United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1800

SUSAN D. GOLAND AND PATRICIA B. SKIDMORE, APPELLANTS

v.

CENTRAL INTELLIGENCE AGENCY, ET AL

On Appellants' Motion to Vacate and Petition for Rehearing

(D.C. Civil Action No. 76-0166)

Filed 28 March 1979

James H. Wallace, Jr., *Thomas C. Arthur*, *Mark H. Lynch*, *Alan B. Morrison* and *Larry P. Ellsworth* were on the motion to vacate and on the petition for rehearing.

Leonard Schaitman and *John F. Cordes* were on the opposition to appellant's motion to vacate.

Also *Thomas C. Martin*, Department of Justice entered an appearance for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: BAZELON, TAMM and WILKEY, *Circuit Judges.*

Opinion Per Curiam

Dissenting opinion filed by *Circuit Judge* BAZELON.

Per Curiam. This petition for rehearing was occasioned by an inexcusable lapse on the part of the Central Intelligence Agency (CIA). While litigating the appeal whose disposition is here questioned, the CIA discovered but failed to disclose within any reasonable time hundreds of documents which were arguably responsive to plaintiff-appellants' Freedom of Information Act request. The documents' existence was not revealed until after we issued our decision, affirming summary judgment for the CIA. The failure to make the disclosure plainly called for naturally casts a cloud over the entire proceeding. Nevertheless, and without the barest intention of countenancing the CIA's untimely disclosure, on analysis of the issues argued and decided, we decline to disturb our judgment, save on the question of attorneys' fees. With respect to that question, we remand to the District Court to reconsider its ruling in light of the altered circumstances of this case.

I. FACTS

We issued our opinion on 23 May 1978, affirming the district court's grant of summary judgment to the CIA. On 30 May 1978, a week after the issuance of our opinion, the CIA informed the Justice Department that it had found hundreds of additional documents that might be responsive to plaintiffs' FOIA request. The Department promptly informed plaintiffs and this Court of CIA's discovery. On 6 June 1978 plaintiffs filed a petition for rehearing and suggestions for rehearing en banc.[1]

[1] The effect of this timely petition has been to suspend issuance of our mandate.

On 14 June 1978 the CIA released to plaintiffs' counsel 30 of the additional documents. In an accompanying letter the Agency stated that, even though it did not believe that all of the documents fell within plaintiffs' FOIA request, it was releasing them anyway to assist plaintiffs' scholarly research. The letter explained further that:

> [m]ost of these documents were discovered late last fall, and additional documents earlier this year, by the librarian of the Office of General Counsel. She discovered all of these documents which were unindexed, in the course of her independent research on legal projects unrelated to the *Goland* case. Although a sampling of the documents last fall revealed their possible relevance to *Goland*, it was not until late May 1978, when a partial list of the documents was completed by the law librarian, that the extent of the documents, and the significance of some of the documents to the *Goland* FOIA request, were fully appreciated.

The following week, on 23 June 1978, the CIA released to plaintiffs' counsel an additional 291 documents. Also on that date CIA's associate general counsel, Ernest Mayerfeld, wrote the Justice Department to explain the circumstances surrounding the Agency's discovery and release of additional documents:

> Most of these documents were discovered last fall by the Office of General Counsel librarian in the course of extensive research on two projects unrelated to the *Goland* litigation. Many of these documents were found in a CIA installation outside of Washington where inactive records are kept, only after great diligence and persistence by the librarian in connection with her research. She became aware of the existence of these documents, which had been stored in cardboard boxes and had not been organized in any fashion, as a result of several interviews with current and former CIA employees conducted in con-

nection with her research projects. These documents were not indexed and could not have been found under normal FOIA search procedures.

I can state most emphatically that there was no intent within the CIA to conceal the fact that these documents had been found. The librarian, who had some personal familiarity with the *Goland* case and thus recognized that some of the documents which she had found might have some bearing on the *Goland* litigation, immediately (i.e. in late November or early December 1977), informed the General Counsel, the Deputy General Counsel and the undersigned. Because at that time the documents had not been organized or analyzed, and because it was not immediately apparent which if any were within the scope of the FOIA request in *Goland*, the General Counsel instructed the librarian to begin to organize these documents and segregate from among them those documents which qualified for designation as "legislative history."

The law librarian proceeded with her assigned task, but her extensive involvement in other routine duties prevented her completing this task as expeditiously as might have been desired. It should be noted that during this period she was engaged in a major reorganization of the law library which incidentally also entailed a physical move from one location to another. Also, although the Table of Organization of the Office of General Counsel called for an assistant law librarian, no one was appointed to that position until March 1978. The law librarian first completed a partial inventory of the additional documents on May 19, 1978 and shortly thereafter it was decided that all the newly-found documents would be released, subject to FOI[A] deletions, and you were immediately informed.

