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)

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TABLE OF CONTENTS

Page

I. JURISDICTIONAL STATEMENT 1

II. STATEMENT OF ISSUES 1

III. STATEMENT OF THE CASE 3

IV. SUMMARY OF THE FACTS 4

A. Nature of the President's Daily Brief 4

B. Prior Releases of PDBs, and Verbatim or Similar Intelligence Information 5

C. Berman's FOIA Request 8

D. Summary Judgment Proceedings 8

V. SUMMARY OF THE ARGUMENT 10

VI. ARGUMENT 13

A. Standard of Review 13

B. The CIA's National Security Exemption Claims Are Not Supported By The Record 15

1. The Withholding Must be Justified by a Particularized Explanation of How Disclosure of the Particular Document, or Portion thereof, Would Damage the Claimed Interest 15

2. The CIA's Declarations are Insufficient to Establish an Exemption 3 Claim 16

3. The CIA's Declarations are Insufficient to Establish an Exemption 1 Claim 25

C. Substantial Deference Should Not Be Given To The CIA's Declarations 29

D. The PDBs Do Not Fall Within Exemption 5's Protections 32

1. The Presidential Communication Privilege does not Apply to the PDBs 33

2. The Deliberative Process Privilege does not Apply to the PDBs 42

VII. CONCLUSION 45

VIII. CERTIFICATE OF COMPLIANCE WITH FRAP 32 47

IX. STATEMENT OF RELATED CASES 48

X. ADDENDUM 49

TABLE OF CITATIONS

Page(s)

Cases

Aftergood v. CIA,
355 F. Supp. 2d 557 (D.D.C. 2005) 20, 21

Armstrong v. Executive Office of the President,
90 F.3d 553 (D.C. Cir. 1996) 37

Assembly of California v. Dep't of Justice,
968 F.2d 916 (9th Cir. 1992) 43, 44

Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State,
818 F. Supp. 1291 (N.D. Cal. 1992) 15, 16, 17

Berman v. CIA,
378 F. Supp. 2d 1209 (E.D. Cal. 2005) .... passim

Binion v. Dep't of Justice,
695 F.2d 1189 (9th Cir. 1983) 36

Campbell v. Dep't of Justice,
164 F.3d 20 (D.C. Cir. 1989) 16

Carter v. Dep't of Commerce,
307 F.3d 1084 (9th Cir. 2002) 43, 44

CIA v. Sims,
471 U.S. 159 (1985) 16, 23

Coastal States Gas Corp. v. Dep't of Energy,
617 F.2d 854 (D.C. Cir. 1980) 44

Dep't of Interior v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001) 34, 35, 43

Dow Jones v. Dep't of Justice,
917 F.2d 571 (D.C. Cir. 1990) 35, 39

EPA v. Mink,
410 U.S. 73 (1973) 36, 37

Fitzgibbon v. CIA,
578 F. Supp. 704 (D.D.C. 1983) 24

Fitzgibbon v. CIA,
911 F.2d 755 (C.A. D.C. 1990) 24

Hunt v. CIA,
981 F.2d 1116 (9th Cir. 1992) 24

In re Sealed Case,
121 F.3d 729 (D.C. Cir. 1997) 33, 36, 39

Judicial Watch, Inc. v. Dep't of Justice,
365 F.3d 1108 (D.C. Cir. 2004) 33

King v. Dep't of Justice,
830 F.2d 210 (D.C. Cir. 1987) 15, 16, 26

Kissinger v. Reporters Committee for Freedom of the Press,
445 U.S. 136 (1980) 37

Lardner v. Dep't of Justice,
2005 WL 758267 (D.D.C. Mar. 31, 2005) 38, 39

Lion Raisins Inc. v. United States Dep't of Agriculture,
354 F.3d 1072 (9th Cir. 2004) 13

Minier v. CIA,
88 F.3d 796 (9th Cir. 1996) 19

National Commission on Law Enforcement and Social Justice v. CIA,
576 F.2d 1373 (9th Cir. 1978) 19, 20

National Wildlife Federation v. Forest Service,
861 F.2d 1114 (9th Cir. 1988) 45

Nixon v. Adm'r of General Services
433 U.S. 425 (1977) 40, 41

Nixon v. Freeman,
670 F.2d 346 (D.C. Cir. 1982) 40

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 32, 33

Playboy Enterprises, Inc. v. Dep't of Justice,
677 F.2d 931 (D.C. Cir. 1982) 45

Powell v. United States Dep't of Justice,
584 F. Supp. 1508 (N.D. Cal. 1984) 45

Rosenfeld v. Dep't of Justice,
57 F.3d 803 (9th Cir. 1995) 29

Ryan v. Dep't of Justice,
617 F.2d 781 (D.C. Cir. 1980) 34, 35

United States v. Nixon,
418 U.S. 683 (1974) 33

Vaughn v. Rosen,
484 F.2d 820 (D.C. Cir. 1973) 15

Wiener v. FBI,
943 F.2d 972 (9th Cir. 1991) .... passim

Statutes

28 U.S.C.A. § 1291 (West 1993) 1

28 U.S.C.A. § 1331 (West 1993) 1

44 U.S.C.A. § 2204(c)(1) (West 1991) 41

5 U.S.C.A. § 551(1) (West 1996) 37

5 U.S.C.A. § 552(a)(4)(B) (West 1996 & Supp. 2005) 1

5 U.S.C.A. § 552(b)(1) (West 1996) 25

5 U.S.C.A. § 552(b)(3) (West 1996) 16

5 U.S.C.A. § 701-706 (West 1996) 1

50 U.S.C.A. § 403(c)(7) (West 2003) 16

50 U.S.C.A. § 431 (West 2003 & Supp. 2005) 22

68 Fed. Reg. at 15331 § 6.1(r) 26

Fed. R. Civ. Proc. 54(b) 1

I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Appellant Professor Larry Berman's ("Berman") Freedom of Information Act ("FOIA") action pursuant to 5 U.S.C.A. § 552(a)(4)(B) (West 1996 & Supp. 2005), 5 U.S.C.A. § 701-706 (West 1996), and 28 U.S.C.A. § 1331 (West 1993). The District Court granted Appellee Central Intelligence Agency's ("CIA") motion for summary judgment, denied Berman's cross-motion for summary judgment and entered judgment in accordance with its decision. (Excerpts of Record ("ER") 0356-67 (hereinafter citations to Berman v. CIA, 378 F. Supp. 2d 1209 (E.D. Cal. 2005); 0368.) The District Court's Order and Judgment are final pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C.A. § 1291 (West 1993) and this Court's jurisdiction over this appeal is proper pursuant to § 1291. The District Court's Order and Judgment were entered July 12, 2005. (Id.) Berman's notice of appeal was filed on September 9, 2005, and is timely. Fed. R. App. P. 4(a)(1)(B). (ER 0369.)

II. STATEMENT OF ISSUES

1. Whether under FOIA's Exemption 3 the CIA's showing was sufficient to establish that disclosure of two, nearly 40-year-old President's Daily Briefs ("PDBs") would reveal an intelligence source or method sufficient to justify withholding every word of the PDBs?

2. Whether under FOIA's Exemption 1 the CIA's showing was sufficient to establish that disclosure of two, nearly 40-year-old PDBs would harm national security such that no word of the PDBs, regardless of their age or content, can be disclosed?

3. Whether substantial deference should be given to the CIA's boilerplate national security claims – including that not one word of the nearly 40-year-old PDBs can be disclosed without exposing the existence of a method or source or causing harm to national security – in light of the public release of 35 other PDBs, a pattern of verbatim, same-day intelligence being released through another high-level intelligence product, and the thousands of publicly accessible documents reflecting President Johnson's foreign policy deliberations contradicting those claims?

4. Whether under FOIA's Exemption 5 a non-advisory communication from the CIA to the President is protected from disclosure under the presidential communications privilege, and, if so: (1) whether such communication satisfies the "inter-agency" prong of Exemption 5; (2) whether the CIA had standing to assert the privilege on the President's behalf absent any indication he so desired the privilege to be asserted; and, (3) whether nearly 40 years later, the PDBs would not normally or routinely be subject to disclosure in civil discovery?

5. Whether under FOIA's Exemption 5 the CIA's showing was sufficient to establish that the PDBs were protected by the deliberative process privilege?

III. STATEMENT OF THE CASE

This FOIA case involves access to two President's Daily Briefs prepared by the CIA for President Lyndon B. Johnson on August 6, 1965 and April 2, 1968.[1] (Court Record ("CR") at 1.) The PDB is a finished intelligence product of the CIA containing factual information on events around the world, presented to the President and other executive branch officials for their consideration. (ER 0018, ¶ 38 (CIA declarant describing PDBs as "finished intelligence"); 0068; 0041, ¶ 4; see also ER 0006, ¶ 16.)

