UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-422(L), 13-445(Con) | Caption [use short title]: The New York Times Company v. United States Department of Justice

Motion for: Leave to submit ex parte declarations

Set forth below precise, complete statement of relief sought:

Leave to submit ex parte classified and privileged supplemental declarations in support of the government's pending petition for rehearing en banc.

MOVING PARTY: United States DOJ, DOD, CIA
- ☐ Plaintiff
- ☑ Defendant
- ☐ Appellant/Petitioner
- ☑ Appellee/Respondent

OPPOSING PARTY: The New York Times Company, Charlie Savage, Scott Shane, American Civil Liberties Union, American Civil Liberties Union Foundation

MOVING ATTORNEY: AUSA Sarah S. Normand

OPPOSING ATTORNEY: See attached list

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

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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's position on motion:
☐ Unopposed ☐ Opposed ☐ Don't Know

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

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: Decision on motion requested as soon as possible, as the rehearing petition is currently pending before the en banc Court.

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: Saran S. Normand **Date:** July 23, 2014

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:

Form T-1080

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IN THE UNITED STATES 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. UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, Defendants-Appellees.	Nos. 13-422(L), 13-445 (Con)

MOTION TO SUBMIT *EX PARTE* CLASSIFIED AND PRIVILEGED SUPPLEMENTAL DECLARATIONS IN SUPPORT OF PETITION FOR REHEARING EN BANC

Defendants-appellees the U.S. Department of Justice, the U.S. Department of Defense, and the Central Intelligence Agency (collectively, the government) respectfully move the en banc court for leave to submit, *ex parte* and *in camera*, two declarations (one classified and one containing privileged material) in support of the petition for rehearing en banc, currently pending before the Court. The declarations will explain why entries in a classified index of Office of Legal Counsel (OLC) records—ordered released *sua sponte* by the panel—would reveal classified information the disclosure of which could reasonably be expected to harm national security, as well as privileged information and information protected by statute that is not subject to disclosure under the Freedom of Information Act

(FOIA) or the panel's ruling. The declarations (which are being delivered to the Classified Information Security Officer) do not purport to identify all information in the index that is classified, privileged, or protected by statute, but instead attempt to focus the Court's attention on the entries that raise particular concern.

Courts have permitted classified or *ex parte* declarations on rehearing, particularly in cases involving confidential information relating to national security. *See, e.g. August v. FBI*, 328 F.3d 697, 700 (D.C. Cir. 2003). Such declarations are warranted here because of the unorthodox procedure adopted by the panel in this case. The OLC document index at issue, which was attached to a classified declaration submitted *ex parte* and *in camera* in the district court, was designed to aid the district court in ruling on the validity of OLC's "no number-no list" response (refusing to confirm the number of responsive records) to the FOIA requests at issue. While OLC does not object to preparing a public *Vaughn* index on remand in accordance with the panel's ruling, *this* index was not prepared with public release in mind. Because the index was designed solely to aid the district court, the entries were not prepared in a way that would avoid releasing privileged or classified information.

The parties did not address below—and the district court in upholding OLC's response had no occasion to address—whether the index, or any of its entries, should be publicly released. Likewise, the question of the release of the

index was not addressed in the parties' briefs or at oral argument on appeal. Nonetheless, the court of appeals panel, after concluding that two other agencies must prepare *Vaughn* indices of their own, reached out *sua sponte* to rule that portions of the OLC index must be released, instead of remanding to the district court for its consideration of the question in the first instance. Rather than providing the government the opportunity to redact classified or privileged entries or to rephrase such entries and to submit a *Vaughn* index for public release, as would occur in district court, the court of appeals panel conducted its own declassification review, determining that certain entries merit protection while others do not.[1]

Although the panel granted the government's rehearing petition in part, it denied panel rehearing with respect to the government's argument that it was inappropriate to order the release of the OLC index rather than remand. The government's request not to order release, or at a minimum to remand the question

[1] The panel adopted a similar approach with respect to an opinion of the Office of Legal Counsel (referred to by the parties and the panel as the OLC-DOD Memorandum) that had not been a part of the district court record but that the government, at the panel's request, submitted *ex parte* and *in camera*. After ruling that the government could not withhold the memorandum in full, the panel – again declining to remand the issue – made its own *sua sponte* redactions of classified and privileged information from the memorandum and took the extraordinary step of attaching the document to its opinion. That approach resulted in an extensive back-and-forth between the panel (through the Clerk of Court) and the government to attempt to ensure that classified or privileged information not covered by the panel's legal rulings would not be inadvertently released.

of the OLC index, remains pending before the en banc Court. Because the panel's ruling requires the release of information that is classified, protected by statute and privileged, and that is unrelated to the panel's legal rulings in this case, it is necessary to submit declarations providing an evidentiary explanation of the nature of the information in the OLC index and the reason the information is classified, privileged, and protected by statute in support of our pending request for nondisclosure and remand.

