UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, INC., PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMEN SENSE, VETERANS FOR PEACE,

Dkt. 15-1606

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF THE ARMY,

Defendants-Appellants.

PLAINTIFFS-APPELLEES' RESPONSE TO MOTION TO REMAND

1. This case, brought under the Freedom of Information Act ("FOIA"), has long sought the disclosure of, among other documents, various photographs relating to the treatment, death, or rendition of detainees held in U.S. custody abroad. The United States District Court for the Southern District of New York originally ordered the photographs at

issue released, *ACLU v. Dep't of Def.*, 389 F.Supp. 2d 547 (S.D.N.Y. 2005), and this Court later affirmed, *ACLU v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008). Defendants-Appellants the United States Department of Defense and the United States Department of the Army (hereinafter, "the government") petitioned the Supreme Court for certiorari, but while that petition was pending, Congress passed and the President signed the Protected National Security Documents Act ("PNSDA"), pursuant to which the Secretary of Defense may prevent the disclosure of a photograph by issuing a certification "that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." By the terms of the PNSDA, such a certification expires after three years. Secretary of Defense Gates issued the first such certification on November 13, 2009 (JA-196), which the District Court upheld as against a challenge brought by Plaintiffs-Appellees. *See* JA 238. However, when Secretary of Defense Panetta issued the identical Certification three (3) years later (JA-240), the District Court found that recertification deficient. *See ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377 (S.D.N.Y. 2014). After the development of a record regarding the process followed by the Secretary of Defense in order to arrive at the determination to recertify the photographs, the District Court adhered to its decision, finding both that the government

had not performed the "individualized review" required by the PNSDA and that it had not "made the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed forces, or government employees clear to the Court. Without such a record," the Court concluded, "judicial review is impossible, and judicial review is fundamental to FOIA and the APA." JA-329 (citation omitted).

2. This appeal followed. Briefing was completed on August 17, 2015 and oral argument is scheduled for January 15, 2016. Meanwhile, on November 7, 2015, Secretary of Defense Carter issued a third certification under the PNSDA, covering all but 198 of the photographs previously certified by Secretaries Gates and Panetta. Based upon the fact of that certification, on December 22, 2015, the government moved to remand this matter to the District Court "for consideration of changed circumstances." Specifically, the government contends that because "the propriety of the Panetta Certification and the record supporting its issuance are among the key issues presented by the government's appeal," and because "the Panetta Certification is no longer operative, and the record supporting the Carter certification is significantly different … the district court's judgment addressed facts that no longer control the determination of this case." Defendants-Appellants Motion to Remand for Consideration of Changed Circumstances (hereinafter, "Govt. Mot.") at 2. Accordingly, argues the

government, "[t]hat judgment should … be vacated and the matter remanded for the district court to consider, in the first instance, the effect of the of the Carter Certification on plaintiffs-appellees' … claim that the remaining photographs at issue must be disclosed.." *Id.*

3. Plaintiffs-appellees respectfully oppose this motion, for three (3) reasons, discussed in further detail below. First, as the government's motion implicitly concedes, and as the briefing clearly reveals, this appeal is primarily addressed to issues as to which the differences between the record underlying the Panetta Certification and that underlying the new Carter Certification, are entirely irrelevant. Specifically, this case is about the availability and scope of judicial review of the Secretary's certification decision: the government contends that this determination is unreviewable — that "judicial review is limited to the fact of the certification" — while Plaintiffs' position, with which the Court below agreed, is that Congress did not intend to *sub silentio* strip Courts of their traditional power to review the withholding of documents under FOIA. This issue will remain, regardless of the record developed below and the issues that may be resolved or limited by virtue of a remand are secondary to the determination of this matter. This is, perhaps, why the government so carefully states that "the propriety of the Panetta Certification and the record supporting its issuance are *among the key issues* presented by the government's appeal." Govt. Mot. at 2