This, then, apears to be the sequence of events: (1) The district court granted summary judgment to the CIA on 26 May 1976. (2) Plaintiffs' filed their notice of appeal

on 23 July 1976. (3) In November or December 1977—while this appeal was still pending *but more than a year-and-a-half after the district court's decision*—the CIA discovered additional documents, some of which arguably fell within the scope of plaintiffs' FOIA request. (4) Failing to inform plaintiffs, the Justice Department, or this Court of the discovery, the CIA undertook a sluggish four-month examination of the documents. (5) It was not until a week after we issued our 23 May 1978 decision that CIA finally revealed its discovery and began releasing the documents.

Contending that this sequence of events completely undermines the basis of our 23 May decision, plaintiffs have now filed a motion summarily to vacate that decision.[2] Plaintiffs' motion states in pertinent part:

> The majority opinion affirmed the district court decision based on CIA affidavits. It appears that these affidavits are incorrect. . . . [T]he CIA has now produced . . . additional documents "discovered late last fall and additional documents earlier this year." Moreover, [the CIA] concedes that "a sampling of the documents last fall revealed their possible relevance to *Goland* . . ."
>
> No explanation has been offered by the CIA or the Justice Department for the CIA's strategy decision to stand mute as to the status of the affidavits relied upon by the Court until *after* the decision was handed down on May 23. Indeed, it appears the CIA chose to withhold this crucial information from the Justice Department until after such decision was handed down.
>
> Based on these admissions and concessions . . . it should now be abundantly clear that discovery is

[2] The motion was filed 16 June 1978—between the CIA's release of 30 documents on 14 June 1978 and its release of 291 documents on 23 June 1978.

appropriate in this case and in any event, attorneys' fees should be awarded because of the manner in which the CIA has chosen to conduct itself in this litigation.

Plaintiffs' contention seems to be grounded on three distinct facts or occurrences: first, the fact that additional responsive documents were found to exist; second, the fact that CIA delayed informing this Court of the documents until the Court had already issued its decision; and third, the fact that CIA ultimately released the documents to plaintiffs. Plaintiffs believe that these three facts warrant vacating the decision of 23 May 1978, at least in part.

II. Discussion

In our 23 May decision we resolved five separate issues. We held: (1) that the CIA was not required under the FOIA to release a Congressional hearing transcript that remained under the control of Congress; (2) that the CIA had properly deleted portions of the so-called "Hillenkoetter Statement" pursuant to Exemption 3 of the FOIA; (3) that, on the record, the CIA's search for documents responsive to plaintiffs' FOIA request was adequate and that the district court's grant of summary judgment without discovery was within its discretion; (4) that the CIA's definition of "agency records" was not in controversy; and (5) that plaintiffs' counsel were not entitled to attorneys' fees.

After carefully reviewing plaintiffs' contentions and the circumstances surrounding the discovery and belated disclosure of the documents, we find no occasion to disturb our affirmance as to issues (1) through (4), but we do vacate that part of our decision affirming the denial of attorneys' fees and remand to the district court for reconsideration of that issue.

A. *Thoroughness of Search Issue*

We based our determination of the "search" issue, as did the district court, on three affidavits of Gene F. Wilson, the CIA's Information and Privacy Coordinator. We concluded "that Wilson's sworn affidavits on their face are plainly adequate to demonstrate the thoroughness of the CIA's search for responsive documents. The affidavits give detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome." [3]

1. Plaintiff's Theory

Plaintiffs' contend that the discovery of additional documents indicates that the CIA affidavits in this case, relied upon by both the district court and this Court, "are incorrect." Therefore, they argue that we should vacate our decision, or at least that portion of the decision dealing with the "search" issue, because it was predicated on inaccurate affidavits. We disagree.

As a substantive matter, the mere fact that additional documents have been discovered does not impugn the accuracy of the Wilson affidavits. *The issue was not whether any further documents might conceivably exist but whether CIA's search for responsive documents was adequate.* The Wilson affidavits never stated that no further documents existed; they merely described the scope of the searches that had been undertaken and stated that no additional documents could be located absent an extraordinary effort not required by the FOIA. As we indicated in our opinion, an agency is required only to make reasonable efforts to find responsive materials; [4] it is not required to reorganize its filing system in response to each FOIA request. The circumstances sur-

[3] Slip Opinion (Slip Op.) at 26.