STATEMENT

1. These consolidated appeals arise out of certain FOIA requests for release of various records regarding "targeted killing" by the U.S. Government of suspected terrorists, including U.S. citizens. The New York Times Company and two of its reporters (collectively, the New York Times) filed such requests with the Department of Justice's Office of Legal Counsel. The government acknowledged that, insofar as the requests were for OLC records pertaining to the Department of Defense, OLC had one record that was responsive—the OLC-DOD Memorandum—but OLC withheld the contents of that document under FOIA Exemptions 1, 3, and/or 5, 5 U.S.C. § 552(b)(1), (3), (5). The government declined to confirm or deny whether OLC had responsive documents insofar as the New York Times requested OLC records pertaining to the Central Intelligence Agency (CIA) or any other government agency.

The American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the ACLU) filed requests with multiple government agencies, including the Department of Justice (DOJ), DOD and CIA, seeking records regarding "targeted killing" of U.S. citizens, including three specific individuals. DOJ acknowledged that it had 64 unclassified responsive documents; and DOJ and the CIA acknowledged they had classified responsive documents but declined to provide information about the number or nature of such classified records on the ground that the information was itself exempt from disclosure under FOIA Exemptions 1 and/or 3. DOD also acknowledged the existence of responsive documents but withheld certain documents under Exemption 5 and issued a no number, no list response with respect to most of the classified documents, which were covered by Exemption 1.

2. The district court granted summary judgment to the government. As relevant here, the district court rejected plaintiffs' arguments that the government had already officially disclosed certain classified information so that it was no longer covered by FOIA Exemption 1 or 3, and that the government had "adopted" withheld legal analysis in the OLC-DOD Memorandum and thus waived protection under FOIA Exemption 5. The district court also upheld DOJ's Glomar response to the New York Times requests insofar as they pertained to the CIA or other agencies, and the "no number, no list" responses filed by the agencies in response

to the ACLU's request. In the course of the district court proceedings, the government submitted both public declarations and *ex parte*, *in camera* classified declarations, including, as an attachment to OLC's classified declaration, a classified index identifying records withheld by OLC in response to the ACLU's FOIA request. In upholding the government's withholding and Glomar and no number, no list responses, the district court had no occasion to address the separate question of whether the classified OLC index should be redacted and released.

3. A panel of this Court reversed. The panel held that the government waived Exemption 1 and 5 protections for the legal analysis contained in the OLC-DOD Memorandum, and that the Memorandum therefore could not be withheld in full. The panel also held that the government's refusal to provide information about the existence, number, and nature of responsive documents could not be upheld in light of the public disclosures that had been made. Accordingly, the panel held DOD and CIA must provide a *Vaughn* index of responsive materials.

Rather than remand to the district court for further proceedings consistent with those holdings, the panel took two extraordinary steps. First, the panel attempted to determine on its own what information remains classified in the OLC-DOD Memorandum (in the process removing the classification markings from the Memorandum), so that it could redact that information and release the Memorandum (which was not part of the record and had not been reviewed by the

district court) with the panel's opinion. As far as we are aware, no court of appeals has ever itself redacted and released a record subject to FOIA instead of remanding the case to the district court to implement an order requiring the agency to release the record after further appropriate input from the agency.

Second, although the panel remanded to require DOD and CIA to prepare *Vaughn* indices, it did not remand for OLC to do so and instead held that the classified OLC index, submitted to the district court as an attachment to a classified declaration to aid the court in adjudicating OLC's no number, no list response, must be released in part. The panel (without the benefit of full briefing and argument on the question whether specific entries in the classified OLC index could be released) engaged in its own classification analysis of the index entries to determine which merited disclosure and which did not.

4. The government did not seek rehearing en banc of the central legal holding of the Court's decision. The government sought panel rehearing, however, and, alternatively, rehearing en banc, with respect to limited parts of the Court's holding and its proposed redactions. The first two categories concerned court redactions to the OLC-DOD Memorandum attached to the panel's decision. The government pointed out that the court-redacted version of the Memorandum failed to redact certain information that the panel itself had held, elsewhere in its opinion, warrants continued secrecy, and also disclosed classified and privileged

information that is subject to exemption claims that had never been analyzed or ruled on by any court. The government provided a separate version of the OLC-DOD Memorandum that redacted the additional information subject to the rehearing petition.

In addition, the government sought rehearing with respect to the panel's order requiring the disclosure of information contained in the classified OLC index. The petition pointed out that the panel had not identified a legal ground for ordering disclosure of the index, which is not a responsive document under FOIA, and that the district court did not have occasion to rule on it, and plaintiffs had not sought disclosure of the index either in the district court or in the court of appeals. The government also pointed out that many of the listings in the OLC index contain information that is classified, protected by statute, and/or privileged, providing numerous examples of those listings. Given space constraints, the petition did not provide a comprehensive analysis of the entire OLC index, but requested that the case be remanded to the district court to give the government an opportunity to prepare a *Vaughn* index that is suitable for filing on the public record, subject to district court and subsequent appellate review.

