

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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 AMERICAN CIVIL LIBERTIES UNION and :
 AMERICAN CIVIL LIBERTIES UNION :
 FOUNDATION, :
 Plaintiffs, :
 v. :
 U.S. DEPARTMENT OF JUSTICE including :
 its components OFFICE OF LEGAL :
 COUNSEL and OFFICE OF INFORMATION :
 POLICY :
 Defendants. :
 -----X

15 Civ. 9002 (PKC)

**BRIEF FOR SENATOR RON WYDEN AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS**

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<https://s3.amazonaws.com/s3.documentcloud.org/documents/1585454/letter-to-doj.pdf>.....1

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Ron Wyden is a United States Senator and senior member of the Senate Select Committee on Intelligence. Senator Wyden submits this brief to direct the Court's attention towards crucial evidence that it should review in this case.¹

BACKGROUND

At the request of an unnamed Executive Branch agency, the Office of Legal Counsel ("OLC") of the Department of Justice ("DOJ") drafted a 19-page classified legal memorandum ("OLC Opinion" or "Opinion") interpreting common commercial service agreements. The OLC Opinion was authored by then-Deputy Assistant Attorney General John Yoo and dated May 30, 2003.² Senator Wyden is familiar with the content and history of the OLC Opinion. On numerous occasions, he warned the DOJ that the Opinion is inconsistent with public understanding of the law and called for declassification of the Opinion so parties to these common commercial service agreements can determine whether to revise or modify their agreements. *E.g.*, Letter from U.S. Senator Ron Wyden to U.S. Att'y General Eric H. Holder, Jr. (Feb. 3, 2015), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1585454/letter-to-doj.pdf>.

On November 17, 2015, the American Civil Liberties Union ("ACLU") filed this lawsuit under the Freedom of Information Act ("FOIA") to release the OLC Opinion. The DOJ filed a motion for summary judgment on March 7, 2016. In support of that motion, the DOJ submitted

¹ All parties provided written consent to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than the *amicus* or his counsel made a monetary contribution to the preparation or submission of the brief.

² The DOJ's March 7, 2016 memorandum of law indicated that the Opinion was dated March 30, 2003. On March 28, 2016, The DOJ called the ACLU to explain that the Opinion was actually dated May 30, 2003, and advised that it will file a correction with the Court.

an unclassified declaration from OLC Special Counsel Paul Colborn and a classified declaration for the Court's *ex parte, in camera* review. Senator Wyden requested a copy of the classified declaration, but the DOJ refused, and provided no justification for this refusal. Senator Wyden also reviewed the memorandum of law accompanying the DOJ's motion for summary judgment and identified a "key assertion which is inaccurate" contained therein. On March 24, 2016, Senator Wyden wrote a letter to Attorney General Lynch to express concern over this inaccurate assertion and attached to that letter a classified document discussing the inaccuracy in greater detail. Letter from U.S. Senator Ron Wyden to U.S. Att'y General Loretta Lynch (March 24, 2016) (Exhibit A) ("March 24 Letter").

SUMMARY OF ARGUMENT

The Court should conduct an *in camera* review of the classified attachment to the March 24 Letter in order to address the apparent incompleteness and inaccuracy of the DOJ's representations to the Court. While classified filings are sometimes necessary in the unique context of FOIA litigation, the Court should do everything within its power to preserve the adversarial system at the heart of our legal tradition whenever it makes use of such evidence. Reliance on classified filings in this case is particularly perilous because the DOJ's March 7, 2016 memorandum of law contains "a key assertion which is inaccurate." Accordingly, the Court should review Senator Wyden's classified attachment as a counterweight to the DOJ's one-sided, and potentially false, narrative.

ARGUMENT

- I. **Reviewing the Classified Attachment is Necessary to Prevent the Court from Proceeding with an Incomplete and Inaccurate View of the Facts**

“[A]n agency invoking a FOIA exemption may meet its burden of proof by submitting ‘[a]ffidavits or declarations giving reasonably detailed explanations why any withheld documents fall within an exemption.’” *Am. Civil Liberties Union v. Dep’t of Def.*, 40 F. Supp. 3d 377, 390 (S.D.N.Y. 2014) (quoting *Am. Civil Liberties Union v. Dep’t of Justice*, 681 F.3d 61, 69 (2d. Cir. 2012)). Submission of a classified affidavit “distort[s] the normal judicial process, since it combines the element of secrecy with the element of one-sided, *ex parte* presentation,” *Arieff v. United States Dep’t of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983). Accordingly, “the use of in camera affidavits has generally been disfavored.” *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996); *see also Am. Civil Liberties Union v. Dep’t of Def.*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005) (“Cases generally disfavor *in camera* inspections [of agency declarations] by district court judges as the primary method for resolving FOIA disputes.”).