(emphasis added). Second, no purpose would be served by a remand; the additional facts that the government would adduce in the district court are set forth with its motion, in the same form (an Affidavit from an Associate General Counsel for one of the defendants) as it provided below in previously developing a record. In other words, this Court has the full record before it, and the government does not proffer any additional facts that it would adduce on remand; to the contrary, it makes clear that the only purpose of the remand would be "to provide the district court with the opportunity to address in the first instance the changed circumstances described in this motion." Govt. Mot. at 10; *see also* Govt. Mot. at 2, 9. Third, and relatedly, remand would have the effect of achieving precisely the delay which the government has sought and, as the district court perceptively noted, obtained by the way it has proceeded with regard to these photographs, from the outset of this matter through this motion. That delay continues to undermine achievement of the salutary public purposes of FOIA, keeping the American public in the dark about the actions of its government.

4. The government seeks a remand based upon "changed circumstances." Specifically, the government argues:

> The Court should vacate the judgment and remand this matter because of the change in circumstances. The certification that is at the heart of the parties' current dispute — the Panetta Certification — is

> no longer operative. Indeed, a ruling by this Court on the record and briefs before it that determined whether the Panetta Certification and the process leading to it are valid under the PNSDA would have no effect, as it would leave open the question that now determines if the photographs must be released: whether the currently operative PNSDA certification is sufficient to permit withholding of the photographs.
>
> And as described above, the process culminating in the direct certification by Defense Secretary Carter is substantially different from that underlying the Panetta Certification. Unlike the former process, the process underlying the Carter Certification involved multiple layers of individual review by both DoD attorneys and uniformed officers with professional experience in making national security judgments. And Secretary Carter's certification determination is based, in part, on new recommendations from his top commanders evaluating the likely harms from disclosure in light of the current threat environment. As a result of this process and the commanders' recommendations, approximately 198 photographs have been decertified and are currently being processed for release. (Apostol Decl. ¶ 10).

Govt. Mot. at 8-9. However, this argument is misconceived: the changes in process as between the Panetta and Carter Certifications are not "at the heart of the parties' current dispute." To the contrary, a remand would leave open the critical question presented to this Court: whether and to what extent the Court may review the Secretary's assertion that release of the photographs would, in fact, "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States," the standard dictated by the PNSDA.

5. That this is the critical question presented is clear from the opinion that is the subject of this appeal. Thus, the District Court, first and foremost, addressed "whether the PNSDA requires judicial review of the Secretary of Defense's determination that a 'photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." *ACLU v. Dep't of Def.*, 40 F. Supp. 3d at 385. Having carefully considered and analyzed the question, the District Court concluded that "the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification …" *Id.* at 388. Thus, it held, "the government must show why, on November 9, 2012, the release of the pictures taken years earlier would continue to "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." *Id.* at 389. The Court provided the government with an opportunity to make this showing, but the government declined to do so. The Court wrote:

> …the Certification must make the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees clear to the Court. Without such a record, judicial review is impossible, and judicial review is fundamental to FOIA and the APA. *See Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667 (1896).

JA 329. To be sure, the District Court also determined that the Panetta Certification was deficient in that it was not based upon the required individual review of photographs, 40 F. Supp. 3d at 389-90; JA 328-29, but its holding certainly went well beyond that, as described above, and the mere resolution of that issue, on remand, would not therefore dispose of this matter.

6. Indeed, in this appeal, the government argues, first and most fundamentally, that FOIA does not apply to "PNSDA-Protected Documents," Brief for Defendants-Appellants (hereinafter, "Govt. Br.") at 21-25, and therefore that "the only issue in this case is whether the Secretary of Defense has 'issued a certification,' 'stating' that disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad." *Id.* at 25. It then goes on to argue, in the centerpiece of its advocacy, that because judicial review is limited to whether the Secretary in fact issued a certification, courts have no authority to review the Secretary's determination of harm, under any standard. *Id.* at 25-37. *See also* Reply Brief for Defendants-Appellants at 5-17. Only later does the government take issue with the District Court's concern that the Department of Defense

had not undertaken an individualized review, Govt. Br. at 43-47, which is the concern that would be addressed on remand.[1]