Berman is a noted historian of the American presidency and the Vietnam war, and a tenured Professor of Political Science at the University of California, Davis. (ER 0333-32, ¶¶ 1-3.) Berman sought access to the PDBs by making a FOIA request to the CIA. The CIA denied his request, asserting FOIA exemptions (b)(1)(national security)("Exemption 1"), (b)(3)(intelligence methods and sources)("Exemption 3") and (b)(5) (deliberative process)("Exemption 5"). (ER

[1] The CIA stated that no PDB was produced for March 31, 1968. Thus, this appeal only involves the PDBs dated August 6, 1965 and April 2, 1968. (CR 8, n 1 at p. 2.)

0337, ¶ 15.) After exhausting his administrative appeals, Berman filed this action. (ER 0338, ¶ 16; CR 1.)

The parties filed cross-motions for summary judgment. (CR 13 & 20.) The District Court granted summary judgment in favor of the CIA on its Exemption 3 and Exemption 5 claims, holding under this latter claim that the documents were protected from disclosure under the presidential communications privilege. Berman, 378 F. Supp. 2d at 1222. The District Court did not rule on the CIA's Exemption 1 claim or its Exemption 5 deliberative process claim. Id. at 1221 n.4 & 1222 n.9. Without even reviewing the PDBs in question, the District Court also found that any non-exempt portions of the PDBs could not be segregated and released. Id. at 1222.

IV. SUMMARY OF THE FACTS

A. Nature of the President's Daily Brief

The PDBs created for President Johnson contain summarized reports on international developments assembled from various sources, such as satellite photographs, signal intercepts, individual recruits, published and transcribed news accounts of foreign events, public comments by foreign leaders and other dignitaries, and other publicly available information.[2] (ER 0041, ¶ 4; 0043, ¶ 4;

[2] Approximately 40 percent of the items covered in the PDBs are addressed in newspapers. (ER at 0085; 0332 (Former President Bill Clinton was reported by the Washington Post to have made similar observations about the PDBs he reviewed).)

0068.) The PDBs created for President Johnson reported only facts and not recommendations to the President. (ER 0068; see also ER 0041, ¶ 5.)[3] Nor was a briefer from the CIA physically present when President Johnson read the PDBs. (ER 0077; CR 26 (Ex. 19 to Berman Decl., ¶ 41) (August 6, 1965 President's Daily Diary reflects no visits from CIA personnel or a CIA briefer).)

B. Prior Releases of PDBs, and Verbatim or Similar Intelligence Information

At least 35 PDBs and President's Intelligence Checklist ("PICLs") (the predecessor to the PDB), or portions thereof, already have been released to the public in various forms, with redactions to protect sources and methods. (ER 0089-0119, 0135-0214; 0059-64, ¶¶ 7-30 (describing PDBs and PICLs and manner released.) Significantly, these include PDBs dated a day after (August 7, 1965) and a day before (April 1, 1968) the PDBs at issue here. (ER 0089-92 & 0094-97.) These also include two PDBs released by the CIA in redacted form during the very month that Berman filed this action and at a time when the CIA's sole declarant avers that he was responsible for authorizing such releases. (ER 0131-33 & 0134-36; ER 0001, ¶¶ 1 & 2.) These two PDBs differed from prior PDB releases only in that they were not published on CIA letterhead, but rather, were transmitted to President Johnson in cable-format. (Compare, e.g., ER 0131-33 & 0134-36 to

[3] Information on the CIA's website states that PDBs do not contain foreign policy recommendations, but instead are designed merely to report facts for the President's consideration. (ER 0068.)

0089-0092 & 0094-97.) The factual information in the publicly available PDBs and made part of the record, is representative of the type of information in the PDBs the CIA generated during the Johnson Administration. (ER 0041, ¶ 7; see also ER 0044, ¶ 8.)

In addition to the publicly available PDBs and PICLs, several thousand Central Intelligence Bulletins ("CIBs") also have been released by the CIA in redacted form. (ER 0347, ¶ 45; 0065, ¶ 36; 0252-315 (five exemplar CIBs).) Like the PDBs, CIBs are top-level intelligence digests prepared by the CIA for the President and other senior executive branch officials. (Id.) Much of the same type of information contained in the PDBs during the Johnson Administration was contained in the CIBs. (ER 0041, ¶ 8.) Indeed, the CIBs often contain verbatim or near verbatim information as in the PDBs. For example, the May 16, 1967 PDB contains the following entry pertaining to Laos:

> Supplies brought to the North Vietnam-Laos border during late March and April are continuing to filter into Laos toward the Plaine des Jarres, **[Redacted]** inside Laos report that about 36 trucks a day – the highest rate in recent months – moved west along the route between 6 and 10 May. We still believe that this is a stockpiling operation in anticipation of the rainy season.

The corresponding declassified and publicly available CIB entry for Laos on that same day reads:

> Supplies brought to the North Vietnam-Laos border during late March and April are continuing to filter into Laos towards the Plaine des Jarres. **Trained observers** inside Laos report that about 36 trucks a day, the highest rate in recent months, moved west between 6 and 10 May. This activity along the principal route from North Vietnam still

> appears to be a stockpiling operation before the rainy season begins in northern Laos. [Redacted.] [Emphasis added.]

(Compare ER 0116 to 0258; compare also 0092 to 0271 (Cyprus entry); 0116-17 to 0258-59 (Egypt and Ecuador entries); 0096 to 0280 (South Vietnam entry).)

Furthermore, vast amounts of information, including over 5,000 hours of presidential tape recordings, presidential deliberations and CIA-generated intelligence reports and analysis, from the Johnson Administration and other administrations already is public. (ER 0344-48, ¶ 38-53; CR 26 (Exhs. 17-26 to Berman Decl.).) At the Johnson Presidential Library alone, there are publicly available National Security Files, which comprise the working files of Johnson's Special Assistants for National Security Affairs, files reflecting presidential deliberations during the Gulf of Tonkin attacks in 1964, the deployment of combat forces, as well as detailed notes and transcripts of 120 meetings Johnson had with his senior civilian and military advisors during 1967-1968. (ER 0344, ¶ 38; ER 0045-46, ¶¶ 12-15.) Much of this information has been available for several years and has been the subject of scholarly discourse and publications, without harm to national security. (ER at 0046, ¶ 15.)

Moreover, the Special Assistant to President Johnson, who regularly reviewed PDBs throughout his tenure with the President, and a former member of the CIA's own Historical Advisory Committee, agree that historic PDBs such as the two at issue here can be reviewed and redacted for release to the public without

harm to present day national security concerns or to the presidential deliberative process. (ER 0041, ¶ 9; ER 0043-44, ¶ 6.)

C. Berman's FOIA Request

Berman made his FOIA request on March 2, 2004, in connection with an ongoing scholarly project. (ER 0337; CR 1 (Ex. 2 to Berman Decl.).) The CIA denied this request under FOIA Exemptions 1, 3 and 5, claiming the PDBs were "inherently privileged, predecisional and deliberative material." (ER 0350.) Berman filed this action in December of 2004, after exhausting his administrative appeals. (CR 1.)

D. Summary Judgment Proceedings

The parties filed cross-motions for summary judgment. (CR 13 & 20.) As the sole evidentiary support for its motion, the CIA relied on declarations of a CIA information review officer, Terry Buroker, who had worked in this position for just over a year. (ER at 0001, ¶ 1.) Buroker's original declaration did not specifically discuss the content of the PDBs presented to President Johnson; rather, it described the creation and use of the PDBs in only general terms. (See, e.g., ER at 0006-08, ¶¶ 16-19.) Although the CIA supplemented the Buroker declaration, it too failed to address the use of the PDBs during President Johnson's Administration. (ER 0353-55.)

Following a motions hearing, the District Court granted summary judgment in favor of the CIA. Berman, 378 F. Supp. 2d at 1222. In holding that the PDBs

were exempt from disclosure under Exemption 3, the District Court accepted the CIA's contentions that: (1) the PDBs "contain information that could, by itself or with other information, expose the existence of specific intelligence sources and methods"; (2) the PDB itself is an intelligence method; and that, (3) if the requested PDBs were released, along with other PDBs released in the future, "patterns of applications of intelligence methods" would emerge. Id. at 1214-1215.

In ruling on the CIA's presidential privilege claim, the District Court held that the privilege attached to the PDBs and that communications to the President, who is not an agency under FOIA, nonetheless qualified as inter-agency or intra-agency memoranda. Id. at 1219-20. The District Court also held that the CIA had standing to assert the presidential privilege and that the passage of 37 and 40 years did not effect the application of the privilege. Id. at 1220-21. Lastly, the District Court found that any non-exempt portions of the PDBs were non-segregable from the exempt portions because: (1) the PDB itself is an intelligence method the release of any portion of which "necessarily constitutes information about the application of an intelligence method"; (2) any non-classified portions of the PDBs were part of "a mosaic of intelligence information that could provide damaging insight into how the CIA conducts its intelligence business"; and (3) documents

protected from disclosure under the presidential privilege are exempt in their entirety. Id. at 1222. Berman filed a timely notice of appeal. (ER at 0369.)

