

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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THE NEW YORK TIMES COMPANY,  
CHARLIE SAVAGE, SCOTT SHANE,  
AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION,

Plaintiffs-Appellants,

v.

Docket Nos. 14-4432(L),  
14-4764(Con)

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,

Defendants-Appellees.

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**MEMORANDUM IN SUPPORT OF MOTION FOR  
EX PARTE ARGUMENT**

The Court has scheduled argument in this matter for June 23, 2015, before the same panel (JJ. Cabranes, Newman and Pooler) that heard the prior consolidated appeals in this case, *New York Times v. Dep't of Justice*, Dkt. Nos. 13-422(L), 13-445(Con) (2d Cir.). By this motion, the government respectfully requests that, in addition to the public argument on June 23, the Court afford the government an

opportunity to present argument in an *ex parte* session, to allow the government and the Court to address classified matters that cannot be discussed on the public record. We have been advised that plaintiffs-appellants take no position on this motion, as set forth below.

### **Background**

As the Court is aware from the prior appeals, these cases concern requests by plaintiffs-appellants under the Freedom of Information Act (“FOIA”) seeking disclosure of information concerning targeted lethal operations against suspected terrorists, including U.S. citizens. In response to plaintiffs’ 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).

In its prior 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. (Special Appendix (“SPA”) 142). The Court further held that other responsive legal memoranda prepared by OLC must be submitted to the district court on remand “for in camera inspection and determination of waiver of privileges and appropriate redaction.” (SPA 143).

On remand, the government submitted ten additional responsive OLC legal

memoranda, together with a classified memorandum and classified declarations, to the district court for *ex parte* review. On September 30, 2014, the district court issued a classified decision upholding the government's withholding of nine of the legal memoranda in full and one memorandum in part. (SPA 178-98). The district court directed the government to conduct a classification review of its decision, and the government subsequently provided the district court with a redacted version of the decision suitable for filing on the public record. On October 31, 2014, the district court filed the redacted version of the decision on the public docket, and directed that the unredacted version remain under seal. (SPA 176-98). This appeal followed.

Given the classified nature of both the government's submissions to the district court and substantial portions of the district court decision under review, the government moved this Court for leave to file a classified brief on appeal, for this Court's review *ex parte* and *in camera*, and to file on the public docket a redacted version of the government's brief. ECF No. 88. The government further moved for leave to file a classified appendix containing classified materials in the district court record. *Id.* The Court granted the government's motion. ECF No. 92.

The government's brief on appeal contains substantial classified information, which has been redacted from the version that was filed on the public docket. *See*

ECF No. 89.

**Request for Leave to Present Argument *Ex Parte***

By this motion, the government respectfully requests that this Court permit the government to argue the issues raised in this appeal pursuant to appropriate security arrangements, including allowing the government the opportunity to present arguments *ex parte* and *in camera*. Substantial portions of the district court's order are classified, and as a result, much of the government's argument is classified and cannot be presented in open court. Thus, the government proposes that the Court hold an additional *ex parte* session, in addition to the public argument; without such *ex parte*, *in camera* proceedings with government counsel, the panel and the government will be unable to meaningfully address the reasoning underlying the district court's order and the government's reasons for withholding the ten OLC memoranda, in whole or in part.

*Ex parte*, *in camera* proceedings are proper where, as here, they are necessary to adequately adjudicate an agency's withholdings under FOIA. *See, e.g., New York Times v. Dep't of Justice*, 756 F.3d 100, 117 (2d Cir. 2014) (noting that panel had reviewed government's classified *ex parte* submission *in camera*, and holding that certain information should remain secret for the reasons stated in the classified *ex parte* submission); *ACLU v. Dep't of Justice*, 681 F.3d 61, 70 (2d Cir. 2012)

(upholding government's withholding of classified information "[b]ased on our *ex parte* and *in camera* review" of classified documents and declarations submitted *ex parte*). The purpose of such proceedings is to afford the Court an opportunity to "accept and examine . . . explanations of the government's reasons for withholding certain documents." *Stein v. United States Dep't of Justice*, 662 F.2d 1245, 1255 (7th Cir. 1981). Indeed, when the government's reasons for withholding documents under FOIA themselves implicate classified information, it may be "impossible" for courts to adequately evaluate those reasons without conducting *ex parte, in camera* proceedings. *Id.*