7. Thus, resolution of the primary issue which the government raises on appeal, and to which the briefing of the parties is addressed, would in no way be furthered by a remand. That remand would focus on the new process described in the government's motion. Govt. Mot. at 6-7. But even assuming, *arguendo*, that this new process fully addresses the District Court's concern that the photographs in fact be subject to individual consideration, it still does not shed any light on "the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees." JA 329. That is, it does not even attempt to "show why, on November 9, 2012, the release of the pictures taken years earlier would continue to "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." 40 F. Supp. 3d at 389. And it does not do these things because the government continues to assert that there is no judicial review of such determinations. Of course, the fundamental question posed by this position will persist even after a remand;

[1] Ironically, the government only focuses, in its briefing, on the adequacy of the process underlying the Panetta Certification after arguing that the PNSDA does not prescribe *any* process that must be followed, including that the statute does not require individual consideration of the photographs in the first instance. *Id.* at 39-43. Thus, it now seeks remand based upon facts that it has previously contended are irrelevant.

there is nothing that can or will happen in the District Court to change that reality. If the District Court, as would be expected, adheres to its position that it has the right to assess whether the photographs satisfy the standard set forth in the PNSDA, then the government will appeal, and again argue that the Court's only role in this process is to ascertain whether a Certification has been executed at all, regardless of its validity; if the Court reverses course, Plaintiffs will appeal. Either way, the question that is already fully briefed will have to be addressed. And nothing will have been gained by waiting. *See infra*, ¶¶ 9-10.[2] In sum, a remand would accomplish nothing, and the government's motion should therefore be denied.[3]

8. A remand would accomplish nothing for yet another reason: this Court already has a sufficient record upon which to assess whether the government has, through its new "multi-phase process," addressed its prior

[2] Nor, obviously, would a remand assist in determining the final issue raised by the government, that the photographs at issue fall within FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), which protects law enforcement records from disclosure, to the extent they "could reasonably be expected to endanger the life or safety of any individual." The process utilized by DoD to ascertain whether the Secretary should certify the photographs has absolutely nothing to do with this exemption, let alone with the issue before the Court on appeal, which is whether this Court's prior rejection of the government's position with regard to this issue should, for some reason, be revisited. *See ACLU v. Dept. of Def.*, 543 F.3d at 71.

[3] Indeed, in one of the cases cited by the government in support of its motion to remand, *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1976), this Court, while recognizing that "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances," *id.* at 1208, declined to do so where such a remand would not change the result. *See generally Casagrande v. Siemens Corp.*, 556 Fed. App'x. 54, 56 (2d Cir. 2014) (declining to remand for consideration of documents outside of the record because it would have been a "useless formality" to do so).

failure to perform the individualized review that the District Court held is required by FOIA and by the PNSDA. Just as it did when the District Court provided it with the opportunity to create a record, *see* 40 F.Supp. 3d at 390, the government relies primarily upon a Declaration from an Associate Deputy General Counsel — in the District Court, it was the Declaration of Megan M. Weis, Associate Deputy General Counsel in the Department of the Army, Office of General Counsel, *see* JA-280 - JA-285,[4] while here it is the Declaration of Liam M. Apostol, Associate Deputy General Counsel in the Department of Defense, Office of the General Counsel. Those declarations set forth the process utilized in creating the Panetta Certification and the Carter Certification, respectively. The government does not propose to adduce any additional facts on remand, just as it introduced no significant additional facts below.[5] Thus, this Court now has a sufficient record based

[4] Ms. Weis's Declaration included, as Exhibits A-C, Memoranda from senior military personnel, JA-286 - JA-292, and was filed along with a Declaration of Sinclair M. Harris, Rear Admiral, United States Navy. JA 293-300. Although Mr. Apostol's Certification conclusorily states that "the Secretary of Defense solicited and received recommendations from the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. central Command, The Commander of U.S. Africa Command, and the Commander U.S. Services, Afghanistan," Apostol Dec. ¶ 9, these documents are not provided with the present motion or proffered by way of showing what would be adduced on remand. That is not surprising, given that these materials do not seek to further explain the process, but apparently, to substantively justify the Secretary's determination to certify the photographs, a matter as to which the government argues there is no judicial review. *See* Govt. Mot at 9 ("Secretary Carter's certification determination is based, in part, on new recommendations from his top commanders evaluating the likely harms from disclosure in light of the current threat environment.").

