

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2956, 15-3122(XAP) Caption [use short title] \_\_\_\_\_

Motion for: Leave to file classified briefs & appendix ex parte American Civil Liberties Union v. United States  
Department of Justice

Set forth below precise, complete statement of relief sought:

Leave to file classified briefs and supplemental appendix  
ex parte, for in camera review, and to file redacted,  
unclassified versions of opening and reply briefs on  
public docket.

American Civil Liberties Union, American Civil  
Liberties Union Foundation

MOVING PARTY: United States DOJ, DOD, CIA

OPPOSING PARTY: \_\_\_\_\_

- Plaintiff  Defendant  
 Appellant/Petitioner  Appellee/Respondent

MOVING ATTORNEY: AUSA Sarah S. Normand

OPPOSING ATTORNEY: Jameel Jaffer, Esq.

[name of attorney, with firm, address, phone number and e-mail]

United States Attorney's Office, SDNY  
86 Chambers Street, Third Floor  
New York, NY 10007  
(212) 637-2709; sarah.normand@usdoj.gov

ACLU  
125 Broad Street, 17th Floor  
New York, NY 10004  
212-519-7814; jjaffer@aclu.org

Court-Judge/Agency appealed from: SDNY/Hon. Colleen McMahon

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):  
 Yes  No (explain): Opposing counsel has advised  
the undersigned that he takes no position on the motion.

Opposing counsel's position on motion:  
 Unopposed  Opposed  Don't Know

Does opposing counsel intend to file a response:  
 Yes  No  Don't Know

Is oral argument on motion requested?  Yes  No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?  Yes  No If yes, enter date: \_\_\_\_\_

Signature of Moving Attorney:  
Sarah S. Normand Date: June 6, 2016

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND  
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?  Yes  No  
Has this relief been previously sought in this Court?  Yes  No  
Requested return date and explanation of emergency: \_\_\_\_\_

Has service been effected?  Yes  No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:  
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: \_\_\_\_\_ By: \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

..... X  
AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION,

Plaintiffs-Appellants-Cross-Appellees,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE, INCLUDING ITS  
COMPONENT THE OFFICE OF LEGAL  
COUNSEL, UNITED STATES  
DEPARTMENT OF DEFENSE,  
INCLUDING ITS COMPONENT U.S.  
SPECIAL OPERATIONS COMMAND,  
CENTRAL INTELLIGENCE AGENCY,

Docket Nos. 15-2956,  
15-3122(XAP)

Defendants-Appellees-Cross-Appellants.

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**DECLARATION OF SARAH S. NORMAND**

SARAH S. NORMAND, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, attorney for defendants-appellees-cross-appellants the Department of Justice, the Department of Defense, and the Central Intelligence Agency (collectively, the “government”) in the above-named consolidated appeals. Together with attorneys with the Department of Justice, Appellate Staff, I have been assigned to litigate this matter,

and I am fully familiar with the facts pertaining to it.

2. Pursuant to the Court's So-Ordered Scheduling Notification dated March 21, 2016, the government's opening brief is due today, June 6, 2016. Because portions of that brief are classified, the government respectfully requests leave to submit the full version of its brief for the Court's review *ex parte* and *in camera*. The government also seeks leave to submit a classified supplemental appendix, which contains portions of the district court record that are classified and privileged and that were filed *ex parte* and *in camera* in the district court. Consistent with the procedure followed in prior appeals in this case, the government has lodged the original and three copies of the classified brief and classified supplemental appendix with a Department of Justice Classified Information Security Officer for secure transmission to the Court. The government is also filing herewith on the public docket a redacted, unclassified version of the government's opening brief on appeal. If the motion is granted, the same procedure would be followed with regard to the government's reply brief in support of its cross-appeal.

### Procedural History

3. As the Court is aware from the prior appeals, *see New York Times v. Dep't of Justice*, Dkt. Nos. 13-422(L), 13-445(Con) (2d Cir.) ("*NYT I*"), and *New York Times v. Dep't of Justice*, Dkt. Nos. 14-4432(L), 14-4764(Con) (2d Cir.) ("*NYT II*"), this case concerns requests by plaintiffs-appellants-cross-appellees

(the “ACLU”) under the Freedom of Information Act (“FOIA”) seeking disclosure of information concerning targeted lethal operations against U.S. citizens suspected of terrorism.<sup>1</sup> In response to the ACLU’s FOIA requests, the defendant agencies withheld documents and information pursuant to, *inter alia*, FOIA exemption 1, which exempts from public disclosure information that is currently and properly classified, *see* 5 U.S.C. § 552(b)(1), FOIA exemption 3, which exempts information that is protected from disclosure by statute, *see id.* § 552(b)(3), and FOIA exemption 5, which exempts privileged information.

4. In its 2014 opinion, this Court held, among other things, that a redacted version of a July 2010 Office of Legal Counsel (“OLC”) legal memorandum must be disclosed. The Court directed the district court on remand to conduct further proceedings with respect to the government’s withholding of (1) additional responsive OLC legal memoranda, and (2) other responsive OLC documents and responsive documents in the possession of CIA and DOD.