Congress has also recognized that *ex parte, in camera* proceedings may be necessary for the Court to fully understand and evaluate the government's explanations for withholding certain information under FOIA. In the debates culminating in the 1974 amendments to FOIA (which added the first explicit reference to *in camera* review), a House of Representatives subcommittee chairman explicitly identified discussions between the district court and government attorneys during *ex parte, in camera* sessions as one acceptable way for a court to "obtain sufficient information needed to make a judgment" as to the application of a FOIA exemption. *See Ray v. Turner*, 587 F.2d 1187, 1195 n.21 (D.C. Cir. 1978) (quoting Source Book: Legislative History, Texts, and Other Documents (Comm. Print

1975)). The Senate Judiciary Committee also observed that “in some cases of a particularly sensitive nature [a court may] decide to entertain an *ex parte* showing by the government.” S. Rep. No. 854, 93d Cong., 2d Sess. 15-16 (1974), *reprinted in* Source Book, at 153, 167-68.

A court’s reliance upon *ex parte*, *in camera* proceedings to evaluate the propriety of a FOIA withholding is especially appropriate where the documents at issue are classified or otherwise involve sensitive matters of national security. *See, e.g., Simmons v. United States Dep’t of Justice*, 796 F.2d 709, 711 (4th Cir. 1986); *Stein*, 662 F.2d at 1253-55. Indeed, a court has the “inherent authority to review classified material *ex parte*, *in camera*, as part of its judicial review function.” *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). Courts adjudicating civil litigation involving national security have thus recognized that it can be of assistance to judges to “ask the government’s counsel questions . . . in an *in camera*, *ex parte* session.” *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 902 n.2 (N.D. Ill. 2006); *see also Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1266 n.3 (Fed. Cir. 2005) (rejecting argument that government’s *ex parte* communications with court in connection with assertion of state secrets privilege were improper).

This Court has already recognized the necessity of relying on classified information to adjudicate this appeal. The Court granted the government leave to

file a classified brief and a classified appendix containing the classified documents in the record *ex parte*, for *in camera* review.

Moreover, *ex parte* proceedings have been utilized by this and other courts of appeals in civil litigation. In at least one prior appeal involving the withholding of classified and otherwise protected information under FOIA, the Court held a public argument, followed by an *ex parte* session to address classified matters that could not be discussed in a public setting. *See, e.g., ACLU v. Dep't of Justice*, No. 10-4290(L), Dkt. Nos. 132, 140. The D.C. Circuit and the Ninth Circuit have also held closed *ex parte* arguments with only government counsel present so as to permit discussion of the classified information in the record in *People's Mojahedin Organization of Iran v. U.S. Dep't of State*, No. 09-1059 (D.C. Cir.) (closed session on January 12, 2010), and *Mohamed v. Jeppesen Dataplan*, No. 08-15693 (9th Cir.) (closed *en banc* argument on December 15, 2009).

We respectfully request that the Court grant leave to follow the same approach here. Because substantial portions of the district court's decision and the government's brief on appeal are classified, the government necessarily must address this classified information in order to thoroughly present its argument to the Court, and to address any questions the Court may have with regard to those matters. We believe that an *ex parte* session, in addition to the public oral argument, would

be useful to the Court in addressing those issues that may not be discussed in open court.

The government does not seek to preclude plaintiffs from publicly arguing to the Court the points they raised in their briefs. Insofar as the Court has questions concerning the matters addressed in the unredacted portions of the government's brief, the government can also address those questions in a public forum. In addition, should the Court hold an *ex parte* session, the government will (with the assistance of the Department of Justice's Classified Information Security Officer) make arrangements to have the *ex parte* session transcribed by a court reporter with appropriate clearances, and will file a redacted transcript, redacting only classified, statutorily protected and/or privileged information, within ten days.

We have conferred with counsel for plaintiffs-appellants, and we have been advised that if a redacted transcript is filed as set forth above, plaintiffs-appellants take no position on this motion.

### **CONCLUSION**

For the foregoing reasons, the government respectfully requests permission to present oral argument pursuant to appropriate security arrangements implemented by the Classified Information Security Officer, including presenting argument *ex parte*. We will, of course, be happy to assist the Court and the Classified



Information Security Officer to ensure that the security procedures proposed herein work smoothly, and with minimal disruption to the Court.

Respectfully submitted,

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cc: Counsel for Plaintiffs-Appellants (via ECF)