

SECURITY

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UCD prof hits wall of security decades-old

Request for papers from Johnson years denied by CIA, courts

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When UC Davis professor Larry Berman requested four aging CIA briefings from the administration of President Lyndon B. Johnson, he wasn't looking for any smoking guns or shadowy conspiracies. Berman, a historian, author and political science professor, was simply doing what he does best — historical research of the Vietnam War era.

Berman's seemingly routine 2004 request under the Freedom of Information Act, however, has since led him on a nearly two-year odyssey through the CIA bureaucracy, Eastern District Federal Court and, finally, to the United States Ninth Circuit Court of Appeal.

The journey is far from over.

Berman, author of "Lyndon Johnson's War: The Road to Stalemate in Vietnam" and "No Peace, No Honor: Nixon, Kissinger and Betrayal in Vietnam," initially asked the CIA for copies of the President's Daily Brief for Aug. 6, 1965, Aug. 8, 1965, March 31, 1968 and April 2, 1968.

According to federal court documents, the CIA declined to release the briefs, responding that "the President's Daily Brief (PDB) contains inherently privileged, pre-decisional and deliberative material for the president and also requires withholding on this basis."

Berman was surprised that the decades-old documents could still hold critically important privileged information in 2004.

"I was using all of my legal rights as a researcher and I believed that there is no smoking gun, nothing in this PDB, that is going to be a startling revelation," Berman told The Vacaville Reporter, adding that many presidential briefs have been declassified and released by various sources in the past.

Berman eventually appealed the first rejection and was turned down again. Alan



Karen Akerson/UC Davis

UC Davis professor Larry Berman has requested four aging CIA briefings from the Johnson Administration but been denied for reasons of national security.

W. Tate, acting information and privacy coordinator for the CIA, informed Berman that he had a right to seek judicial review of the decision in a federal district court.

In December 2004, Berman did so, represented by the San Francisco law firm of Davis Wright Tremaine in a suit against the CIA asking for declaratory and injunctive relief for violation of the Freedom of Information Act.

In the suit, Berman argued that the "requested PDBs largely consist of factual information that was publicly available from news reports at the time, intelligence reports and other information that nearly four decades later can no longer reasonably be considered sensitive for national security concerns."

Berman has repeatedly said he had no intention of publishing anything that would affect national security or endanger CIA personnel.

"These PDBs should be evaluated on an individual basis, and if they don't pose a threat to the current security interests of the country or a threat to the safety of government intelligence operatives, they should be released for history," Berman said.

In his suit, Berman also pointed out that considerably more recent PDBs have been released. In 2004, the historian noted, President George W. Bush declassified and released excerpts of PDBs for Dec. 4, 1998 and Aug. 6, 2001 to the National Commission on Terrorists Attacks Upon the United States.

The case was heard by U.S. District Judge David Levi and Berman's request for freedom of Information Act access to the Johnson-era PDBs again was rejected, this time in a ruling that Berman feels could have far-reaching and chilling effects upon future research efforts.

Judge Levi ruled that all such briefs could be withheld because they're untouchable due to a blanket presidential privilege for confidential communications.

Judge Levi also ruled that the PDBs should be withheld because, in themselves, they could reveal protected intelligence methods.

Berman said the district court ruling was more stunning than the CIA's repeated refusals to release the PDBs in any form.

"I think that the district court and its decision have gone further than anything to date," Berman said.

Berman has now narrowed his Freedom of Information Act request to two presidential briefing documents — those for March 31, 1968 and April 2, 1968 — and has taken the case for disclosure to the Ninth District Court of Appeal.

In doing so, Berman said he's more concerned with the chilling effect Judge Levi's ruling could have on legitimate historical inquiry than he is with the research work he was doing at the time of the request.

"We are now in an era of great secrecy with the government trying to maintain control of the intelligence area," Berman said. "This lawsuit is actually about the ability of future historians and researchers to gain information, whether it's about Vietnam or Iraq or wherever we have made decisions."

Some of Berman's fears are evidenced in a recent report from the National Security Archive — a non-governmental research institute and library in Washington, D.C. — in which it was revealed that the CIA and other federal agencies were in the process of reclassifying more than 55,000 pages of previously declassified documents that had readily been

available to the public for years.

According to Matthew Aid, a visiting fellow at the archive, the secret process of reclassifying documents — many of them already published — began in 1999.

Berman's suit in the Ninth District Court of Appeal has drawn support from a broad spectrum of respected historical organizations that filed an amici curiae ("friends of the court") brief in the case.

Organizations weighing in for the Davis professor include the American Historical Association, Society of American Archivists and the Society for Historians of American Foreign Relations.

In an introduction to their brief, the groups noted that "The amici have no interest in the disclosure of materials that could threaten the national security or endanger sensitive intelligence sources or methods. The PDBs, however, provide a vital historical record of what issues were important to President Johnson and what information President Johnson consulted as part of his decision-making process."

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

For Berman, the rest is a waiting game. Rulings from the appellate court usually take eight to 12 months or longer.