

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARK A. ALLEN,)
)
Plaintiff-Appellant,)
)
v.) No. 79-1454
)
CENTRAL INTELLIGENCE AGENCY)
and STANSFIELD TURNER,)
)
Defendants Appellees.)

MOTION TO REMAND

Appellees respectfully move this Court to remand the case to the district court for the limited purposes specified below. The grounds for this motion are as follows:

1. On January 12, 1979, the district court in the instant case entered an order dismissing this Freedom of Information Act (FOIA) suit with prejudice on the basis that the document at issue here was among several held protected from disclosure by the court in Fensterwald v. CIA, D. D.C., Civ. No. 75-897 (decided January 12, 1978, vacated July 28, 1978), ^{1/} and on the basis that agency affidavits supporting nondisclosure of the document on national security grounds were entitled to substantial weight. The court in the instant case denied rehearing

^{1/} The plaintiff in Fensterwald moved voluntarily for dismissal with prejudice "to relieve the government from the duty of complying" with the court's original order requiring the government to supplement the record, to support exemption claims on privacy grounds, with regard to documents other than the one in issue here. The plaintiff in Fensterwald in no way sought to disturb the court's substantive holding regarding this document or other documents as to which national security exemptions were claimed, and in our view, the court's corresponding order of July 28, 1978 can therefore not be read to operate upon the substantive finding that this document was properly withheld. However, for the purposes of the instant motion to remand, the continued precedential significance of the Fensterwald (Footnote ^{1/} continues on p. 2).

on February 22, 1979, and plaintiff took this appeal.

In the course of further study of this case for purposes of briefing in this Court, defendants-appellees have become convinced that the interests of justice would best be served by a remand to the district court for the limited purposes stated below. Following remand, the case should promptly be transmitted back to this Court for appropriate appellate consideration.

2. As noted above, the district court in the instant case relied in part upon the district court's earlier opinion in the Fensterwald case, which upheld the nondisclosability of the very document at issue here. However, the Fensterwald case involved 1363 documents, all related to Lee Harvey Oswald and the John F. Kennedy assassination, including the single document at issue here. The government affidavit supporting non-disclosure in the Fensterwald case discussed the document at issue here in the context of all of the 1363 documents involved in that case. And, although the district court conducted a sample in camera inspection in Fensterwald, the court did not examine the particular document at issue here. While in another factual context the question would arise whether to re-litigate a prior

(Footnote 1/continued from p. 1)

1/ opinion need not be decided.

court's ruling concerning the withholding of a document, in this particular case the government feels that the interests of justice would be served by augmenting the record.

3. Although in our view, the district court was correct in relying on the holding in Fensterwald regarding the same document the circumstances in this case are unusual. In view of the fact that the district court in Fensterwald did not review the specific document at issue here, the government takes the view that the interest of justice in these unusual circumstances would be served by supplementing the record for the district court by a more particularized affidavit.

4. For these reasons, we believe that a remand would be advisable (1) to allow the government to supplement the record in a manner which focuses more particularly on the document at issue here and (2) to enable the district court to evaluate the supplemented record in light of the applicable law and to exercise its discretion to determine whether additional steps, including in camera inspection of the document, should be taken. Such a course of action would be appropriate to ensure adequate judicial review, enhance judicial economy and ultimately expedite appellate review.

Accordingly, appellees respectfully request this Court to remand this case to the district court for the purposes described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 1979, I served the foregoing Motion to Remand upon plaintiff-appellant, pro se, by causing a copy to be mailed, postage prepaid, to:

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