[4] Slip Op. at 23.

rounding the discovery of additional documents as described in CIA's letters of 14 and 23 June do not contradict the statements made in the Wilson affidavits. According to CIA, the discovery of these documents was entirely adventitious. They were found by the law librarian in the course of independent research on projects unrelated to the *Goland* litigation. The documents were not indexed; they were found, only after extraordinary effort, stored in cardboard boxes primarily among the 84,000 cubic feet of documents at CIA's retired-records center outside of Washington. According to CIA, the documents "could not have been found under normal FOIA procedures." Thus, it would appear that the new facts before us now do not really conflict with the facts as presented to the district court and reflected in the record upon which our decision was based, and would not, as a substantive matter, prompt us to vacate our affirmance.

Concededly, the discovery of additional documents is more probative that the search was not thorough than if no other documents were found to exist. Moreover, the delay in disclosing the documents at least arguably evidences a lack of vigor, if not candor, in responding to FOIA requests. However, a disappointed litigant may not avail herself of every imaginable inference from newly disclosed facts in order to upset a final judgment. The occasions when newly discovered evidence or changed circumstances will warrant setting aside a final judgment are limited procedurally as well as substantively.

2. Applicable Principles of Appellate Review

A final district court judgment may be altered on direct review only through two procedures.[5] One, of course, is

[5] *See Carr* v. *District of Columbia*, 543 F.2d 917, 924 (D.C. Cir. 1976).

the present appeal. The other is a motion in district court for relief from the judgment under Federal Rule 60(b).[6] Appellate review is ordinarily unaffected by matters not contained in the record.[7] This we think is the case with the facts disclosed here, whether characterized as "newly-discovered evidence" or "changed circumstances." In neither event do the disclosures warrant vacating our judgment.

The fact that additional documents exist, insofar as it is probative of the thoroughness *vel non* of the search, is rather plainly "newly-discovered evidence." We have found no case in which the Supreme Court or a court of appeals has granted a rehearing or vacated its opinion based on newly-discovered evidence. The reason for this should be self-evident: an appellate opinion is based on the record before it, and hence cannot be set aside on the basis of newly-discovered facts outside the record.[8] This rule is clear in the Supreme Court's cases, dating from those in the last century[9] to the recent *Standard Oil*

[6] Fed. R. Civ. P. 60(b).

[7] There are a number of settled exceptions to this general principle of appellate review; as, for example, where there is an intervening change in a pertinent law, *e.g.*, *Gomez* v. *Wilson*, 477 F.2d 411, 416-17 (D.C. Cir. 1973); changed circumstances which render the controversy moot, *e.g.*, *Wirtz* v. *Local Union 410*, 366 F.2d 438, 442 (2d Cir. 1966); changed circumstances which alter the appropriateness of injunctive relief, *e.g.*, *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1208 & n.3 (2d Cir. 1972); *In re Gulf Aerospace Corp.*, 449 F.2d 733, 734 (5th Cir. 1971); and, in limited cases, facts which may be judicially noticed, *e.g.*, *Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139, 150-51 (3rd Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

[8] *See, e.g., Carr* v. *District of Columbia*, 543 F.2d 917, 921 (D.C. Cir. 1976); *AG Pro., Inc.* v. *Sakraida*, 481 F.2d 668, 669 (5th Cir. 1973), *rev'd on other grounds*, 425 U.S. 273 (1976); *Davis* v. *Casey*, 103 F.2d 529, 536-37 (D.C. Cir. 1939).

[9] *E.g., Maxwell Land-Grant Case*, 122 U.S. 365 (1887); *Roemer* v. *Simon*, 91 U.S. 149 (1875).

case [10] where the Court refused to recall its mandate and vacate its opinion on the basis of newly-discovered facts, stating that its opinion was confined to the record.

An appellate court has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination. Fact-finding and the creation of a record is the function of the district court; therefore, the consideration of newly-discovered evidence is a matter for the district court. The proper procedure for dealing with newly-discovered evidence is for the party to move for relief from the judgment in the district court under rule 60(b) of the Federal Rules of Civil Procedure.

Insofar as plaintiffs rely on the facts surrounding the documents' discovery and release by the CIA, their argument is more nearly dependent on "changed circumstances." To be sure, there are occasional cases in which altered circumstances are properly noticed on appeal.[11] Invariably in such cases, however, events have altered the essential nature of the controversy, as, for example, where there has been an intervening change in the law or where the controversy has become moot. But in this case the distinction between new evidence and altered circumstances is largely a matter of technical usage rather than substance.[12] Here the intervening events are

[10] *Standard Oil Co. of Calif.* v. *United States*, 429 U.S. 17 (1976).

