



JOHN J. GIBBONS FELLOWSHIP IN
PUBLIC INTEREST & CONSTITUTIONAL LAW

HONORABLE JOHN J. GIBBONS

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March 19, 2015

Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, New York 10007-1312

Re: *American Civil Liberties Union, et al. v. Department of Defense, et al.*
Docket No. 04-cv-4151

Dear Judge Hellerstein:

Please accept this letter in response to the government's letter of March 17, 2015 requesting a stay of the execution of this Court's judgment for Plaintiffs, pending the conclusion of a renewed certification process. Although the Government has now achieved the "substantial delay" which the Court predicted and feared, *Feb. 4 Tr.* at 23:3-4, we recognize that this Court's resources and those of the Second Circuit may be wasted if the Government alters the process by which it certifies any photos, and, thus, arguably moots any pending appeal. For that reason, as described below, Plaintiffs would not oppose a stay, subject to the following conditions.

First and foremost, because time is of the essence — indeed, it is the entire purpose for this alteration of the process — the Government must be held to its promise to complete the certification process on the schedule it proposes, *i.e.*, within 3 months. See *Government's Letter Requesting a Stay*, March 17, 2015, dkt # 547 (Gov't Letter). Accordingly, Plaintiffs propose that on or before June 17, 2015, the Government should issue its new certification, covering whichever photographs it continues to seek to withhold.

Second, on the same date, the Government should be required to file with the Court an appropriate pleading — likely an Affidavit or series of Affidavits — setting forth the process it followed in recertifying which photographs it continues to seek to withhold, similar to the narrative it provided previously. See *Government's Renewed Seventh Motion for Summary Judgement*, dkt # 528.

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Third, also on the same date, the Government should be Ordered to Show Cause why the recertification process that it followed, including the results thereof, in fact complied with Your Honor's order. In its letter, the Government indicates that it is "taking consideration of the Court's views as it undertakes the process of evaluating [a] possible recertification." *Gov't Letter*. The implication is clear: the Government may not adhere to all of the conditions set by the Court. Accordingly, Plaintiffs propose that, following the recertification process, the Government should be required to demonstrate whether and how it has followed this Court's instructions, making clear those conditions with which it continues to refuse to comply and as to which it, presumably, will appeal following the Court's evaluation of its showing. Thereafter, Plaintiffs will have two weeks (or until July 1, 2015) to respond, after which the Court can either hold a hearing or simply rule, thus moving the appellate process along.

To be clear, as this Court has repeatedly explained, the Protected National Security Documents Act "requires the Secretary of Defense [to] consider each photograph individually, not collectively." *Court's February 12, 2015 Order* at 1, dkt # 543. An "*en grosse* certification [is] not sufficient[,] . . . [rather] the certification has to be individual; if not on the type required by a [Vaughn] index, something resembling it." *Id.* at 2. When considering certification, the Secretary may not rely on "samples," particularly where he, or his delegates, have separated photos into groups of unstated size based on unexplained criteria. *Id.* In addition, although the Secretary may rely on his staff to aid him in his review, he "must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions." *Id.* Finally, the Government "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." *Id.* at 3.

Finally, assuming, as the Government's letter suggests, that the Secretary will not, in this recertification process, fully comply with the Court's Order, an appeal appears to be inevitable. That being so, there is no reason that the Government should not immediately initiate the well known, time-intensive process of seeking approval from the Solicitor General to file an appeal. That is, following the Court's ruling on this issue, the matter should proceed promptly to an appeal, rather than allowing that process to result in still further delays. Plaintiffs would suggest that the Government have two weeks from any judgment to file their notice of appeal, even if it is provisional, pending Solicitor General approval.

In sum, Plaintiffs are willing to consent to a stay if it is in fact in the interest of judicial economy and an expeditious resolution of this longstanding matter. The conditions set forth above would accomplish that objective. Accordingly, Plaintiffs respectfully request that these provisions be included in any Order that the Court might issue with respect to the Government's pending request for a stay.

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Thank you for your kind consideration of this submission.

Respectfully submitted,

/s/ Lawrence S. Lustberg

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cc: Tara LaMorte, Assistant U.S. Attorney (via email)
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