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.	:	

OPPOSITION OF THE NEW YORK TIMES APPELLANTS TO GOVERNMENT'S MOTION TO SUBMIT EX PARTE CLASSIFIED AND PRIVILEGED SUPPLEMENTAL DECLARATIONS IN SUPPORT OF PETITION FOR REHEARING EN BANC

Appellants The New York Times Company, Charlie Savage, and Scott Shane (jointly, "The Times") respectfully submit this opposition to the Government's Motion to Submit Ex Parte Classified and Privileged Supplement Declarations in Support of Petition for Rehearing En Banc (the "Motion").

The Times adopts the arguments set forth in the opposition of the American Civil Liberties Union appellants. (*See* Appellant ACLU's Opposition to Motion, Docket No. 260, filed July 25, 2014.) We write separately to emphasize a single point.

In moving for partial summary judgment in the District Court, The Times specifically asked for a Vaughn index of Office of Legal Counsel ("OLC") materials that were withheld as a result of OLC's Glomar response. That relief was denied by the District Court. The Second Circuit panel reversed and granted appellants the right to Vaughn indexes of responsive documents. The panel – undoubtedly aware (a) that The Times had filed the first of its FOIA requests in June of 2010, nearly four years earlier, and (b) that the materials at issue were of immediate news value to The Times and its readers – fashioned relief designed to move this action toward a quicker conclusion. It recognized that OLC had already created a Vaughn index. It then consulted with the Government as to what redactions should be made before the redacted Vaughn index was provided to appellants.

The Government, through its current motion, makes plain it wants to put aside the panel's careful and appropriate resolution of the Vaughn index issue and have that issue remanded to the District Court. The Court should see the Government's Motion and en banc petition for what they are: foot-dragging designed to inject even more delay into a case that has gone on too long already, depriving The Times and its readers of access to information of vital public importance. The Second Circuit ruled. It did so in consultation with the Government because of the national security concerns involved. In fact, the Government was given three opportunities to provide input as to what should be included in the public version of the Vaughn index. The panel took that input into account before ruling. But the Government, still not satisfied with the panel's decision, now wants a "do over" before the District Court – in essence, seeking to empower the District Court to conduct a *de novo* review of this Court's decisions.

The delays need to stop. The Government's Motion should be denied, as should its petition for rehearing en banc.

Dated: July 25, 2014

Respectfully submitted,

By: s/ David E. McCraw

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