5. In the first proceeding on remand, the government submitted ten additional responsive OLC legal memoranda, together with a classified memorandum and classified declarations, to the district court for review *ex parte* and *in camera*. On September 30, 2014, the district court issued a classified decision

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<sup>1</sup> The prior appeals also involved FOIA requests by the New York Times and two of its reporters. The Court’s decision in *NYT II* disposed of all issues relating to the New York Times’ requests, and the pending appeals concern only the ACLU’s requests.

upholding the government's withholding of nine of the legal memoranda in full and one memorandum in part. This Court affirmed the district court's rulings with regard to the ten OLC legal memoranda in its decision in *NYT II*, which was issued publicly on October 22, 2015.

6. In the second proceeding on remand, the government submitted detailed classified indices and classified declarations supporting its withholdings from other responsive OLC documents (other than OLC legal memoranda), and responsive CIA documents and DOD documents, for review by the district court *ex parte* and *in camera*. The government also submitted public declarations and briefing in support of its withholdings. On June 23, 2015, the district court issued a 160-page classified decision which, as amended and supplemented by later orders, sustained the government's invocation of exemptions as to the vast majority of the documents at issue, and ordered disclosure in whole or in part of seven documents. (Special Appendix ("SPA") 1-160; SPA 161; SPA 162-64; Joint Appendix 620-22). Judgment was entered, and this appeal and cross-appeal followed.

#### Government's Motion

7. It is well-settled that this Court may consider classified information *ex parte* and *in camera* in FOIA cases, including where appropriate a classified brief. *See, e.g., ACLU v. Dep't of Justice*, 681 F.3d 61, 70 (2d Cir. 2012), No. 10-4290(L), Dkt. Entry 63 (granting government's motion to file classified

versions of its briefs and portions of the record *ex parte* for *in camera* inspection).

8. In *NYT I*, the Court permitted the government to file classified inserts to its brief on appeal, as well as a classified submission responding to questions posed at oral argument, *ex parte*, for *in camera* review. See *NYT I*, Dkt. Entries 144, 176. The Court similarly granted the government leave to file a redacted version of its petition for rehearing on the public docket, and the full, unredacted version of the rehearing petition *ex parte*, for *in camera* review. *Id.*, Dkt. Entries 216-217.

9. In *NYT II*, the Court permitted the government to file a classified brief and supplemental classified appendix, and to file a redacted version of its brief on the public docket. See *NYT II*, Dkt. Entry 92. At the Court's direction following oral argument in *NYT II*, the government also submitted a declaration and additional briefing addressing certain privileged information, for the Court's review *ex parte*. See *NYT II*, Dkt. Entry 125-26.

10. We respectfully request that the Court grant leave to follow a similar procedure in this appeal as in the prior appeals. Specifically, with regard to the government's opening and reply briefs, the government requests leave to submit a classified brief for the Court's review *ex parte* and *in camera*, and to file a redacted version of the brief on the public record. The redacted version of the government's opening brief redacts classified information that cannot be disclosed publicly. In

addition, a small amount of unclassified but privileged information is also redacted, so as to prevent against the waiver of the government's Exemption 5 arguments for protection of that information in withheld records. Substantial portions of the district court's decision address specific classified information that the government has asserted is protected from public disclosure under FOIA exemptions 1 and 3, as well as privileged information protected by FOIA exemption 5. (See SPA 1-160). In order to fully and accurately describe the issues ruled on by the district court and the government's argument, the government necessarily must address this classified and privileged information in its briefs on appeal.

11. In addition, the government has prepared, for the Court's convenience, a classified supplemental appendix containing an unredacted version of the district court's decision and other classified and privileged documents submitted in district court, and/or submitted to this Court in the prior appeals, that are pertinent to these appeals.<sup>2</sup> In *NYT I*, the Court had difficulty locating certain classified materials in the district court record, and at the Court's request, the government thereafter provided the Court with a complete set of the classified materials in the record. See *NYT I*, Dkt. Entries 161-162. To avoid any such

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<sup>2</sup> For the Court's convenience, the classified supplemental appendix also includes a handful of unclassified, unprivileged documents. These include copies of this Court's orders issued on May 28, 2014, June 23, 2014, and August 11, 2014 in *NYT I*, and a copy of the unclassified Department of Justice White Paper (draft dated November 8, 2011) that is discussed in the brief.

difficulties in *NYT II*, the government sought and was granted leave to file a classified supplemental appendix *ex parte*, for *in camera* review. See *NYT II*, Dkt. Entry 92.

12. The government respectfully requests leave to file a classified supplemental appendix in these appeals as well. We believe that having ready access to the classified materials in the supplemental appendix will assist the Court in its review of the district court's decision.

13. Counsel for plaintiffs take no position at this time on the relief requested in this motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
June 6, 2016

/s/ Sarah S. Normand  
SARAH S. NORMAND  
Assistant United States Attorney