V. SUMMARY OF THE ARGUMENT

In a decision that is unprecedented in its scope, the District Court created a categorical, blanket exemption under FOIA for PDBs regardless of age or content, that even Congress has not seen fit to create. It did so by acquiescing in the sweeping and conclusory claims of the CIA that disclosure of any word of any PDB, no matter how innocuous or dated the content, could expose the already public process by which the CIA briefs the President through the PDB – a process that the CIA insists is itself a protected intelligence method. Berman, 378 F. Supp. 2d at 1222. The District Court's unprecedented interpretation of "intelligence methods" will dramatically expand the ability of intelligence agencies to withhold from disclosure entire intelligence products – a result never intended by Congress.

Along the way, the District Court applied the presidential communications privilege in such a broad manner that, if allowed to stand, virtually assures that important factual information given to the President will remain forever beyond the grasp of historians and the public. Id. at 1218-22. The Order's broad scope ignores the record before the District Court, which included evidence directly contradicting the broad claims of the CIA that no word of any PDB can be disclosed without

harm to national security, and makes new law despite the dearth of case law supporting its determinations.

Specifically, the District Court's Exemption 3 holding was not supported by the record, which consisted of only generalized statements about the theoretical consequence of disclosure of PDBs as a category of information. (ER 0001-39.) The CIA offered no explanation of how disclosure of the two requested PDBs could lead to the harm claimed. Instead, the CIA offered two theories. First, that the PDB itself is a protected intelligence method. (ER 0017, ¶ 35.) This theory is legally untenable since the CIA's use of the PDB already is publicly known and officially acknowledged, and adoption of this expansive theory would greatly and unnecessarily expand the government's ability to claim withholdings under Exemption 3, in violation of FOIA's narrow construction rule. (ER at 0006-11, ¶¶ 16-25; 0068; 0071-87.) Moreover, this theory is not supported by any showing that the two requested PDBs in any way reveal the process by which the CIA briefed President Johnson or any related feedback he may have provided. (ER at 0001-39.) The CIA's second theory was that disclosure of even innocuous portions of the requested PDBs, combined with other potential releases in the future, would reveal a mosaic of intelligence information to enemies of the United States. (ER at 0018-19, ¶¶ 26-28 & 38-40.) Yet, just how the release of the dated PDBs in question would logically lead to this result was left unexplained by the CIA, which

has overseen the public release of 35 other PDBs and PICLs, without incident. (ER 0089-0119, 0135-0214; 0059-64, ¶¶ 7-30.) More should be required before any court accepts this indirect and near-impenetrable approach to establishing an Exemption 3 claim.

The District Court's Exemption 5 holding was similarly flawed. The District Court offered no analysis to support its sweeping conclusion that non-advisory communications between the President and the CIA are privileged. Berman, 378 F. Supp. 2d at 1219. Separately, the District Court's expansive, extra-textual interpretation of Exemption 5's "inter-agency or intra-agency" requirement as encompassing agency communications with the President, a non-agency under FOIA, was legally unsupported and in contravention of FOIA's narrow construction rule. Id. at 1219-20. Additionally, the District Court's determination that the CIA could on its own, independently assert the presidential privilege was error, as was its determination that the passage of 37 and 40 years had no effect on the application of the privilege. Id. at 1220-21.

For all these reasons, and because the CIA's other claims of exemption not addressed by the District Court are similarly deficient, this Court should reverse the District Court's Order and enter summary judgment in favor of Berman.

VI. ARGUMENT

A. Standard of Review

Ordinarily, summary judgments are reviewed de novo. Assembly of the State of Cal. v. Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992). In FOIA actions, however, the record typically is not in dispute given that the government holds all the facts and "the document says whatever it says." Id. at 919. Because of this unusual posture, review of summary judgment in a FOIA case involves a two step process. First, the Court determines whether the district court had an adequate factual basis for its decision. Lion Raisins Inc. v. United States Dep't of Agriculture, 354 F.3d 1072, 1078 (9th Cir. 2004). Whether a particular set of documents gives the court an adequate factual basis for its decision is a question of law that the Court reviews *de novo*. Id.; Wiener v. FBI, 943 F.2d 972, 978 (9th Cir. 1991).

Assuming the facial sufficiency of the government affidavits, the second step is to review the district court's decision itself as to whether an exemption applies to a particular undisputed set of facts. Lion Raisin Inc., 354 F.3d at 1078. Decisions which turn mainly on a district court's findings of fact are reviewed under the clearly erroneous standard. Id. Decisions which turn on "the district court's interpretation of law" are reviewed de novo. Id.

Applied here, the standard of review for determining the sufficiency of the CIA's Exemption 3 claim (section B(2) below) is de novo. Whether the record

presented by Berman contradicted the national security claims of the CIA such that substantial deference should not been afforded those claims (section C below) also should be reviewed de novo. This is so because unlike in the typical FOIA case, involving an undisputed record of government affidavits or an in camera review of the documents by the district court, in this case Berman presented a record that specifically contradicts the sweeping national security claims of the CIA. Thus, whether, in light of this record, substantial deference should be afforded the CIA's claims also should be reviewed de novo. Under these circumstances, no reason exists to deprive Berman of the standard of review afforded other summary judgment litigants.

Because the District Court's holding on the presidential privilege claim turned mainly on its application of the law, this aspect of the District Court's Order also should be reviewed de novo (section D below). Lastly, while the District Court did not rule on the CIA's Exemption 1 and Exemption 5 deliberative process claims, these issues were fully briefed below and further delay through remand would unnecessarily frustrate Berman's effort to obtain historic documents. See Ryan v. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980) (reaching Exemption 5 deliberative process claim though district court did not decide this issue). Thus review of these claims is appropriate.

B. The CIA's National Security Exemption Claims Are Not Supported By The Record

1. The Withholding Must be Justified by a Particularized Explanation of How Disclosure of the Particular Document, or Portion thereof, Would Damage the Claimed Interest

The CIA's showing fails to meet the de novo standard set forth in this Circuit in FOIA actions for judging the sufficiency of government affidavits. The CIA's declarations speak only in categorical terms and fail to explain how the requested documents would damage the protected interest. This is particularly notable because in FOIA actions, unlike most civil actions, only the government has access to all of the facts purportedly justifying the withholding of documents. "This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system." Wiener, 943 F.2d at 976 (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973)). Consequently, in FOIA cases, "the sufficiency of the agency's affidavits is of paramount import." Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State ("BALANAC"), 818 F. Supp. 1291, 1295 (N.D. Cal. 1992). Effective advocacy requires that agencies provide "'as much information as possible without thwarting the exemption's purpose.'" Wiener, 943 F.2d at 979 (citing King v. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987)).

In particular, agency declarations "must provide a relatively detailed justification, specifically identifying the reason why a particular exemption is relevant and correlating those claims with the particular part of a withheld

document to which they apply." BALANAC, 818 F. Supp. at 1296 (emphasis in original) (quoting King, 830 F.2d at 219). Though the CIA's declarations are to be accorded substantial weight in the context of national security exemptions, "deference is not the equivalent to acquiescence." Campbell v. Dep't of Justice, 164 F.3d 20, 30-31 (D.C. Cir. 1989) (rejecting agency declarations because they failed to draw a connection between the decision to withhold and a national security justification for withholding). Importantly, this Circuit has rejected as "clearly inadequate" the "categorical approach" indicating the "anticipated consequences of disclosure" when only "categorical description[s] of redacted material" are disclosed. Wiener, 943 F.2d at 979 (citing King, 830 F.2d at 224).

Applying these principles here, there can be no question that the Buroker declarations are wholly inadequate to support the CIA's national security exemptions.

2. The CIA's Declarations are Insufficient to Establish an Exemption 3 Claim

Under Exemption 3 of FOIA, the government may withhold documents if their withholding is authorized by another statute. 5 U.S.C.A. § 552(b)(3) (West 1996). The National Security Act ("NSA"), which provides that the Director of Central Intelligence ("DCI") is responsible for "protecting intelligence sources and methods from unauthorized disclosure" is such a statute. 50 U.S.C.A. §§ 403-3(c)(7) (West 2003); CIA v. Sims, 471 U.S. 159, 167 (1985). The burden of

proving the existence of the exemption, however, is on the government. BALANAC, 818 F. Supp. at 1295. And this exemption, like others under FOIA, must be narrowly construed. Id.

In upholding the CIA's Exemption 3 claim, the District Court relied on three contentions advanced by the CIA through the original Buroker declaration, none of which were set forth with sufficient detail to allow Berman to contest the CIA's bald conclusions or sufficient to support the CIA's claim.