[11] *See* note 7 *supra*.

[12] The distinction is ordinarily made between these two grounds of relief for purposes of applying the timing rules for filing motions under Fed. R. Civ. P. 60(b). To be "newly discovered," evidence must have been in existence at the time of the trial, *see* C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2859 & n.35 (cases cited) (1973). However, in this case, the alleged substantive effect of the disclosures is independent of their characterization for purposes of rule 60(b). Moreover, the exercise of our discretion is likewise unconfined by the "correct" rule 60(b) characterization of these facts.

allegedly probative of the same contentions as arose from the mere existence of the documents (*i.e.*, that the search was not conducted thoroughly or in good faith). Consequently, for purposes of appellate review of these allegations, we think nothing turns on the arguable distinction between newly discovered evidence and altered circumstances. Under either theory the proper course ordinarily would be to proceed in the first instance in district court under rule 60(b).

Finally, inasmuch as relief in district court may be foreclosed,[13] it might be thought that this court, in the exercise of our appellate jurisdiction, should remand for further proceedings in light of the new facts without regard to the strictures of rule 60(b). Some support may be found for the propostion in the broad language of 28 U.S.C. § 2106 which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[14]

This court recently reserved the question whether § 2106 afforded an alternate way of reopening a final judgment in light of new facts.[15] Although our research has dis-

[13] See pp. 12-15 *infra*.

[14] 28 U.S.C. § 2106 (1976).

[15] *Carr* v. *District of Columbia*, 543 F.2d 917, 929 & n.96 (D.C. Cir. 1976) (if it appeared relief were not otherwise

closed no case which has so held, we may suppose *arguendo* that we do have ample revisory power under § 2106 *in appropriate cases*. We are nevertheless thoroughly convinced that this would not be a proper occasion for such extraordinary relief. Nothing in the circumstances which plaintiffs raise suggest to us that the district court judgment was incorrect. We are satisfied by the submissions to this court that the original failure to uncover the documents was wholly understandable and not inconsistent with the district court's finding that the search was thorough.

Moreover, although the delay in releasing the materials may not be excused, we do not think that that misconduct vitiates the district court's finding either. Only were we to indulge a fairly harsh inference as to the *bona fides* of the CIA would we be inclined to upset the judgment. The instant facts fall quite short of supporting any such conclusion. Consequently, whether or not there is any possibility of relief from the judgment in district court, we decline to disturb our affirmance respecting the thoroughness of the search. We reach this conclusion fully aware that we deal here with a summary judgment whose factual basis derives from affidavits and without discovery.

3. Relief in the District Court

Relief from a final judgment may be sought in district court through a rule 60(b) motion;[16] our decision not to

available, court would consider "whether the interests of justice would not require [it] to remand to the district court to consider the claim").

[16] Fed. R. Civ. P. 60(b) provides as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

vacate our affirmance is, of course, without prejudice to plaintiffs' proceeding under that rule. However, as we have noted, that approach may be difficult or wholly unavailable.

Insofar as the additional documents are new evidence, recourse to rule 60(b) is governed (and apparently precluded) by the rule's strict timing requirements. There is an ironclad one-year limit on the filing of a rule 60(b) motion based on newly-discovered evidence. Such motions must be filed within one year from the date the judgment was entered in the district court, which in this case was 26 May 1976—two years ago and more. The one-year period

is not tolled by a pending appeal,[17] and under the Federal Rules no court has power to extend the deadline.

The one-year time limit in rule 60(b) applies only to motions under clauses (1), (2), and (3), covering fraud between the parties, newly-discovered facts, and misconduct of a party. There is also a catch-all clause (6), covering "any *other* reason justifying relief from the operation of a judgment." There is no time limit for motions brought under this clause; however, relief under this clause is not available unless the other clauses, (1) through (5), are inapplicable.[18] It may be that a showing of changed circumstances would bring plaintiffs within the residual 60(b)(6), although it is far from certain either that the allegations are not covered by clauses (1) through (3) (in which case they would be time-barred) or that they present the "extraordinary" circumstances for which relief under 60(b)(6) is reserved.[19]

In any case, rule 60(b) contains a saving clause which states that the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding. . . ." Thus the rule does not extinguish the historical authority of equity courts to reform judgments in appropriate cases.[20] The

[17] *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 280 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2866 at 233 (1973).

