

[ORAL ARGUMENT SCHEDULED FOR OCTOBER 18, 2018]

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

No. 17-5275

JUDICIAL WATCH, INC.

PLAINTIFF-APPELLANT,

v.

MICHAEL POMPEO
IN HIS OFFICIAL CAPACITY

DEFENDANT-APPELLEE.

*On Appeal from the United States District Court
for the District of Columbia*

REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.

James F. Peterson
JUDICIAL WATCH, INC.

Counsel for Plaintiff-Appellant

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* Authorities upon which Plaintiff-Appellant chiefly relies are marked with asterisks.

SUMMARY OF THE ARGUMENT

In its opening brief and before the district court, Plaintiff demonstrated this case is not moot as there are still records unrecovered and more places to look. As Defendant has not asked the Attorney General for help in locating these yet unrecovered records, the district court's dismissal of this case as moot should be reversed and the case remanded for further proceedings.

ARGUMENT

As an initial matter, it is important to recall that this case arises from a mess of the State Department's own making. The State Department was fully aware throughout Secretary Clinton's tenure that she was using a private email system. Then, at the end of her tenure, the State Department allowed four years of federal records to "walk out the door" with Secretary Clinton. Only belatedly did the State Department ask Secretary Clinton to return those records. Yet it is undisputed that not all emails have been returned. All the efforts that have been made – and remain to be made – are necessary because of the State Department's failure to preserve federal records as it was required to do. And because the State Department still has not recovered all the records, a referral to the Attorney General is necessary.

I. The Case Is Not Moot as Defendant Has Not Met His Burden.

Defendant never claims that all unlawfully removed records have been recovered. *See generally* Def's Br. This undisputed fact, together with the possibility that additional emails might be recoverable, means that this case again is not moot. As this Court has observed, a case cannot be dismissed even if it is “nearly moot.” *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016).

Defendant dismisses as “speculative” the likelihood that records could be recovered from third parties who corresponded with Secretary Clinton. As demonstrated in Plaintiff’s opening brief, the record is at best unclear as to what extent the FBI pursued senders/recipients as sources of recoverable emails.

Defendant does not dispute that the FBI never explained who it contacted, who the FBI actually talked to, who the FBI requested records from, who actually provided records, and whether the FBI believes those that they requested records from actually returned all of the requested records. Instead, Defendant relies on an entirely conclusory and self-serving statement from the FBI that “no further steps” would recover additional records. *Haftlang v. INS*, 790 F.2d 140, 144 (D.C. Cir. 1986) (holding conclusory evidence insufficient to establish a *prima facie* case).

In fact, Defendant specifically rejects the possibility of seeking emails from one of Secretary Clinton’s most frequent email correspondents, former British prime minister Tony Blair. Def’s Br. at 17. This would seem to confirm,

however, that no effort has been made to recover emails from at least Mr. Blair. If so, he is at least one potential source of unrecovered records that the Attorney General could explore. And, as identified by Plaintiff, numerous other correspondents could be sources of unrecovered records.

In any event, conclusory statements by the FBI are not sufficient evidence for Defendant to meet his burden. This is especially so in light of the specific evidence provided by Plaintiff. This case is not moot.

II. Plaintiff Seeks the Exact Relief to Which It Is Entitled.

Defendant argues, as he previously did before this Court, that the relief Plaintiff seeks is not available. Def's Br. at 13-18; *cf.* Br. for Appellees/Cross-Appellants, USCA Case #16-5015, Document #1629720, filed August 10, 2016, at 18. Defendant again claims that Plaintiff seeks “judicial supervision” of the government’s recovery efforts. As they were before, these arguments are unavailing.

Plaintiff does not seek “judicial supervision” of the government’s recovery efforts. Instead, Plaintiff seeks a court order directing Defendant to comply with his non-discretionary statutory obligations to initiate action through the Attorney General for the recovery of unlawfully removed records. As this Court previously stated in this case:

Although there may be ambiguities in § 3106(a)’s mandate to

‘initiate action through the Attorney General,’ our decision in *Armstrong* made clear that § 3106 encompasses at least a duty to ‘ask the Attorney General to initiate legal action.’

JA 27 (*Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (citing *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991)).

As before, the only issue here is whether Defendant must approach the Attorney General and seek his assistance in retrieving federal records that have been unlawfully removed from the State Department. The Federal Records Act requires him to do so. Because he has not done so, Plaintiff has the right to judicial review of that failure and a court order requiring Defendant’s compliance. Defendant’s attempt to relitigate this issue should be rejected.

CONCLUSION

Until Defendant proves through non-conclusory evidence that no more records are recoverable, this case is not moot. Nor should a case be dismissed because it is “nearly moot.” *True the Vote, Inc.*, 831 F.3d at 561. Defendant must be held to his duty under the FRA or other agencies may again, like the State Department, recklessly and unlawfully disregard their duties under the law.

Dated: August 24, 2018

Respectfully submitted,

/s/ James F. Peterson

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JUDICIAL WATCH, INC.

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 1,177 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2018, I filed via the CM/ECF system the foregoing **REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ James F. Peterson