First, the CIA asserted that the PDBs "could" expose specific intelligence sources and methods. (ER at 0016, ¶ 34.). Yet, the Buroker declaration provided no information whatsoever about the content of the two PDBs at issue or how information in these two documents could lead to disclosure, directly or through a mosaic theory, of intelligence sources or methods. Contrary to the District Court's determination, the fact that the PDBs contain "'explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships'" does not explain how disclosure of the PDBs will reveal a source or method of collection. Id. at 1215 (quoting Buroker Decl., ¶ 34). Indeed, far from providing a "rationale" for the CIA's contention, as the District Court concluded, this assertion says nothing more than that the PDBs contain information that comes from foreign officials and, perhaps, foreign liaison relationships, a contention not disputed by Berman. Id. at 1216.

The insufficiency of the CIA's first contention is further highlighted when read in context with its very next statement: "Each of the Requested PDBs contain information specifically stating sensitive sources or methods of collection." (ER 0016, ¶ 34.) (Emphasis added.) The CIA makes its assertion in the alternative as if it has not yet determined which could be exposed by release, but goes on to define intelligence methods as including the PDB itself because the PDB is part of a process by which the CIA advises the President and his most senior advisors and which the CIA generally asserts includes presidential feedback concerning intelligence priorities. (ER 0017-18, ¶¶ 35, 37.) Thus, when read in context, at most, the Buroker declarations establish that disclosure of the requested PDBs would reveal a loosely defined method, the factual and legal sufficiency of which is addressed below.[4]

The Buroker declarations provide even less information than the affidavit rejected by this Court in Wiener, which claimed that "disclosure of [the withheld] portions reasonably could be expected to lead to identification of the source of information." Wiener, 943 F.2d at 983. Indeed, the insufficiency of the CIA's

[4] Examining the CIA's statements in context, it is clear that the CIA's contention is simply that the PDB itself is an intelligence method. Yet, by failing to analyze in any manner the facial sufficiency of the CIA's claims, the District Court erroneously concluded that the CIA presented "three specific ways in which the release of the requested PDBs will reveal intelligence sources and methods…." Berman, 378 F. Supp. 2d at 1216.

position is even more glaring when used to justify withholding every word in the two PDBs as compared to the three paragraphs at issue in Wiener. Id.

The CIA's showing is far from the mainstream of existing Ninth Circuit precedent. For example, in Wiener, the CIA justification for withholding portions of four documents was based on a CIA agent's affidavit discussing "each document separately." Id. at 983. Addressing specific information in the document sought, the affidavit identified that disclosure of two portions of the four documents would reveal codenames and another portion would reveal the location of a CIA installation outside of the United States, and how disclosure of these portions of the documents would compromise intelligence sources and methods. Id. No similar showing was made by the CIA here; indeed, no effort whatsoever was made to "tailor the explanation to the specific document withheld." Id. at 978-79. In another case, National Commission on Law Enforcement and Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978), the CIA provided affidavits that "contained detailed information," explaining that the requested document was "two pages with attachment," "contains the name of a CIA employee," had an attachment of the Foreign Intelligence Subcommittee's meeting minutes, devoted "seven of 13 paragraphs" to the deliberations described, and that the attachment "also contains the names of Agency employees." Id. at 1377 n.6; see also Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (where CIA declaration explained harm from disclosure

of identities of CIA personnel, statutorily exempt from disclosure as a source or method). In contrast to the fact-heavy and specific CIA affidavits presented in these cases, the Buroker declarations are glaringly deficient.

Because the CIA's showing provides no factual basis upon which Berman can contest the CIA's assertions, its proof in this regard should be deemed insufficient.

The CIA's second contention is that the PDB itself is an intelligence method because it is part of a process by which the CIA advises the President and by which the CIA receives feedback concerning intelligence priorities. (ER 0017-18, ¶¶ 35-37.) The District Court's acceptance of this theory was legally and factually unsupported.

Without analysis, the District Court observed that "the PDB is no less an intelligence method than the CIA budget, which has been held exempt from disclosure as an intelligence method. See Aftergood v. CIA, 355 F. Supp. 2d 557, 562 (D.D.C. 2005)." Berman, 378 F. Supp. 2d at 1215. Even assuming the Aftergood decision was correctly decided and should be adopted by this Circuit, it does not support this sweeping proposition and, in any event, is distinguishable. The request in Aftergood involved a discrete type of intelligence information – historical intelligence budgets. The court held that the CIA's affidavit was sufficient because disclosure of the requested budget information would itself

reveal other "classified intelligence methods used to transfer funds to and between intelligence agencies." Id. at 561-62. As the then-acting DCI 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." Id. at 562 (emphasis added). Thus, far from holding that historical budget information itself is an intelligence method, the court's decision was predicated on the concern that disclosure of the budgets would disclose other, congressionally enabled intelligence methods – a contention that the CIA cannot and does not make here.

More fundamentally, there is a clear distinction between the methods of secretly funding clandestine intelligence activities and the already publicly known process of informing the President about the results of those intelligence activities. (ER at 0006-11, ¶¶ 16-25; 0068; 0071-87.) While the former is integral to intelligence collection activities and its disclosure necessarily would reveal the collection methods funded, the process by which the CIA briefs the President through use of the PDB does not necessarily reveal the collection methods employed by the CIA in providing that information. Furthermore, unlike the classified methods of transferring funds at issue in Aftergood, the process by which the CIA briefs the President through the PDBs (the supposed "method" at issue) is

already officially acknowledged by the CIA and publicly known, facts completely ignored by the District Court. (ER at 0006-11, ¶¶ 16-25; 0068; 0071-87.)

The District Court's holding creates a categorical exemption for PDBs, regardless of age or content, that Congress itself has not seen fit to adopt and which is not supported by case law. Compare 50 U.S.C.A. § 431 (West 2003 & Supp. 2005) (exempting CIA operational files from FOIA). More troubling, by permitting the CIA to treat its intelligence product as an "intelligence method," the District Court allows the agency to exempt as a "method" most any process used by the CIA regardless of its connection to intelligence gathering. Given the agency's ability to readily protect national security information from disclosure under Exemption 1 of FOIA, with the attendant safeguards for asserting such claims, such an expansive reading of "intelligence methods" under the NSA should not be countenanced by this Court.

Even if the PDB process described by the Buroker declaration is a method within the meaning of the NSA, the CIA does not claim that this process was in effect during the Johnson Administration; nor does it explain how disclosure of the two requested PDBs would in any manner reveal this process. (ER 0017-18, ¶¶ 35-37.) Because the CIA makes no attempt to connect the supposed consequence of disclosure to the two PDBs at issue here, this statement must be deemed insufficient to allow for effective advocacy.

The third contention made by the CIA is that no word of any PDB can be revealed because releasing such information would cause "patterns of applications of intelligence methods including those by which the U.S. sets priorities, collects intelligence, and analyzes it [to] emerge." (ER 0018, ¶ 38.) Like its first two contentions, this boilerplate statement says nothing specific about the two PDBs sought or whether the specific information contained in them could lead to the disclosure of an intelligence source or method. See Wiener, 943 F.2d at 981 (failure to state "specific harms which may result from the release of a particular document" and instead stating "generalized, theoretical discussion of possible harms which can result from the release of this category of information" held insufficient). What is meant by this statement is further obscured when in the immediately proceeding paragraph the CIA concludes that since the PDB is itself an intelligence method, it necessarily follows that "any PDB information . . . constitutes information about the application of an intelligence method." (Id.,¶ 37.)

Again, the CIA's showing falls well outside the mainstream of existing FOIA precedent and, particularly, those cases in which the mosaic theory was raised. Chief among these is the U.S. Supreme Court decision in Sims, 471 U.S. 159. Sims involved a request for the institutional affiliations of the researchers who worked on CIA-financed research projects established to counter Soviet and Chinese advances in brainwashing and interrogation techniques. Id. at 161-62.

There, relying on a mosaic theory, the Court held that the DCI "reasonably concluded that an observer who is knowledgeable about a particular intelligence research project, like MKULTRA, could, upon learning that research was performed at a certain institution, often deduce the identities of the individual researchers who are protected 'intelligence sources.'" Id. at 179-80. Given the focused nature of the particular research project and limited qualified researchers at each institution, it is within reason that the DCI's explanation was sufficient for the Court to review the merits of the CIA's contentions. Nothing more was needed to challenge the statement.

Similarly, the affidavits submitted in camera by the CIA in Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992), where the Court upheld the CIA's refusal to confirm or deny the existence of certain documents, explained that disclosure of documents relating to a particular individual was tantamount to verifying whether the individual was a source or intelligence target. And, in Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990), the withholding of generally known methods under a mosaic theory was supported by affidavits of the DCI, submitted in camera, that provided "specific explanations for individual groupings of documents which relate to a common theme, e.g., a particular operation in a foreign country, a particular CIA intelligence capability, or a particular individual who assisted the agency." Fitzgibbon v. CIA, 578 F. Supp. 704, 722 (D.D.C. 1983).

In stark contrast to this authority, the CIA did not explain its mosaic theory, or any of its claims of exemptions, in relation to any specific items contained within the two PDBs in question. Instead, the CIA asserted only theoretical harms that could result from disclosure of bits and pieces of information contained in PDBs generally as an intelligence product. Nor did the CIA explain why these theoretical harms did not come to pass when 35 other PDBs and PICLs were released by the agency. The CIA's conclusory assertions left Berman without a factual basis to contest the claims, and the District Court's contrary conclusion should be set aside.