5. On June 9, 2014, the panel submitted to the government *ex parte* and *in camera* a proposed order on rehearing and a further redacted version of the DOD-OLC Memorandum. The order granted the government's redactions to the OLC-

DOD Memorandum, and bifurcated the issue of the release of the OLC index, reserving that issue for further decision. In an order date June 10, the panel ordered the government to notify the court whether it had any objection to issuance of the proposed opinion on rehearing and the further redacted OLC-DOD Memorandum. After the government submitted a response raising several minor points, the panel's order on rehearing was issued publicly on June 23.

6. On July 10, 2014, the panel issued an opinion denying the petition for panel rehearing with respect to the OLC index, but revising its earlier opinion to permit redaction of the titles and descriptions of 10 additional listings in the index, and the titles of 24 additional listings in the index. The panel rejected the government's contention that it was inappropriate to order disclosure of the OLC index when plaintiffs had not raised the issue on appeal, stating that plaintiffs had argued that the government should prepare *Vaughn* indices and cannot be faulted for "not requesting a classified index of which they were not aware." July 10 Op., at 9. The panel then noted that it had not ordered disclosure of "the index," since, in its view, "the dispute about the OLC's *Vaughn* index concerns whether titles and descriptions of some specifically identified listings must be disclosed." *Id*. n. 9.

Turning to the specific listings identified in the rehearing petition, the panel stated that it would "exempt" the titles and descriptions of six listings identified by the government in one category, and three in another. *Id*. at 11, 12. With respect to

57 additional listings identified by the government, the panel stated that it would exclude from disclosure "the titles, but not the descriptions" of 23 listings. *Id*. at 12. The panel also stated that, based on its "own reexamination of the *Vaughn* index," it would "exclude from disclosure the titles, but not the descriptions" of two additional entries (69 and 80), *id*., although the panel's previous opinion had indicated those entries could be withheld in full. 6/23/14 Op., at 62-63.

Finally, the panel held that it would not except from disclosure the "other" listings mentioned in the rehearing petition but not specifically identified by the government. The panel declared that the government already had "three opportunities to claim justified exceptions to the *Vaughn* index disclosures – first, in its brief on the merits, second, in the pending petition for review, and third, in its response to the Court's *ex parte* letter of June 10, submitting for *in camera* review the Court's proposed Revised Opinion." *Id*. at 13. Any additional listing, the panel held, "could have been included in one or two lines of type" at the end of page 15 of the rehearing petition. *Id*.

ARGUMENT

In this motion, we do not seek to reargue the merits of the government's rehearing petition. Rather, we seek leave to submit, *ex parte* and *in camera*, two declarations explaining that the panel's decision, as clarified in its recent order of July 10, requires the disclosure of classified information, as well as privileged

information and information protected by statute that does not fall within the reasoning of the panel's underlying decision, thus supporting our pending request for en banc review to reverse the order of disclosure and to remand to the district court.

Although the submission of a declaration on rehearing is not a common practice, the procedural posture of this case is itself uncommon. The classified OLC index was attached to a classified declaration submitted to the district court, to further explain the basis of the government's partial Glomar and no number, no list responses to the FOIA requests at issue. As the panel noted, the plaintiffs were not aware of the classified index and thus cannot be "faulted" for failing to litigate the issue. But the fact remains that the district court, for which the index was prepared, had no occasion to address the issue in the first instance, and the issue whether specific entries in the classified OLC index should be released was not fully briefed.

Taking a classified document prepared to aid the trial court *in camera* and converting it through redactions into a public unclassified document should be a delicate and cautious undertaking. Determining whether information is classified often requires extensive knowledge of agency practices, programs and policies, and involves educated judgments about the potential harm from disclosure of various pieces of information that may not be apparent without intelligence

expertise. Agency personnel "must of course be familiar with 'the whole picture,' as judges are not," and "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 179, 180 (1985); *see also Wilner v. NSA*, 592, F.3d 60, 73 (2d Cir. 2009). The agency's classification decisions may ultimately be subject to judicial review, but that review generally begins in the district court, where the government can fully explain the basis for its classification decisions with evidentiary submissions. Thus, when a court of appeals determines that the agency has not adequately explained the basis for withholding such information, the proper course in the first instance is to permit the agency an opportunity to explain more fully the basis for withholding. *See, e.g., Gardels v. Central Intelligence Agency*, 637 F.2d 770, 774 (D.C. Cir. 1980).