[18] *Klapprott* v. *United States*, 335 U.S. 601, 613 (1949); C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2864 at 217 (1973).

[19] *See, e.g., Ackermann* v. *United States*, 340 U.S. 193, 202 (1950); C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2864 at 219-20 (1973).

[20] *See* Advisory Committee Note to 1946 Amendment to Rule 60(b); *West Virginia Oil & Gas Co.* v. *George E. Breece Lumber Co.*, 213 F.2d 702, 706 (5th Cir. 1954). The independent action is, of course, to be distinguished from the ancillary common law and equitable remedies specifically abolished by rule 60(b).

one-year limit on certain of the rule 60(b) motions is not applicable to the independent action, leaving it, apart from collateral attack, as the only manner of obtaining relief from a judgment in those cases where the 60(b) motion has become time-barred. We recently recalled that "the exception for equitable interposition by independent suit rests on 'stringent' rules limited to circumstances 'which render it manifestly unconscionable that a judgment be given effect.'" [21] Although such circumstances may sometimes appear from evidence disclosed after the judgment, such extraordinary review is not to be indulged loosely. We have observed:

> in an independent action seeking relief from a judgment on the basis of newly-discovered evidence and asking for a new trial the plaintiff must meet the same substantive requirements as govern a motion for like relief under Rule 60(b): he must show that the evidence was not and could not by due diligence have been discovered in time to produce it at the trial; that it would not be merely cumulative; and that it would probably lead to a judgment in his favor.[22]

We merely note the difficulty of satisfying the "stringent" rules which circumscribe the trial court's discretion in such matters; our disposition does not, of course, foreclose plaintiffs' bringing an independent suit for relief.

[21] *Carr* v. *District of Columbia*, 543 F.2d 917, 927 (1976) (quoting *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 279 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972)).

[22] *Philippine Nat'l Bank* v. *Kennedy*, 295 F.2d 544, 545 (D.C. Cir. 1961) (footnotes omitted).

B. *The Hearing Transcript, the Hillenkoetter Statement, and the Definition of "Agency Records" Issues*

With respect to the Congressional hearing transcript issue, we held in our 23 May decision that, given the circumstances of the transcript's creation, it "remains under the control of and continues to be the property of the House of Representatives."[23] Thus, we concluded that "the Hearing Transcript is not an 'agency record' but a Congressional document to which the FOIA does not apply."[24]

With respect to the Hillenkoetter Statement issue, we held that the deleted portions of the Statement could properly be withheld pursuant to FOIA Exemption 3, which was determined to encompass 50 U.S.C. 403(d)(3) and 50 U.S.C. 403(g). Our analysis involved a two-step inquiry: (1) whether the CIA's nondisclosure statutes—sections 403(d)(3) and 403(g)—are Exemption 3 statutes; and (2) whether the withheld materials, as described by CIA's affidavit, fall within the nondisclosure statutes.

Finally, we refrained from reaching the definition of "agency records" issue because no live and genuine controversy remained on this matter between plaintiffs and CIA.

Neither the discovery of additional documents, nor CIA's delayed disclosure of this discovery, nor CIA's ultimate release of the documents in any way undermines our holdings on these three issues. The discovery and release of new documents obviously does not change the character of the Congressional Hearing Transcript. It remains a Congressional record for the reasons stated in our opinion, and as such was properly withheld by CIA. Similarly, the discovery and release of additional documents clearly has no bearing on whether, as a matter of law, sections 403(d)(3) and 403(g) are Exemption 3 statutes or on whether portions of the Statement fall within those nondisclosure statutes. Finally, the circumstances of the discovery and release of new documents do not give rise to a controversy between the parties as to CIA's definition of "agency records."

[23] Slip Op. at 12-13.

[24] Slip Op. at 14.

Nevertheless, plaintiffs argue that the CIA's discovery of additional documents does, in a very remote sense, bear upon the validity of our holdings on the Transcript, Statement, and Definition issues. They point out that our conclusions on these three issues were, to varying extents, based partially upon assertions in CIA's affidavits. Thus, they argue that, since the discovery of new documents suggests that CIA's affidavits may have been inaccurate in one respect, namely, the thoroughness of search issue, they may also have been inaccurate in other respects, namely on these other three issues. Therefore, plaintiffs argue, our decision on these points may have rested on incorrect affidavits. In other words, plaintiffs' contention is that the CIA's discovery of new documents is circumstantial evidence that the Agency's affidavits generally may not have been accurate.