In summary, the Buroker declarations are insufficient to establish that disclosure of the two PDBs at issue, in whole or in part, reveal intelligence sources or methods of intelligence gathering protected from disclosure under Exemption 3.

3. The CIA's Declarations are Insufficient to Establish an Exemption 1 Claim

While the District Court did not reach the CIA's Exemption 1 claim, the CIA's showing as to this claim was equally deficient. Under Exemption 1, the government may withhold documents or portions of documents if disclosure would be expected to cause damage to national security. 5 U.S.C.A. § 552(b)(1) (West 1996); Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 28, 2003) (attached to Addendum). To support an Exemption 1 claim, an agency affidavit must do the following:

> [F]or each redacted document or portion thereof, (1) identify the document, by type and location in the body of documents requested; (2) note that Exemption 1 is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and (5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

King, 830 F.2d at 224 (FBI affidavits asserting Exemption 1 deemed inadequate). Additionally, an Exemption 1 claim that is based on the national security implications caused by disclosure of confidential intelligence sources must be supported by 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 972; see also 68 Fed. Reg. at 15331 § 6.1(r)).

This Court's decision in Wiener, involving an almost identical invocation of Exemption 1, is instructive, if not dispositive. In Wiener, involving access to FBI records on John Lennon, the FBI stated in conclusory declarations that the release of the withheld documents would damage national security by leading to the disclosure of a confidential source. Id. at 980. This Court was skeptical of the government's failure to allege specific harms to national security that would result from the disclosure of the requested documents:

> This explanation leaves unanswered the following relevant questions, among others. Is it realistic to expect disclosure of a twenty year old investigation to reveal the existence of a current intelligence investigation? If so, why? Why is it reasonable to expect that the disclosure of documents from the investigation of John Lennon would reveal the objectives or priorities of current intelligence operations?

> Are the intelligence methods used in the investigation of John Lennon still used today, justifying continued secrecy?

Id. at 981 n.15. This Court rejected the agency's "generalized, theoretical discussion of the possible harms which can result from the release of this category of information." Id. at 981. The Court found the agency's "boilerplate explanations" insufficient under FOIA because they provided plaintiff with "little or no opportunity to argue for release of particular documents" or failed to provide the court with "an opportunity to intelligently judge the contest." Id. at 979.

Like the government affidavits in Wiener, replete with boilerplate language, the Buroker declarations fall far short of providing the required descriptions of how the disclosure of the two, nearly 40-year-old PDBs would threaten current national security. For instance, the CIA fails to state whether specific sources are even identified in the PDBs, let alone "whether the source [if there is one] is still useful as an informant, or even alive." Id. at 981 n.14. Similarly, with respect to foreign government information, the CIA claims that, "[i]nformation provided to the CIA by the intelligence services of foreign countries with which the CIA maintains a liaison relationship is provided only upon a guarantee of absolute secrecy." (ER 0025, ¶ 51.) This assertion, stated in the present tense and apparently relating to foreign countries with which the CIA presently maintains a liaison relationship, does not say that foreign government information contained in the two PDBs at issue was provided with an expectation that the information would

be held in confidence, let alone account for the many regimes that no longer exist 40 years later, after the end of the Cold War and after many intervening wars and political changes. The CIA goes on to recount the harms that could flow from exposure of liaison relationships, in general, without identifying specific harms that disclosure of any part of the two PDBs at issue here would cause. (Id., ¶ 52.)

The CIA's showing regarding the threat of disclosure of sources and methods is similarly deficient. As with the CIA's Exemption 3 claim, its Exemption 1 claim fails to state that an intelligence source (either an individual source or confidential liaison relationship source) is even revealed in the two requested PDBs. Instead, the CIA states, "[t]he Requested PDBs each contain references to intelligence obtained from individual human sources and from confidential liaison relationships." (ER 0026-27, ¶ 54.) That the PDBs contain information from sources is not disputed. However, this is not sufficient to establish an Exemption 1 claim, given that all CIA intelligence products are derived from source material. And, while the CIA does state that disclosure of the two PDBs "would disclose specific intelligence methods," given the CIA's limitless definition of methods as including the PDBs themselves, this assertion too has little meaning. (ER 0029, ¶ 59.)

The CIA's blanket assertions followed by only generalized harms fail to provide sufficient detail for Berman "to argue for release of particular documents. .

. ." Wiener, 943 F.2d at 981; compare, Rosenfeld v. Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995) (government's affidavits "showed with particularity how disclosure might reveal the identity of an intelligence source"). Given the abstract mosaic theory on which the CIA's argument is premised, it was even more imperative that the record provide as detailed a public disclosure as possible to give B erman a meaningful opportunity to oppose the CIA's sweeping claims. Because the Buroker declarations failed to provide this level of specificity, this Court should independently reject the CIA's Exemption 1 claim.

C. Substantial Deference Should Not Be Given To The CIA's Declarations

The District Court should not have acquiesced in the CIA's claims in light of the contradictory record that Berman presented and the CIA failed to refute.

For example, Berman presented evidence that 35 PDBs and PICLs previously have been redacted for release to the public, including those from the day before and the day after the PDBs at issue. (ER 0089-92 & 0094-97; 0089-0119, 0135-0214; 0059-64, ¶¶ 7-30.) Indeed, Buroker himself authorized for release in redacted form two Johnson-era PDBs the very month Berman filed his FOIA complaint. (ER 0131-33 & 0134-36; ER 0001, ¶¶ 1 & 2.) Because the CIA's claim of harm was based on the PDB as an intelligence product generally, as opposed to any specific information in the two PDBs at issue, Buroker's own conduct directly contradicted the CIA's claims that no portion of the two PDBs can

be released without disclosing sources or methods, or causing grave harm to national security.[5] It simply cannot be right that the information in a PDB is subject to release so long as the information is not in the PDB format. The release of these two documents is strong evidence that the CIA's national security claims are false.

Moreover, that the PDBs at issue contain "information different from that contained in previous PDBs," a CIA claim credited by the District Court, is beside the point. Id. at 1216. This fact does not explain how, on the one hand, the CIA can authorize for disclosure in redacted form 35 PDBs and PICLS and, on the other hand, claim that no portion of the PDBs at issue – regardless of their content – can be released without exposing sources and methods, or harming national security.

The District Court disregarded in their entirety these prior disclosures, accepting, without any factual showing, the legal argument that only the DCI can decide when disclosure constitutes an acceptable risk. Berman, 378 F. Supp. 2d at 1217. But this argument should not have relieved the District Court from considering whether the evidence contradicted the claims asserted so as to require

[5] The District Court misinterpreted Berman's argument in this regard. Berman did not argue that the disclosure of previous PDBs and PICLs, including those authorized by Buroker, contradicted claims that disclosure of the PDBs at issue "could disclose any source or method not already disclosed." 378 F. Supp. 2d at 1216 (citing Reply at 4). Berman's very different argument was that given the CIA's prior judgments that PDBs can be declassified in redacted form and released to the public, Buroker's claim that no portion of the two requested PDBs can be released lacked credibility and underscored why the CIA's declarations were not entitled to any deference. (CR 31 at 4-5.)

more from the CIA than bald assertions. The District Court even overlooked Berman's evidence that former DCI George Tenet admitted that it is not the content of the PDBs that make them sensitive, it is the fact that they are briefed to the President, and that another former DCI, Robert Gates, caused to be published the contents of a PDB in a book following his departure from the agency. (ER 0216; 0163-165.) This uncontested evidence directly contradicts Buroker's claims that every word of the PDBs must be withheld to protect sources and methods, and, in light of this evidence, this Court should not give substantial deference to the CIA's claims.

In addition to the undisputed evidence that Berman offered regarding the public release of other PDBs, Berman also established that publicly available CIBs often disclosed verbatim, or near verbatim, intelligence information as contained in the same-day PDBs. (Compare ER 0116 to 0258; compare also 0092 to 0271 (Cyprus entry); 0116-17 to 0258-59 (Egypt and Ecuador entries); 0096 to 0280 (South Vietnam entry).) Rather than dispute this pattern of verbatim disclosures through the same-day CIBs, which were part of the record before the District Court, the CIA attempted to justify disclosures of the CIBs by distinguishing the two intelligence products. (ER 0354, ¶ 4.) But none of the justifications offered, such as that the PDBs contain "raw intelligence" while the CIBs do not, were shown to be true during the Johnson Administration. (Id.) Such specificity was

particularly important for effective advocacy here because review of the PDBs and CIBs available during the Johnson Administration does not support the CIA's distinctions; rather, it supports a determination that the two products were very similar both in their content and their presentation by various countries. That the CIBs may, in some instances, contain more information on more countries and have slightly wider distribution than the PDBs, does not sufficiently justify how the former can be released by the thousands while disclosure of any portion of the requested PDBs, according to the CIA, stands to cause the nation grave harm. The CIA's distinctions between the two products makes no sense when the content reported in each is identical. Again, it cannot be right that the information in a PDB is subject to release so long as the information is not in the PDB format.