These principles ensure that a court will not release properly classified information and provides a full opportunity for the appropriate agency officials with expertise to submit declarations explaining the basis of the classification decision. These principles also counsel against a court of appeals' attempting to engage in its own declassification review, as the panel attempted to do here, rather

than remanding the case to the district court to implement the court of appeals' legal rulings based on an appropriate factual record.

Moreover, courts have applied these principles to permit the filing of declarations on rehearing in similar circumstances. In *August v. FBI*, 328 F.3d at 700, for instance, the D.C. Circuit permitted the government, on rehearing, to submit an *in camera* declaration to establish the applicability of FOIA Exemptions 7(C), 7(D), and 7(F) to protect the privacy and safety of a confidential source. The court permitted the government to raise exemptions on rehearing because it had not failed to raise those exemptions in order to gain a "tactical advantage" and because wholesale disclosure would pose a significant risk to the safety and privacy of third parties. *Id*. at 702; *see also Schanen v. Department of Justice*, 798 F.2d 348, 349-50 (9th Cir. 1986). Significantly, the *August* court recognized that permitting a new declaration is appropriate where "an agency 'is forced to invoke an exemption for the first time on appeal because of a substantial change in factual circumstances of the case or because of an interim development in applicable legal doctrine,'" or where the case involved "'confidential information compromising the nation's foreign relations or national security . . . .'" *August*, 328 F.3d at 700 (quoting *Jordan v. Department of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978)).

Both of those situations are presented here. As noted above, OLC submitted its classified declaration and index to aid the district court *in camera* and *ex parte*,

and the issue whether specific entries in that index were properly classified or privileged was not an issue in this litigation until the panel *sua sponte* elected to parse individual entries in the OLC index. In addition to these changed factual circumstances, the case involves classified national security information. In these circumstances, the court should not order the information released without providing the government an opportunity to more fully explain the basis of the classified and privileged entries at issue through *ex parte* declarations.

Moreover, because the OLC index was not prepared with public release in mind, the entries were not written in a way that could have avoided, in certain contexts, language that would disclose privileged or classified information. The government could not have anticipated that it would be called upon to release entries from the index without first having an opportunity to prepare a *Vaughn* index whose descriptions do not themselves reveal the information sought to be protected.

The panel's July 10 opinion stated that it is "too late" for the government to identify any additional entries to be withheld because it already had three opportunities to claim exceptions to OLC index disclosures. We respectfully submit that the panel was mistaken.

First, the panel states that the government could have raised the issue in its briefs on the merits. But the plaintiffs (though they cannot be "faulted" for it) did

not raise this issue on appeal. Indeed, the panel itself recognized that plaintiffs argued only that the government should be required to "prepare and produce a public *Vaughn* index" and that the issue whether "specifically identified listings must be disclosed" from an earlier-prepared index is a different issue. July 10 Op., at 9 & n.9. Nor was the issue addressed by the district court. Because the government's merits briefs were filed in response to the plaintiffs' appeal, the government reasonably limited its briefs to the arguments raised by the plaintiffs.

Second, although the panel stated that the government could have identified additional entries in the few additional lines that might have been added to "the last page of [its rehearing] petition" (July 10 Op. at 13), the government could not have realistically provided any meaningful explanations about the national security implications of the index entries in such limited space; national security subjects do not reduce to sound bites. Moreover, such contentions must be made in evidentiary declarations by appropriate government officials, not by legal counsel. The government acted reasonably in pressing its argument that the panel should have remanded the issue to the district court, and by providing illustrative examples of entries in the OLC index that should not be released. Even if the Court believes the government should not have adopted this approach, we submit that the result should not be to release classified or privileged information without

a full analysis of the nature of that information and its potential harm to national security.

Finally, the panel stated that the government could have included additional objections to the disclosure of the classified OLC index entries in response to the panel's letter of June 10. But that letter expressly stated that the panel had bifurcated and "deferred decision with respect to the Appellees' request for relief with respect to the *Vaughn* index." 6/10/14 Order, at 2. In light of that language, the government reasonably understood the panel's letter as a directive to state objections only to the public release of the panel's original opinion and the newly-redacted OLC-DOD Memorandum and not as an invitation to submit additional material with respect to the bifurcated and deferred issue concerning the OLC index.

To be clear, the government does not seek relief from the panel's order that the defendant agencies prepare and submit public *Vaughn* indices on remand. We merely seek to explain to the *en banc* Court why specific information ordered released from the *classified* OLC index should not be subject to release by this Court and why the Court should reverse the release order and remand the issue for district court consideration. OLC will, on remand, produce a publicly available *Vaughn* index, subject to district court scrutiny, that balances the need for public filing with the need to protect classified and privileged material.

CONCLUSION

For the foregoing reasons, the motion to permit the submission of *ex parte* and *in camera* declarations should be granted.

Respectfully submitted,

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