Our reasoning with respect to the issue of the search's thoroughness is fully applicable here.[25] We will not vacate our judgment on the basis of such a tenuous theory. The allegations raise no serious doubt as to the correctness of the district court's findings. Plaintiffs may nevertheless wish to seek relief from the district court under rule 60(b) or otherwise. In the meanwhile, our resolution of the Transcript, Statement and Definition issues must stand as originally stated in our 23 May decision.

[25] *See* pp. 7-15 *supra*.

C. *Attorney's Fees Issue*

In our 23 May decision we declined to award attorney's fees to plaintiffs, holding that plaintiffs had not "substantially prevailed" even though the CIA had released the Vandenberg Statement and portions of the Hillenkoetter Statement *after* they commenced suit. We stated: "Even if plaintiffs could show some causal nexus between their litigation and the CIA's disclosure, which they have not done, we doubt that plaintiffs could be said to have 'substantially prevailed' if they, like Pyrrhus, have won a battle but lost the war." [26]

Plaintiffs now contend that this aspect of our decision has been undermined by subsequent events. They point *not* to the CIA's discovery of additional documents or to the Agency's delay in revealing this discovery, but rather to the fact that CIA ultimately released these additional documents. Plaintiffs' argument seems to be that there is the requisite causal connection between their prosecution of the action and CIA's ultimate release of further documents such as they may *now* be said to have "substantially prevailed" in the litigation. The Agency's release of documents occurred *after* the decision in this case. Thus, this part of plaintiffs' argument relies on a *post-judgment change in factual circumstances.*

Of course, plaintiffs might move to reopen this particular issue in district court by means of a rule 60(b)(6) motion. The one-year limit in rule 60(b) applies only to clauses (1) through (3); it does not apply to clause (6) which authorizes relief from judgment "for any other reason justifying relief from the operation of the judgment." As we have observed, one of the grounds for relief that has been recognized under this broad rubric is post-judgment change in circumstances.[27]

[26] Slip Op. at 32-33. *See* 5 U.S.C. § 552(a)(4)(E) (1976).

[27] *See Scott* v. *Young*, 307 F.Supp. 1005, 1007 (E.D. Va. 1969), *aff'd*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *American Employers Ins. Co.* v. *Sybil Realty*, 270 F.Supp. 566, 569-70 (E.D. La. 1967).

However, in the interest of expediting this matter and because we entertain little doubt that the merits of the attorneys' fees argument should be reheard in light of the new facts, we vacate that portion of our affirmance and the District Court judgment pertaining to fees and remand for the District Court's reconsideration.

So ordered.

BAZELON, *Circuit Judge, dissenting* from the denial of the motion to vacate, the denial of rehearing, and the denial of rehearing en banc. In November or December, 1977, while this case was pending before our panel, the General Counsel of the CIA learned that documents known to be relevant to plaintiffs' FOIA request had been discovered within the agency. Not until May 30, 1978, one week after our opinion issued, and some six months after the documents were "discovered," did the General Counsel inform the Justice Department that these documents had been found.[1] We must now determine the effect of these events on our previous disposition of this case. I believe that both the disclosure of 321 additional documents and the circumstances surrounding their discovery cast serious doubt on the original disposition of this case. I therefore dissent from the majority's decision to leave that opinion undisturbed.[2] I concur, however, in the decision to remand for consideration of plaintiffs' right to attorney fees.

I.

I begin my examination with a simple question—had the CIA seasonably revealed to us, *prior to our decision,*

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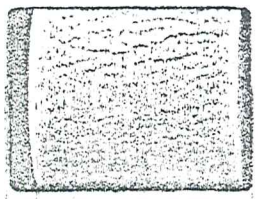
[1] The Justice Department, acting with commendable dispatch, appears to have informed both plaintiffs *and this court* of the existence of additional documents on the same day that the CIA informed Justice. There is thus no suggestion that the attorneys for the Justice Department departed in any way from their duties as officers of this court.

[2] I express no opinion herein concerning the significance of these disclosures on the "hearing transcript," the "Hillenkoetter statement" and the definition of agency records. I adhere to the views expressed in my dissenting opinion. *See* Goland v. CIA, No. 76-1800 (D.C.Cir., May 23, 1978) (Bazelon, J., dissenting) at 5-13 (hearing transcript), 13-20 (Hillenkoetter statement).

