

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellees,*

v.

Dkt. No. 15-1606

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.*

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**DEFENDANTS-APPELLANTS' REPLY MEMORANDUM IN FURTHER  
SUPPORT OF MOTION TO REMAND FOR  
CONSIDERATION OF CHANGED CIRCUMSTANCES**

As stated in the government's opening memorandum in support of remand, the primary issue presented in this appeal is whether the certification issued by the Secretary of Defense pursuant to the Protected National Security Documents Act ("PNSDA") is sufficient to preclude disclosure of certain detainee photographs. (*See* Govt. Br. at 8; *see also* Govt. Merits Br. at 4).<sup>1</sup> As the government also explained, the record underlying the district court's analysis and this appeal is now obsolete: the operative certification has expired, and a new certification—premised upon a materially different review process—has issued, covering a smaller portion of the photographs previously certified. It is of course unfortunate that these recent events occurred after full briefing and on the eve of argument. However, because a significant portion of this

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<sup>1</sup> The second issue presented by the government's appeal is whether the photographs at issue are exempt from disclosure pursuant to FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F). The events that have transpired since the government's appeal do not impact resolution of this issue.

appeal is no longer “live,” remand is the proper course.

In their opposition, plaintiffs-appellees first claim that remand would “accomplish nothing” (Opp. at 10 n.9) because a newly developed record would have no bearing on the important threshold question of whether the Court is permitted to inquire beyond the existence of a PNSDA certification in determining whether disclosure of certified photographs is required. (Opp. at 4-10 nn.3-7). However, the fact that this threshold legal question would again be presented in a subsequent, live appeal is not significant. *Cf. New England Merchants Nat’l Bank v. Iran Power Generation and Transmission Co.*, 646 F.2d 779, 783-84 (2d Cir. 1981); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1030 (1974). The point is that the PNSDA certification that plaintiffs-appellants challenged, and that the district court considered and ruled insufficient to sustain the government’s withholding of photographs (the Panetta Certification), has expired. It has been superseded by a different PNSDA certification (the Carter Certification) supported by a revamped review process and different threat environment, and covering only a subset of the photographs at issue in this appeal. The Court should not rule on the validity of a superseded certification. Resolution of the questions and issues presented in the government’s appeal—including the threshold question concerning the scope of judicial review—should occur in the context of a live, relevant record based on the new certification. And under this Court’s preferred procedure, that record should be fully developed and considered in the first instance by the district court. *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972).

Plaintiffs-appellees also claim that “no purpose would be served by a remand” because, they speculate, “the additional facts that the government would adduce in the district court are set forth with its motion, in the same form . . . as it provided below in previously developing a record,” and thus “this Court has the full record before it.” (Opp. at 5 n.3; *see id.* at 10-11 n.8). This is

simply incorrect. The government submitted the Declaration of Liam Apostol in support of its remand motion solely to show the Court that a standard for granting remand—“changed circumstances”—is met in this case. The Apostol Declaration does not include all details of the process leading to Secretary Carter’s certification, but instead is intended to “highlight[] the differences” between the process used in connection with Secretary Carter’s certification and Secretary Panetta’s expired certification. (Apostol Decl. ¶ 2). All of the facts plaintiffs-appellees point out are missing from the Apostol Declaration, including, *e.g.*, the recommendation memoranda solicited and received by Secretary Carter in connection with his certification decision (*see id.* ¶ 9) and a description of the process used for creating the representative sample discussed in the declaration (*see id.* ¶¶ 5-8), are facts that the government would have the opportunity to develop on remand to establish that the Carter Certification justifies the withholding of the certified photographs (assuming that the court rejects the government’s argument that the Secretary’s issuance of the certification is alone sufficient to preclude disclosure of covered photographs). Indeed, as reflected in the current appellate record, the government provided analogous facts to the district court in connection with the court’s consideration of the Panetta Certification. The prudent and preferred course would be to remand to the district court for further record development and adjudication of the issues based on a live record in the first instance.

Finally, plaintiffs-appellants accuse the government of seeking remand to achieve delay and impede the purposes of FOIA. (Opp. at 5 n.3; *id.* at 12-13 n.9). This accusation is belied by the timeline of events surrounding litigation of Secretary Panetta’s certification and plaintiffs-appellants’ challenge to it. The Panetta Certification issued on November 9, 2012. While plaintiffs- appellants indicated to the district court that they might challenge the Panetta

Certification, they did not file a motion for summary judgment until January 15, 2014—over a year later. (*See* Dist. Ct. Dkt. No. 493). Briefing on the parties’ cross-motions was complete in approximately two months (*see id.* Nos. 493-497, 499, 502), and the district court ruled on the parties’ motions approximately five months later, on August 27, 2014 (*see id.* No. 513).

Following a status conference on October 21, 2014, and at the court’s direction, the government developed and submitted a factual record by December 19, 2014. (*Id.* Nos. 524, 525). The government reasonably did not seek to develop or submit evidence concerning issuance of the Panetta Certification prior to that time (in connection with its cross-motion for summary judgment) because the district court previously had ruled that the virtually identical PNSDA certification issued by then-Secretary Gates alone was sufficient to sustain the government’s withholding of PNSDA-certified photographs. (*Id.* No. 469). Following oral argument and clarification of the district court’s order (*see id.* Nos. 540, 543), the district court entered judgment for plaintiffs-appellees on March 20, 2015. The government timely appealed that judgment. As the government had advised the district court and plaintiffs, while appellate briefing was underway, DoD also undertook the recertification process, because the Panetta Certification was scheduled to expire by operation of law on November 9, 2015. Secretary Carter recertified certain of the photographs on November 7, 2015, and following consultations with plaintiffs, the government promptly filed the instant motion.

As this timeline establishes, the government has not sought to delay resolution of this issue at all, but has acted promptly and responsibly. The government, having expended substantial resources in the current appeal, is not seeking remand to unduly prolong this matter. Rather, remand is the proper course because of the fact—not disputed by plaintiffs-appellees—that the district court’s judgment relies upon facts that are now obsolete and no longer control the

determination of this case.

**Conclusion**

For the reasons set forth in the government's opening brief and this reply, the district court's judgment should be vacated and the matter remanded for further consideration, to provide the district court with the opportunity to address in the first instance the changed circumstances described in the government's motion.

Dated: New York, New York  
January 6, 2016

Respectfully Submitted,  
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