U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	:	
Plaintiffs-Appellants,	:	
v.	:	Docket No: 13-422(L), 445 (Con)
UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,	:	
Defendants-Appellees.	:	

DECLARATION OF DAVID E. McCRAW
IN OPPOSITION TO GOVERNMENT'S
MOTION TO FILE CLASSIFIED SUPPLEMENT

DAVID E. McCRAW, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a Vice President and Assistant General Counsel of The New York Times Company and counsel in this matter to The New York Times Company, Charlie Savage, and Scott Shane, Plaintiffs-Appellants

(jointly, "The Times"). I have personal knowledge of the facts contained herein and would be competent to testify thereto, and I make this declaration in opposition to the Government's motion to supplement its oral argument with a sealed supplemental filing.

2. On October 1, 2013 a panel of this Court heard argument in this case.

3. On October 10, 2013, the Government filed a motion with this Court seeking leave to "file *ex parte* and *in camera* [a] classified supplemental submission" that provides "an additional answer to a question posed during oral argument that could not be adequately and completely answered in a public setting." (Declaration of Sharon Swingle, dated October 10, 2013 ("Swingle Dec."), ¶ 6.)[1]

[1] On the same day, the Government submitted a post-argument letter as requested by the Court to (a) clarify a single sentence written on page 47 of the Government's brief on appeal and (b) distinguish the instant matter from the D.C. Circuit's case *ACLU v. CIA*, 710 F.3d 422 (2013). That submission is not at issue here.

4. The Government's motion does not at any point include information about the nature of the "additional answer" that the Government is providing to the Court or the question to which it is addressed.[2] The Court did not request such a supplemental answer, and there is no basis for a party to unilaterally provide itself with a further opportunity to extend argument – especially in secret – after the conclusion of oral argument.

5. Additionally, the Government has failed to explain why the answer cannot be provided on the public record. *Cf. Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (instructing district courts "to create as complete a public record as possible" before electing to examine affidavits *in camera*, in order to obtain "the benefit of criticism and illumination" that is gained through participation by the opposing party's counsel) (citation omitted)); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) ("The court should attempt to create as complete a public record as is possible" (quotation marks omitted)).

6. In any event, the motion for sealing does not comport with the constitutional standards set forth in *Press-Enterprise Co. v. Superior Court*

[2] The Government's motion also seeks the sealing of a second answer, one clarifying a citation in a classified declaration already in the record. (*See* Swindle Dec. ¶ 6.) The Times does not oppose the sealing of that answer in response to a question from the Court.

of California, 478 U.S. 1 (1986), protecting the public's right to access judicial documents.

7. The public enjoys a qualified First Amendment right of access to judicial documents. *See Press-Enterprise*, 478 U.S. at 8-9 (setting standard for invocation of First Amendment right); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006) (common law and constitutional rights of access to judicial documents apply in civil case). The constitutional right attached to documents that "have historically been open to the press and general public" when "public access plays a significant positive role." *Press-Enterprise*, 478 U.S. at 8; *Lugosch*, 435 F.3d at 120.

8. Under *Press-Enterprise*, the presumption of openness can be overcome only if a court finds that sealing is "necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124. Further, a court must make "specific, on the record findings" to support its decision to close the courtroom or seal documents. *Press-Enterprise*, 478 U.S. at 13-14; *Lugosch*, 435 F.3d at 124.

9. Accordingly, should the Court decide to allow sealing here, it should review *in camera* the classified supplemental answer to determine whether, through more-tailored redaction, parts of it must be made public pursuant to *Press-Enterprise*.

10. Further, if the sealed submission is permitted, the Government should also be directed to publicly describe the answer more fully, including disclosure of which of the Court's questions is being answered, the issue to which the answer is addressed, whether it is addressed to the requests of The Times or the ACLU appellants or both, and whether it contains only factual averments or both legal and factual material. That sort of disclosure would help more properly balance any need for secrecy with the public's right to know under the Constitution and common law.

WHEREFORE, this Court should reject the Government's application to file the unrequested supplemental answer under seal or, in the alternative, review the answer i*n camera* to determine whether parts of it can be made public and require the Government to make a public disclosure of the nature of the sealed supplemental answer.

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

Executed on October 14, 2013

/s/ David E. McCraw

David E. McCraw