "final decision," where that decision is "to make a particular recommendation to another agency of the government" to use in that agency's decision-making concerning the budget proposals to recommend to the President. Id. at 1497 (emphasis added). It is a serious misstatement of the court's ruling for the CIA to say that the records were found to be predecisional "precisely because it was 'undisputed that the President, not the EPA, makes the final decision concerning what budget request should be submitted to the Congress.'" (CIA Brief at 47 (quoting id. at 1497).) Rather, the court found the EPA recommendations predecisional because they "were submitted by one agency to a second agency that has final decisional authority" over what to recommend to the President. Id.

And, contrary to the CIA's contention, the court in Judicial Watch, 412 F.3d 125, did not reaffirm the CIA's interpretation of BNA. Rather, that Judicial Watch court appeared to recognize that the communications at issue were between two agencies. See Judicial Watch, 412 F.3d at 129-30. To the extent Judicial Watch's holding was bolstered by a misinterpretation of the holding in BNA, this is yet

another reason why that case was wrongly decided and should not be followed by this Court.

By taking quotes out of context, the CIA once again attempts to send this Court down a slippery slope – this time by construing predecisional documents as including final agency documents that play some indefinite role in the President's decisionmaking. This is neither the law nor what the law should be. (See Berman's brief at 43-44.)

Setting aside all this, the "predecisional" chain here is at best unclear. In sharp contrast to the budget recommendations at issue in BNA, where the President ultimately accepted or rejected the recommendations in arriving at a final budget, nothing in the record here indicates how the factual reports played into any policymaking decision of President Johnson. See Assembly of California v. U.S. Dep't of Justice, 968 F.2d 916, 921 (9th Cir. 1992) (that document may be used in some hypothetical future determination does not make it predecisional). (CIA Brief at 48.)

The CIA also has not and cannot establish that the PDBs are deliberative. By suggesting the PDBs are deliberative within the CIA, the CIA resurrects an argument that it conceded below – that "a report does not become part of the deliberative process simply because it contains only those facts which the person

making the report thinks material." (CIA Brief at 46; compare CR 28 at 22.) The law in this Circuit simply does not support the CIA's theory. (Berman Brief at 45.)

Alternatively, the CIA argues without citation to any authority that the PDBs are deliberative because they reflect what the President thought was important. (CIA Brief at 46.) Yet, this theory may be advanced only if Exemption 5 extends to protect the deliberations of the President – a non-agency under FOIA. Even then, the bald assertion that PDBs reflect specific material requested by the President does not and cannot convert factual documents into deliberative ones.

Because the CIA cannot establish any of the three prongs necessary to establish the deliberative process privilege, this Court should reject the CIA's withholding on this basis.

III. CONCLUSION

For all the reasons stated herein, and those in Berman's opening brief, this Court should reverse the District Court's order, hold the presidential privilege and

deliberative process claims inapplicable, and order the District Court to conduct a more probing review of the CIA's national security claims.

DATED: April 20, 2006. Respectfully submitted,

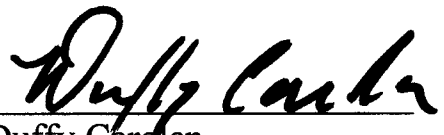
Thomas R. Burke
Duffy Carolan

DAVIS WRIGHT TREMAINE LLP

Counsel for Appellant,
Larry Berman

IV. CERTIFICATE OF COMPLIANCE WITH FRAP 32

I hereby certify that Appellants' Reply Brief complies with the Federal Rules of Appellate Procedure 32(a)(5) and (7). According to the word count of the word processing system used to prepare this Brief, Microsoft Word, the brief contains 6,938 words.



Duffy Carolan
DAVIS WRIGHT TREMAINE LLP
One Embarcadero Center
Suite 600
San Francisco, CA 94111
(415) 276-6556

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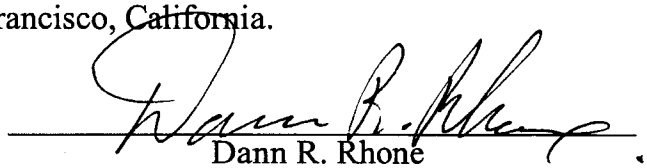

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[M] McGregor W. Scott, U.S. Attorney
Yoshinori H. T. Himel, Asst U.S. Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

Telephone: (916) 554-2760

Attorneys for Defendant CENTRAL INTELLIGENCE AGENCY

[FD] Mark B. Stern
Alisa B. Klein
Department of Justice, Civil Division
Appellate Staff, Room 7531
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Telephone: (202) 514-1597
Facsimile: (202) 514-8151

Mark.stern@usdoj.gov
Alisa.klein@usdoj.gov

Attorneys for Appellee CIA

[M] Meredith Fuchs
The National Security Archive
The George Washington University
Gelman Library, Suite 170
2130 H Street, N.W.
Washington, D.C. 20037

Telephone: (202) 994-7000
Facsimile: (202) 994-7005

Attorney for Plaintiff LARRY BERMAN

[M] Honorable David F. Levi
U.S. District Court Judge
Courtroom No. 7
501 "I" Street, 14th Floor
Sacramento, California 95814