[5] Plaintiffs do not concede that the process outlined in the government's motion is sufficient. In particular, as it is described, Secretary Carter made the ultimate

upon which to assess whether the government has, in fact, now established an appropriate process for individually evaluating the process being used. Especially given that the government's position, from which it has not retreated even one step, is that the PNSDA does not require that any particular process be used, so that any process it invents would be sufficient, *see* Govt. Br. at 39-43; Reply Brief for Defendants-Appellants at 17-20, a remand would accomplish nothing.

9. Indeed, the government's renewed request for a remand leads inexorably to the conclusion that, as the District Court has observed in criticizing the government's prior delays in this matter, "the Government's conduct reflect[s] a 'sophisticated ability to obtain a very substantial delay,' tending to defeat FOIA's purpose of prompt disclosure." JA-331 (quoting JA-323). Here, again, the government's motion seeks simply to buy time, although that time will not be spent in a way that will in any regard address the fundamental issues here raised. Allowing the District Court to consider DoD's new process will not assist the Court in understanding why any given

---

determination to Certify the photographs that he did, *see* Apostol Dec. ¶ 10, without reviewing each of the photographs, *see id.* ¶¶ 8-9 and, as before, the sample of photographs that was provided to the Secretary is neither described nor justified. *See* Govt. Br. at 52-55. And, while the government's filing suggests that there may be additional facts that would shed light on the new recertification process, *see* Apostol Dec. ¶ 2) ("This declaration does not provide all details of the process.") (cited in Govt. Mot. at 6 fn.1), it does not proffer what those facts might be or explain why they require a remand, as opposed to being provided here and now.

photograph was Certified, while 198 others were not;[6] accordingly, regardless of what occurs on remand, there will be no judicial review of the basis for the Secretary's harm determination. Nor, obviously, will a remand assist the Court in deciding whether, as the government contends, *see supra* ¶¶ 6-7, judicial review is, as a matter of law, limited to the ministerial act of determining whether the Secretary issued a certification at all, as he undisputedly did. *See* Apostol Dec., Exhibit B. Nor even will it confront the government's contention that no particular process is required by PNSDA. And the government does not even explain how a remand will develop the facts further so as to allow either this Court or the District Court to better determine whether the individualized consideration required by the District Court occurred: we already know that some DoD personnel, but not the ultimate decisionmaker, examined all of the photographs. *See supra* at 12, fn. 4.

10. In sum, the government seeks a remand that would not only be

[6] That, after all this time, the government has suddenly determined to release 198 photographs, long after the District Court determined that "many of these photographs are relatively innocuous," 40 Supp. 3d at 389, casts significant doubt upon both the reliability of the process that the government so resolutely defends, as well as upon the substantive validity of the Secretary's determination of harm. *See also* JA-319 (THE COURT: I observed when I originally reviewed the Abu Ghraib photographs that a number of them required no redaction and were, in all respects, harmless and could be produced. And I feel that in a large number of sets that will be the case as well.").

useless but would prolong this already decade-long litigation. Its motion should be denied.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Ana Munoz
GIBBONS P.C.
1 Gateway Center
Newark, NJ 07102
(973) 596-4500 (tel)
(973) 596-6285 (fax)
llustberg@gibbonslaw.com
amunoz@gibbonslaw.com

Jameel Jaffer
Alex Abdo
American Civil Liberties Union
125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500 (tel)
(212) 549-2654 (fax)
jjaffer@aclu.org
aabdo@aclu.org

Dated: January 4, 2016

CERTIFICATE OF SERVICE

I, Lawrence S. Lustberg, hereby certify as follows:

1. I am a Director with the law firm of Gibbons P.C., attorneys for Plaintiffs-Appellees in the above-captioned matter.

2. On January 4, 2016, I served Defendants-Appellants with the following documents via electronic filing and e-mail:

- Plaintiffs-Appellees' Response to Motion to Remand; and
- this Certificate of Service.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg

Dated: January 4, 2016