In light of Berman's evidence, the Buroker declarations are not entitled to substantial deference.

D. The PDBs Do Not Fall Within Exemption 5's Protections

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. § 552(b)(5). The U.S. Supreme Court has held that this exemption 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). Under this exemption the CIA

asserted both the presidential communications privilege and the deliberative process privilege, neither of which applies here. (ER 0033-37, ¶¶ 68-76 (deliberative process); 0037, ¶ 77 (presidential privilege).)

1. The Presidential Communication Privilege does not Apply to the PDBs

The District Court ruled solely on the presidential privilege claim, holding that communications to the President, though not an agency under FOIA, are "inter-agency or intra-agency" memoranda. 378 F. Supp. 2d at 1219-20. The District Court also held that the CIA had standing to assert the presidential privilege and that the passage of 37 and 40 years did not effect the application of the privilege. Id. at 1220-21. Each of these determinations was wrongly decided.[6]

First, by stretching Exemption 5's "inter-agency or intra-agency" requirement beyond the text of the FOIA to include agency records submitted to a

[6] The District Court's ruling is unbounded. If followed, then any communication from an agency to the President would be covered by the privilege, a view that has never been endorsed by any court. Compare United States v. Nixon, 418 U.S. 683, 705-07 (1974)(recognizing President's generalized interests in confidentiality in "high-level communications" with chief White House advisors); see also In re Sealed Case, 121 F.3d 729, 744, 752(D.C. Cir. 1997)(holding privilege applies to communications between advisors and outsiders consulted by advisors and never conveyed to the President but only if advisors are members of White House staff); Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108 at 1114 (D.C. Cir. 2004)(rejecting expansion of presidential privilege to all documents prepared by those within Justice Department). Moreover, the Court did not differentiate at all between records that reveal presidential decisionmaking and all other records. Berman, 378 F. Supp. 2d at 1219. In the case of the requested PDBs, Berman's evidence showed that at the time of the PDBs in question the CIA's role is not advisory or recommendatory but one of providing factual information for the President's use in policymaking. (ER 0068.) 378 F. Supp. 2d at 1219. Compare Judicial Watch, 365 F.3d at 1114.

non-agency, the President,[7] the District Court deprived that exemption's first condition of "independent vitality," in contravention of the U.S. Supreme Court's decision in Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001). In Klamath, a unanimous Court held that communications between the Department of Justice and the Klamath Tribe were neither inter-agency nor intra-agency memoranda and, as such, the documents could not be withheld under Exemption 5. While recognizing the importance of candor to the deliberations at issue, the Court nevertheless emphasized that "[t]here is . . . no textual justification for draining the first condition of independent vitality." Id. at 12.

The District Court distinguished Klamath on its facts as not involving documents produced by an agency for the benefit of the President, as though this distinction abrogated the statute's necessary threshold determination. Id. at 1222 n. 10. The Court instead relied on Ryan v. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980), which involved agency-created questionnaires completed by U.S. Senators for use by the Department of Justice. The Senators in Ryan, however, were acting as "outside consultants" to aid in what were otherwise internal deliberations of the Department of Justice. Id. at 208. The outside consultant/inter-agency argument is inapposite here. Moreover, the continuing

[7] The CIA conceded that the Office of the President is not an agency under FOIA. (CR 28, p. 17.) Nor did the CIA argue that PDBs are intra-agency memoranda.

vitality of Ryan was specifically called into question in Klamath, which described Ryan as a decision that "arguably extends beyond what we have characterized as the typical examples" of Exemption 5. Klamath, 532 U.S. at 12 n.4.

A case that is more analogous here and which supports a narrow construction of Exemption 5's inter-agency/intra-agency requirement is Dow Jones v. Dep't of Justice, 917 F.2d 571 (D.C. Cir. 1990). There, the court held that a letter sent by the Department of Justice to the House Ethics Committee for that Committee's use in its deliberations was not an "inter-agency or intra-agency" document. In so holding, the court refused to extend the meaning of "inter-agency or intra-agency" to cover a document created by an agency for the use of an entity expressly excluded from FOIA's definition of agency, to wit, Congress. Importantly, the court rejected the same arguments advanced by the CIA and adopted by the District Court – that by exempting the President from the definition of "agency" under FOIA, Congress could not have intended to make presidential records accessible under FOIA. By so doing, the Dow Jones court properly refused to add a gloss on Exemption 5 that cannot be found in the text of FOIA. Id. at 574; compare 378 F. Supp. 2d at 1220.[8]

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[8] The Presidential Records Act ("PRA"), 44 U.S.C.A. § 2201-07, offers further support for this point. Although the PRA does not apply to presidential records before the Reagan Administration, under the PRA, after a maximum twelve-years following the expiration of a presidential term, records become subject to disclosure under the processes established in the FOIA. At that time, [Exemption 5 of FOIA] "shall not be available for purposes of withholding any Presidential record…." 44 U.S.C.A. § 2204(c)(1). Thus, under the PRA,

The District Court's reliance on EPA v. Mink, 410 U.S. 73 (1973), and Binion v. Dep't of Justice, 695 F.2d 1189 (9th Cir. 1983), was equally misplaced. Binion did not even involve documents "prepared for the President by the Office of Pardon Attorney," as the District Court stated. 378 F. Supp. 2d at 1220. Rather, Binion involved documents of the Pardon Attorney prepared for the Attorney General, together with FBI records used by the Pardon Attorney to investigate the plaintiff's pardon application. Binion, 695 F.2d at 1190-91. Even though the records were to support the presidential pardon function, the privilege simply does not extend to such records. See In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)(holding that the privilege for communications of presidential advisers "should not extend to staff outside the White House in executive branch

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"confidential communications requesting or submitting advice, between the President and his advisors . . . ." id. § 2204(a)(5), lose protection after 12 years. Given that Congress specifically addressed confidential communications in the PRA, it is clear that presidential records, by definition, could not possibly satisfy Exemption 5's requirement that records be "inter-agency or intra-agency." The PRA's legislative history on this point is unambiguous:

> [T]hese confidential [presidential] communications would be publicly made available . . . because the material falling within the scope of the [PRA's confidential communication provision], would not qualify as an agency record for protection under 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.

H. Rep. No. 95-1487, pt. 1, 14 (1978). Viewed against the backdrop of changes in the law concerning the President's status under FOIA, and Congress's express understanding of Exemption 5's non-applicability to records "received by the President," the District Court's rationale for disregarding Exemption 5's inter-agency and intra-agency requirements was clearly flawed.

agencies."). Mink, which involved a deliberative process claim not a presidential privilege claim, in no way addressed the issue of whether agency communications with the President, a non-agency, fell within Exemption 5's inter-agency or intra-agency requirement. Although the Mink Court did shield records addressed to the President, that was in 1973, one year before Congress amended FOIA to specifically define "agency." In 1973, neither the author of the Mink records – the National Security Coucil – nor the recipient of the records – the President – had been excluded from FOIA's coverage. Before 1974, the meaning of the term "agency" in the FOIA was understood to be the Administrative Procedure Act definition of "agency": any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C.A. § 551(1) (West 1996)). In 1974, Congress specifically defined "agency" under FOIA to exclude the "Office of the President." Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980) ("The legislative history [of the 1974 amendments] is unambiguous . . . in explaining that "Executive Office" does not include the Office of the President."). And in 1996, the NSC was determined to also fall within this exclusion from FOIA coverage. Armstrong v. Executive Office of the President, 90 F.3d 553, 567 (D.C. Cir. 1996). Thus, while perhaps properly decided at the time, the Mink suit today would not survive.

Because the PDBs are not inter-agency or intra-agency records and because the District Court's contrary determinations violated FOIA's narrow construction rule, the District Court's Exemption 5 determination should be reversed.

Second, the District Court erred in holding that the CIA has standing to invoke the presidential privilege. Lacking direct authority to support this proposition, the District Court relied on the unpublished district court decision of Lardner v. Dep't of Justice, 2005 WL 758267 (D.D.C. Mar. 31, 2005). Berman, 378 F. Supp. 2d at 1220. There, the district court held that under FOIA the President need not personally invoke the presidential communications privilege. Lardner, 2005 WL 758267 at 11. But that holding does not go to the threshold issue here of the CIA's standing, or lack thereof, to invoke the presidential privilege. Nor does the rationale for the holding in Lardner – wholly adopted by the District Court here – that "courts routinely accept declarations from an employee at the agency other than a high-level official as documentation of an Exemption 5 claim" – advance the District Court's determination. 378 F. Supp. 2d at 1221. That other employees within an agency may assert privileges under FOIA on behalf of the agency in which they work in no way supports a determination that covered agencies under FOIA may invoke executive privileges belonging to other agencies, let alone non-agencies such as the President. The potential conflicts of interest between the President, who may indeed desire disclosure, and

the agency advocating non-disclosure, standing alone, strongly inform against such a rule.