For the purposes of this discussion I confine my remarks to the impact of these disclosures on the majority's previous discussion of the adequacy of the CIA's search.



that it had "discovered" 321 documents arguably within the scope of plaintiffs' request, would we nonetheless have issued the opinion of May 23? I have no difficulty in concluding that we would not.[3]

The jurisdiction of the federal courts is limited to cases or controversies.[4] Central to that provision is the requirement that the federal courts do not sit to give advisory opinions,[5] nor to render decisions which can offer no relief to any party.[6] Here the plaintiffs sought

[3] We may assume, arguendo that an appellate court would be more reluctant to consider new evidence brought to its attention after its opinion issued rather than before. *Compare* Standard Oil Co. of California v. United States, 429 U.S. 17 (1976) (denying motion to recall mandate after decision on the basis of alleged misconduct by government counsel and new evidence) *with* United States v. Shotwell (I), 355 U.S. 233, 241 (1957) (remanding for consideration of a "challenge to the integrity of the record based on newly discovered evidence"). But where, as here, the evidence was withheld by the agency with full knowledge of its relevance, the concern for finality is overridden by a need to prevent the agency from profitting by its misdeed. Therefore, I believe it is appropriate to analyze the motion to vacate in terms of the effect that the CIA's revelations would have had on this court, had that information been seasonably tendered before our decision.

Accordingly, this case comes in a different posture than Realty Acceptance Corp. v. Montgomery, 284 U.S. 547 (1932), where the Court of Appeals' order remanding to the District Court to consider new evidence was entered *after* the Court of Appeals lost jurisdiction of the case (by virtue of its earlier order dismissing the appeal). *See id.* at 551-52.

[4] U.S. CONST., Art. III, Sec. 2.

[5] *See, e.g.*, Golden v. Zwickler, 394 U.S. 103, 108 (1969).

[6] *See, e.g.*, Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

> [A] federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " (Citations omitted.)

all CIA records concerning the legislative history of the agency's governing statute. As a result of the belated release of some 321 documents to plaintiffs by the CIA, it may well be that plaintiffs are fully satisfied that their request has been honored [7] and no longer require further relief from this court on that issue.

If the plaintiffs are in fact satisfied, then any appeal from the denial of discovery is clearly moot. Because mootness would deprive this court of jurisdiction, we would be obliged to note it, regardless of when during the course of the litigation the controversy became moot.[8] I therefore find it difficult to believe that we would not have inquired further into the issue of mootness, either by remanding to the district court for a determination of that issue,[9] or at least requiring further submission from the parties.

[7] Of course, plaintiffs have not conceded the propriety of the CIA's decision to withhold certain documents or portions of documents pursuant to FOIA. *See* note 2, *supra*.

[8] *See*, e.g., Allee v. Medrano, 416 U.S. 802, 818 n.12 (1974): "In the federal system an appellate court determines mootness as of the time it considers the case, not as of the time it was filed." *See also* Steffel v. Thompson, 415 U.S. 452, 459-60 & n.10 (1974).

[9] "There would certainly be no doubt of the need for a court remand if the change of circumstances were such as to make the case moot." Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 283 n.25 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Although Judge Leventhal there referred to review of agency proceedings, the same jurisdictional considerations apply to appellate review of a district court decision.

II.

Even assuming that there remained a live controversy between the parties over the existence of additional documents, it is inconceivable to me that we would have been indifferent to the significance of the CIA's admissions in assessing the adequacy of the original search. The majority rests its decision on the observation that "the mere fact that additional documents have been discovered does not impugn the accuracy of the Wilson affidavits." Slip op. at 7. To my mind, this is a question of fact that cannot possibly be decided on the record before us. The majority notes, "[a]ccording to CIA, the discovery of these documents was entirely adventitious. They were found . . . only after extraordinary effort . . . ." *Id.* at 8. These representations may well be true. But the fact is that at this stage of the litigation they are simply *ex parte* representations. Plaintiffs have had no opportunity to test these assertions under circumstances that would admit of appropriate findings of fact.

The majority's extreme reluctance to permit plaintiffs to explore the factual basis of the CIA's assertions thus repeats the basic error of the original panel opinion. The majority again prematurely forecloses plaintiffs' inquiry into the nature of the CIA's search in response to the FOIA request.[10] But the error is even more serious in this case, for we do not have the benefit of a trial court judgment, entered after appropriate inquiry, that these revelations do not undermine the validity of the CIA's original affidavits. The majority correctly notes that "[a]n appellate court has no fact-finding function." Slip op. at 10. I submit that the majority denies the motion to vacate precisely because it has found the facts against plaintiffs.

[10] As I noted in my earlier dissent, "[m]y disagreement, again, concerns not the substance but the timing of the judgment in favor of the agency." Dissenting op. at 21.