While courts recognize *ex parte* review of an agency’s classified affidavit as sometimes necessary in FOIA litigation, they “cannot pretend to be comfortable in endorsing regular use of *ex parte* procedures—a practice out of accord with normal usage under our common law tradition, in which the judge functions as the impartial arbiter of a dispute *fully argued by both parties* before him.” *Arieff*, 712 F.2d at 1471 (emphasis added). Even in the national security context, courts must “ensure that the use of such affidavits has the smallest possible negative impact on the effective functioning of the adversarial system.” *Armstrong*, 97 F.3d at 580-81 (requiring agency to “both make its reasons for [submitting *in camera* evidence] clear and make as much as possible of the *in camera* submission available to the opposing party.”); *see also*

Scott v. United States CIA, 916 F. Supp. 42, 48 (D.D.C. 1996) (denying *in camera* review until CIA “creates as full a public record as possible.”).

Here, the DOJ has not made any portion of its *ex parte* submission available to the ACLU. Nor has it given any reason for denying Senator Wyden—who has routine access to classified information—from viewing that submission. The DOJ’s conduct prevents any meaningful response to its classified declaration, thus leaving the Court at risk of adjudicating based solely on a partisan presentation of facts. *Arieff*, 712 F.2d at 1469.

Senator Wyden’s classified attachment offers the Court the opportunity to preserve an aspect of the adversarial system because it rebuts a key assertion in the DOJ’s otherwise one-sided account. The ACLU cannot present this rebuttal evidence because it is classified, and the very existence of the inaccurate assertion in the DOJ’s March 7, 2016 memorandum of law indicates that the DOJ failed to provide this crucial evidence on its own initiative. The classified attachment is the only evidence capable of challenging the DOJ’s factual account. Its review is therefore essential to the Court’s efforts to minimize injury to the adversarial system and gain a more complete view of the relevant facts.

The Court’s need to review the classified attachment is all the more compelling due to the concern that, in addition to presenting a one-sided—and therefore incomplete—account, the DOJ’s declarations may also present an inaccurate one. The March 24 Letter warns that the DOJ’s filings to this Court contain an inaccurate assertion that “appears to be central to the DOJ’s legal arguments.” The Court should inquire into the nature and extent of this inaccuracy, and its relevance to the litigation, to ensure it does not proceed on the basis of a potentially false


narrative. Review of the classified attachment discussing the inaccurate assertion in more detail is a necessary component of that inquiry.

In order to ensure that it does not resolve this case with an incomplete, and potentially inaccurate, account of the facts, the Court should require the DOJ to make Senator Wyden's classified attachment available for *in camera* review. See *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005) (“[W]hen a court is not able to resolve to its own satisfaction an agency's determination to withhold documents, it may require a further showing by the agency and, if necessary, it may conduct an *in camera* review.”).

CONCLUSION

For the reasons stated above, the Court should review the classified attachment to the March 24 Letter.

Date: March 30, 2016



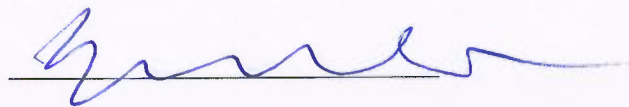
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CERTIFICATE OF SERVICE

I, Gregory L. Diskant, hereby certify, under penalty of perjury pursuant to 28 U.S.C. § 1746, that on this 30th day of March 2016, I served a true and correct copy of the foregoing Brief For Senator Ron Wyden As *Amicus Curiae* In Support Of Plaintiffs by electronic mail upon the following counsel of record:

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A handwritten signature in blue ink, appearing to read "Gregory L. Diskant", is written over a horizontal line.

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March 24, 2016

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SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS
SPECIAL COMMITTEE ON AGING
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COMMITTEE ON FINANCE

The Honorable Loretta Lynch
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Attorney General Lynch:

As you may be aware, I have previously written to the Department of Justice regarding a particular secret legal opinion from the DOJ's Office of Legal Counsel, which has now been the subject of a recent suit under the Freedom of Information Act. This opinion remains classified, but it pertains to common commercial service agreements. The DOJ's motion to dismiss the now-pending FOIA case also noted that this opinion was signed by Deputy Assistant Attorney General John Yoo and dated March 30, 2003.

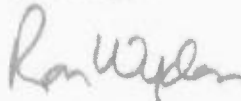
As I have noted in previous correspondence with the DOJ, I believe that this opinion is inconsistent with the public's understanding of the law, and should be withdrawn. I also believe that this opinion should be declassified and released to the public, so that anyone who is a party to one of these agreements can consider whether their agreement should be revised or modified. For these reasons, I encourage you to direct DOJ officials to comply with the pending FOIA request.

Additionally, I am greatly concerned that the DOJ's March 7, 2016, memorandum of law contains a key assertion which is inaccurate. This assertion appears to be central to the DOJ's legal arguments, and I would urge you to take action to ensure that this error is corrected.

I am enclosing a classified attachment which discusses this inaccurate assertion in more detail. If you or your staff have any difficulty obtaining the documents referenced in this attachment, please do not hesitate to let me know.

Thank you for your attention to this matter.

Sincerely,



Ron Wyden
United States Senator

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