Similarly unconvincing is the District Court's burden argument, also adopted from Lardner, 2005 WL 758267 at 9-10. 378 F. Supp. 2d at 1220. The District Court reasoned, "Congress would not have intended to impose such a burden, given that it specifically intended the President and his immediate staff to be immune from FOIA requests." As explained above, this very rationale was rejected in Dow Jones, 917 F.2d at 574, as a basis to extend the Exemption's inter-agency or intra-agency requirement to Congress, a non-agency. It should be rejected here as well.

At the very least there should be some indication, whether direct or indirect, that the President believes continued confidentiality in the documents is necessary before the privilege is allowed to stand in litigation with a covered agency under FOIA. See, e.g., In re Sealed Case, 121 F.3d 729 (President Clinton directed White House counsel to invoke the privilege). This is especially important given that the presidential privilege, unlike the deliberative process privilege, bars disclosure of the entire communication regardless of its segregability. Id. at 745. A contrary rule would also force the assertion of privilege claims to avoid a waiver, resulting in unnecessary and increased withholding of public records.

Third, the District Court erred in a number of ways in determining that, even after the passage of 40 and 37 years, discovery of the PDBs would not normally be disallowed in civil discovery. 378 F. Supp. 2d at 1222-23. To begin with, the District Court placed the burden on Berman to show that the passage of time abrogated the privilege rather than requiring the CIA to show that under FOIA the privilege attached to these historical documents. Id. at 1222. While "no court has put a specific time limit on the privilege" [id. at 1221], it is equally true that no court has upheld the invocation of the privilege to documents even close to those as old as those at issue here. Indeed, the case law strongly suggests that no reasonable expectation of confidentiality can exist in presidential records as old as the PDBs here. See Nixon v. Adm'r of Gen. Services, 433 U.S. 425 (1977) (allowing for the transmission of Nixon's recordings to government archivists under the Presidential Recordings and Materials Preservation Act ("PRMPA"), over claim of presidential privilege, less than three years after Nixon left office); Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982) (upholding constitutionality of PRMPA and making Nixon's taped Oval Office conversations available to the general public eight years after Nixon left office). Indeed, in Nixon v. Adm'r of Gen. Services the Supreme Court noted Presidents' willingness to remove nearly all restrictions on their records over time and cautioned that the "expectation of the confidentiality of executive communications [] has always been limited and subject

to erosion over time after an administration leaves office." Id. at 450-51; id. n. 12 (emphasis added).

Similarly, the PRA's allowance of access to deliberative presidential records in accordance with FOIA after, at most, the twelve-year restricted period, supports a determination that there can be no expectation by the President or any of his advisors today that 40-year-old presidential records will remain confidential forever. 44 U.S.C.A. § 2204(c)(1) (West 1991). That Congress saw fit to allow disclosure of presidential records through the PRA, and disallow application of Exemption 5 to such disclosures, also calls into question the District Court's determination that the public's interest in "frank exchange between the leadership of the CIA and the President" overrides the public's interest in overseeing how the government is conducting the public's business. 378 F. Supp. 2d at 1221. If "frank exchange" is not legally paramount to the public's right of access to presidential records governed by the PRA, it is hard to understand how this rationale supports nondisclosure of even older, allegedly deliberative documents.

Lastly, the District Court failed to consider the effects of the passage of time in the context of the requested PDBs by, for example, explaining how their disclosure could compromise frank discussion today between the President and the CIA, especially in light of the PRA. This was particularly important given that the CIA already has authorized for release in redacted form 35 PDBs and PICLs,

including the ones from the day before and the day after the PDBs in question, and given the enormous amounts of documents reflecting high level presidential foreign policy deliberations already released or available from the Johnson and other presidential administrations. (See infra. p. 5-6.) Rather than analyzing the record in any manner, including the CIA's showing, or lack thereof, in this regard, the District Court's determination on the effects of the passage of time on the privilege turned entirely on the absence of case law compelling disclosure of presidential records after 40 years. 378 F. Supp. 2d at 1221. Under this logic, historical presidential records will be forever secret, even though contemporary presidential records will be publicly available. In short, the District Court's determination regarding the effects of the passage of time on the privilege was wrongly decided.

In summary, the District Court's expansive definition of "inter-agency," its holding that the CIA can assert the privilege absent any indication the President intends such an assertion and its determination that the passage of time had no effect on application of the privilege require reversal of its Order by this Court.

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

The CIA's evidence was insufficient to establish any element of the deliberative process privilege. (ER 0033-37, ¶¶ 68-76.) That privilege shelters "advisory opinions, recommendations and deliberations comprising part of a

process by which governmental decisions and policies are formulated." Carter v. Dep't of Commerce, 307 F.3d 1084, 1090-91 (9th Cir. 2002) (citing Klamath, 532 U.S. at 12). To fall within the privilege, the documents sought must be (1) inter-agency or intra-agency documents, (2) predecisional, and (3) part of the agency's deliberative or decision-making process. See 5 U.S.C.A. § 552(b)(5); see also Assembly of California v. Dep't of Justice, 968 F.2d 916, 920 (9th Cir. 1992)(en banc). As explained above, the PDBs are not inter-agency or intra-agency documents. Nor are they predecisional or deliberative.

This Circuit considers a document pre-decisional if it was prepared "in order to assist an agency decision-maker in arriving at his decision." Assembly of California, 968 F.2d at 921. Material loses its pre-decisional character if it is adopted, formally or informally, by the agency. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (explaining that pre-decisional documents "are those which would inaccurately reflect or prematurely disclose the views of an agency, suggesting as agency position that which is yet only a personal decision.").

The CIA does not dispute that the PDBs are final documents provided to the President, not draft documents circulated for brainstorming purposes, or drafts subject to later revisions. (CR 28, p. 23.) Instead, the CIA argues that the PDBs are a vehicle for "ongoing dialogue" between the CIA and the President. (ER

0035, ¶ 73.) But this "ongoing process" argument has been expressly rejected by this Circuit and others. See Assembly of California, 968 F.2d at 921("Any memorandum always will be 'predecisional' if referenced to a decision that possibly will be made at some undisclosed time in the future."); Coastal States Gas Corp., 617 F.2d at 868 (same). To extend the deliberative process privilege in this manner would necessarily shield virtually all government records from disclosure under the pretext that documents are predecisional because they are part of an ongoing process that may one day result in a decision.

The CIA's evidence also was insufficient to establish the third prong of the deliberative process privilege. This prong focuses on what information the deliberative process privilege intended to protect, that is, "advisory opinions, recommendations and deliberations." Carter v. Dep't of Commerce, 307 F.3d 1084, 1090-91 (9th Cir. 2002) (holding that adjusted census data was not deliberative and would not reveal any protected decision-making process). The deliberative privilege allows agencies to "explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Assembly of California, 968 F.2d at 920. The key inquiry is whether revealing the information requested exposes the deliberative process. Id. at 922.

In an attempt to fit the PDBs into this deliberative process prong, the CIA claims that, "[o]n occasion, information will also be provided in the PDB that

responds directly to questions from the President or one of his advisors." (ER 0035, ¶ 72.) However, this vague and generic allegation – made in a vacuum without reference any date, time, or subject matter, and certainly without reference to the requested PDBs – does not explain how disclosure of the PDBs at issue here will expose the CIA's deliberative process.

Having acknowledged the non-deliberative nature the PDBs, the CIA resorts to a claim that disclosure of facts in the PDBs would reveal the CIA's deliberative process by revealing what it thought to be important. (ER 0033, ¶ 69.) ("[d]etermining what information to include is the height of the deliberative process.")] This Circuit has rejected this very argument. National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988) (citing Playboy Enterprises, Inc. v. Dep't of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982)); see also Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1519 (N.D. Cal. 1984).

Because the CIA's evidence is insufficient to establish any prong of the deliberative process privilege, its withholding of the PDBs on this basis was not justified.

VII. CONCLUSION

The District Court's blanket, categorical exemption from disclosure under FOIA for historic PDBs cannot stand. The CIA's showing was insufficient to

support its claims of exemption and the District Court's sweeping legal rulings extending these exemptions beyond the text of FOIA are untenable. Therefore, the District Court's Order should be reversed and summary judgment entered in favor of Berman.

DATED: January 18, 2006.

Respectfully submitted,

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Duffy Carolan

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Counsel for Appellant,
Larry Berman

VIII. CERTIFICATE OF COMPLIANCE WITH FRAP 32

I hereby certify that Appellants' Opening 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 11,026 words.

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IX. STATEMENT OF RELATED CASES

There are no related case pending in this Court.