Both the volume of documents discovered by the CIA and the circumstances surrounding the initial withholding and later disclosure of the documents raise serious questions that can only be resolved by a full factual inquiry. The majority finds the "original failure to uncover the documents was wholly understandable." Perhaps I would too, on a proper record. Under our supervisory power, invested in this court by virtue of 28 U.S.C. § 2106 (1976), I would remand this case to the district court to determine the effect of these disclosures on the district court's prior decision upholding the adequacy of the CIA's initial search.[11]

[11] I entertain no doubt that we have the power to consider the impact of these disclosures pursuant to § 2106, whether they are characterized as "newly discovered evidence" or "changed circumstances." *See* Patterson v. Alabama, 294 U.S. 600, 607 (1935); Gomez v. Wilson, 477 F.2d 411, 416-17 (D.C. Cir. 1973). Although typically this evidence should be considered through a motion for a new trial, compelling circumstances justify this court considering such developments. *Cf.* Carr v. District of Columbia, 543 F.2d 917, 929 & n.96 (D.C.Cir. 1976) (where consideration of new evidence time-barred under Rule 60(b) and no other forum available to consider such evidence, court "would consider whether the interests of justice would not require" remand to district court pursuant to 28 U.S.C. § 2106).

The possibility that the CIA has disregarded its responsibilities under the Freedom of Information Act presents a particularly appropriate occasion for the exercise of our § 2106 authority to require further proceedings. Under FOIA, as with any litigation, we adhere to "the fundamental precept that issues on appeal are to be confined to those duly presented to the trial court", *Jordan v. Department of Justice*, No. 77-1240 (D.C. Cir. October 31, 1978) at 56. However, in *Jordan* we recognized that in unusual circumstances we might remand to the trial court (pursuant to § 2106) to permit consideration of a FOIA exemption raised by the government for the first time on appeal. In so observing, we recognized that the policies of FOIA might outweigh the generalized interest in finality that normally confines our review to the is-

III.

I wish to make explicit the seriousness with which I regard the CIA's dereliction in this case. I do not suggest that the CIA failed to inform this court that it had discovered the documents simply to procure a favorable decision (though this possibility certainly cannot be rejected without a fuller factual inquiry into the circumstances surrounding these events). I do believe firmly, however, that the CIA had a strict obligation to report this information to the court *at the moment its arguable relevance became known.*[12] This is central to the "unqualified duty of scrupulous candor that rests upon government counsel in all dealings" with the courts.[13] The CIA's "excuse" for this delay, that the matter was given "insufficient priority," [14] is nothing short of a confession

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sues as presented in the trial court. If the government, under some circumstances, is to be permitted to expand its arguments on appeal to protect legitimate interests in non-disclosure, surely it is equally consonant with the principles of FOIA to permit one who requests information to enlarge the record, especially where there is disturbing evidence of impropriety by the government.

[12] Had the CIA mistakenly failed to recognize the relevance of these documents, or had the librarian failed to inform the General Counsel of her discovery, different, and more difficult issues would be posed. Here, however, *the three top legal officers* of the CIA withheld the fact that documents had been discovered which *they knew to be relevant to this litigation.* I can imagine no clearer breach of duty to this court.

[13] Shotwell Mfg. Co. v. United States (*Shotwell II*), 371 U.S. 341, 358 (1963).

[14] The full text of the CIA's explanation is as follows:

> To be sure, there is one regrettable aspect to the CIA's recent disclosures. Apparently the Agency became aware of the existence of documents possibly relevant to *Goland* in the late fall of 1977. See Exhibits C and E. Despite the pendency of this case before this Court and plaintiffs' outstanding FOIA request, the documents were not compiled speedily, and Justice Department counsel were not informed of their existence. However, this was not a "strategy decision to stand mute," as claimed in plaintiffs' motion to vacate. As explained in the attached letter from the CIA's Office of General Counsel to Justice Department counsel (Exhibit E), insufficient priority was given to these additional documents because there was uncertainty to what extent the documents found by the law librarian were relevant to this litigation and because of the press of other business. Moreover, as is clear from the attached CIA letters (Exhibits C, D, and E), the number of additional documents turned out to be very great. The law librarian did not complete her first partial inventory of the additional documents until May 19, 1978. *Id.*

Opp. to Mot. to Vacate at 7-8.

[15] The CIA seeks to refute any suggestion of bad faith by pointing to its disclosure, albeit belated, of the documents after our opinion issued. Opp. to Mot. to Vacate at 7 n.3. I confess I am unable to find grounds for applause in the agency's tardy recognition of long-neglected legal and moral duty.

that it has been derelict in its duty to this court. Such behavior is worthy only of censure.[15]