X. ADDENDUM

33. Ex parte communication

Congress enacted provisions of this subchapter and chapter 7 of this title, prohibiting ex parte communication to ensure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome. Raz Inland Navigation Co., Inc. v. I.C.C., C.A.9, 1980, 625 F.2d 258.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk

Federal Register

Friday,
March 28, 2003

Part III

The President

Executive Order 13292—Further Amendment to Executive Order 12958, as Amended, Classified National Security Information

Federal Register
Vol. 68, No. 60
Friday, March 28, 2003

Presidential Documents

Title 3—

The President

Executive Order 13292 of March 25, 2003

Further Amendment to Executive Order 12958, as Amended, Classified National Security Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to further amend Executive Order 12958, as amended, it is hereby ordered that Executive Order 12958 is amended to read as follows:

"Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security remains a priority.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Sec. 1.1. *Classification Standards.* (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(c) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

Sec. 1.2. *Classification Levels.* (a) Information may be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the

national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

Sec. 1.3. *Classification Authority.* (a) The authority to classify information originally may be exercised only by:

(1) the President and, in the performance of executive duties, the Vice President;

(2) agency heads and officials designated by the President in the **Federal Register**; and

(3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to paragraph (a)(2) of this section; or the senior agency official described in section 5.4(d) of this order, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position title.

(d) Original classification authorities must receive training in original classification as provided in this order and its implementing directives. Such training must include instruction on the proper safeguarding of classified information and of the criminal, civil, and administrative sanctions that may be brought against an individual who fails to protect classified information from unauthorized disclosure.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless it concerns:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or

(h) weapons of mass destruction.

Sec. 1.5. *Duration of Classification.* (a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. The date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years from the date of the original decision. All information classified under this section shall be subject to section 3.3 of this order if it is contained in records of permanent historical value under title 44, United States Code.

(c) An original classification authority may extend the duration of classification, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) Information marked for an indefinite duration of classification under predecessor orders, for example, marked as "Originating Agency's Determination Required," or information classified under predecessor orders that contains no declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6. *Identification and Markings.* (a) At the time of original classification, the following shall appear on the face of each classified document, or shall be applied to other classified media in an appropriate manner:

(1) one of the three classification levels defined in section 1.2 of this order;

(2) the identity, by name or personal identifier and position, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

- (A) the date or event for declassification, as prescribed in section 1.5(a) or section 1.5(c);
- (B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b); or
- (C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5 (b); and

(5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.

(b) Specific information described in paragraph (a) of this section may be excluded if it would reveal additional classified information.

(c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7. *Classification Prohibitions and Limitations.*

(a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security.

(b) Basic scientific research information not clearly related to the national security shall not be classified.

(c) Information may be reclassified after declassification and release to the public under proper authority only in accordance with the following conditions:

(1) the reclassification action is taken under the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of the national security;

(2) the information may be reasonably recovered; and

(3) the reclassification action is reported promptly to the Director of the Information Security Oversight Office.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with

has occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2), or (3) of this section occurs.

PART 6—GENERAL PROVISIONS

Sec. 6.1. *Definitions.* For purposes of this order:

(a) "Access" means the ability or opportunity to gain knowledge of classified information.

(b) "Agency" means any "Executive agency," as defined in 5 U.S.C. 105; any "Military department" as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

(c) "Automated information system" means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(d) "Automatic declassification" means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority; or

(2) the expiration of a maximum time frame for duration of classification established under this order.

(e) "Classification" means the act or process by which information is determined to be classified information.

(f) "Classification guidance" means any instruction or source that prescribes the classification of specific information.

(g) "Classification guide" means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(h) "Classified national security information" or "classified information" means information that has been determined pursuant to this order or any

predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(i) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(j) "Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

(k) "Declassification" means the authorized change in the status of information from classified information to unclassified information.

(l) "Declassification authority" means:

(1) the official who authorized the original classification, if that official is still serving in the same position;

(2) the originator's current successor in function;

(3) a supervisory official of either; or

(4) officials delegated declassification authority in writing by the agency head or the senior agency official.

(m) "Declassification guide" means written instructions issued by a declassification authority that describes the elements of information regarding a specific subject that may be declassified and the elements that must remain classified.

(n) "Derivative classification" means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(o) "Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(p) "Downgrading" means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(q) "File series" means file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

(r) "Foreign government information" means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as "foreign government information" under the terms of a predecessor order.

(s) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that

is owned by, produced by or for, or is under the control of the United States Government. "Control" means the authority of the agency that originates information, or its successor in function, to regulate access to the information.

(t) "Infraction" means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not constitute a "violation," as defined below.

(u) "Integral file block" means a distinct component of a file series, as defined in this section, that should be maintained as a separate unit in order to ensure the integrity of the records. An integral file block may consist of a set of records covering either a specific topic or a range of time such as presidential administration or a 5-year retirement schedule within a specific file series that is retired from active use as a group.

(v) "Integrity" means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(w) "Mandatory declassification review" means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.5 of this order.

(x) "Multiple sources" means two or more source documents, classification guides, or a combination of both.

(y) "National security" means the national defense or foreign relations of the United States.

(z) "Need-to-know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(aa) "Network" means a system of two or more computers that can exchange data or information.

(bb) "Original classification" means an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure.

(cc) "Original classification authority" means an individual authorized in writing, either by the President, the Vice President in the performance of executive duties, or by agency heads or other officials designated by the President, to classify information in the first instance.

(dd) "Records" means the records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code, including those created or maintained by a government contractor, licensee, certificate holder, or grantee that are subject to the sponsoring agency's control under the terms of the contract, license, certificate, or grant.

(ee) "Records having permanent historical value" means Presidential papers or Presidential records and the records of an agency that the Archivist has determined should be maintained permanently in accordance with title 44, United States Code.

(ff) "Records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

(gg) "Safeguarding" means measures and controls that are prescribed to protect classified information.

(hh) "Self-inspection" means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the

implementation of the program established under this order and its implementing directives.

(ii) "Senior agency official" means the official designated by the agency head under section 5.4(d) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(jj) "Source document" means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(kk) "Special access program" means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

(ll) "Systematic declassification review" means the review for declassification of classified information contained in records that have been determined by the Archivist to have permanent historical value in accordance with title 44, United States Code.

(mm) "Telecommunications" means the preparation, transmission, or communication of information by electronic means.

(nn) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

(oo) "Violation" means:

(1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;

(2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or

(3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(pp) "Weapons of mass destruction" means chemical, biological, radiological, and nuclear weapons.

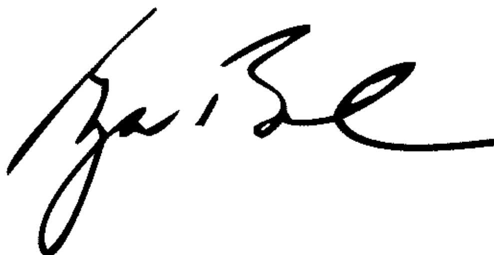
Sec. 6.2. *General Provisions.* (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(c) Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution, Freedom of Information Act exemptions, the Privacy Act of 1974, and the National Security Act of 1947, as amended. This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, officers, employees, or agents. The foregoing is in addition to the specific provisos set forth in sections 3.1(b) and 5.3(e) of this order."

(d) Executive Order 12356 of April 6, 1982, was revoked as of October 14, 1995.

Sec. 6.3. *Effective Date.* This order is effective immediately, except for section 1.6, which shall become effective 180 days from the date of this order.



THE WHITE HOUSE,
March 25, 2003.

[FR Doc. 03–7736
Filed 3–27–03; 9:17 am]
Billing code 3195–01–P

Proof of Service

I, Dann R. Rhone, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is One Embarcadero Center, Suite 600 San Francisco, California 94111.

I caused to be served the following document:

APPELLANT'S OPENING BRIEF; EXCERPTS OF RECORD

I caused the above document (s) to be served on each person on the attached list by the following means:

☒ **I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on January 18, 2006, following the ordinary business practice.**
(Indicated on the attached address list by an* [M] *next to the address.)

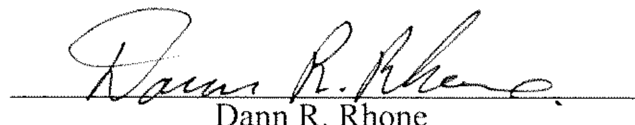
☑ **I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on January 18, 2006, for guaranteed delivery on January 19, 2006, following the ordinary business practice.**
(Indicated on the attached address list by an* [FD] *next to the address.)

☐ I consigned a true and correct copy of said document for facsimile transmission on ____________.
(Indicated on the attached address list by an [F] *next to the address.)*

☐ I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery by messenger on ____________.
(Indicated on the attached address list by an [H] *next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on January 18, 2006, at San Francisco, California.



Dann R. Rhone

Service List

Key: [M]	Delivery by Mail	[FD]	Delivery by Federal Express	[H]	Delivery by Hand
[F]	Delivery by Facsimile	[FM]	Delivery by Facsimile and Mail	[C]	Delivery by Certified Mail

[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
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[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	*Appearing Pro Hac Vice* 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	