

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,

Docket Nos. 13-422(L),
445(Con)

v.

UNITED STATES DEPARTMENT OF
JUSTICE, UNITED STATES
DEPARTMENT OF DEFENSE,
CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

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DECLARATION OF SARAH S. NORMAND

SARAH S. NORMAND, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, attorney for defendants-appellees the Department of Justice, the Department of Defense, and the Central Intelligence Agency (collectively, the “government”) in the above-named consolidated appeals. Together with attorneys with the Department of Justice, Civil Division, Appellate Staff, I have been assigned to defend this matter, and I am fully familiar with the facts pertaining to it. I submit this declaration in support of

the government's motion for leave to submit a petition for rehearing *ex parte*, for the Court's review *in camera*.

2. The Court issued its decision in this case on April 21, 2014.

The Court issued a public version of its opinion on that date, which contains certain redactions made at the government's request to preserve the government's opportunities for possible further appellate review of the Court's decision. Slip op. at 2 n.1. The Court has indicated that if its decision is not altered in the course of any further appellate review, an unredacted version of the opinion will be filed publicly, accompanied by an attachment that consists of a Court-redacted version of the "OLC-DOD Memorandum" at issue in these appeals. *Id.* On April 21, the Court also filed under seal its unredacted opinion, and the Court-redacted version of the OLC-DOD Memorandum.

3. The government does not intend to seek further review of the Court's ruling that the OLC-DOD Memorandum may not be withheld in full under the Freedom of Information Act ("FOIA"). The government does intend, however, to seek panel rehearing, and alternatively, rehearing *en banc*, with respect to certain parts of the Court's opinion and its proposed redactions. Pursuant to Federal Rules of Appellate Procedure 35(c) and 40(a)(1), that petition is due on June 5, 2014. As discussed below, the government's rehearing petition will necessarily discuss classified and privileged material that cannot be disclosed publicly or to opposing

counsel.

4. The government intends to seek rehearing to protect certain information in the Court's opinion, the Court-redacted version of the OLC-DOD Memorandum, and the OLC classified *Vaughn* index ordered disclosed by the Court. In the government's view, that information is properly classified, protected from disclosure by statute, and/or privileged, and therefore exempt under FOIA Exemptions 1, 3, and/or 5, 5 U.S.C. § 552(b)(1), (3), and/or (5), even if the OLC-DOD Memorandum cannot be withheld in its entirety under FOIA. Some of the information appears to have been ordered disclosed based on inadvertence or mistake, or is subject to distinct exemption claims or other legal protections that have never been judicially considered.

5. The government seeks leave to file its rehearing petition *ex parte*, for inspection *in camera*. In order to make its position clear for the Court, and to explain why particular information remains exempt under FOIA, the government necessarily must identify and discuss the specific classified and privileged information at issue. The government cannot address this classified and privileged information in a public filing without mooting its arguments. We therefore respectfully request leave to file the petition *ex parte*, for *in camera* review, to avoid rendering the government's claims moot.

6. The relief requested here is consistent with the Court's practice.

The Court previously has granted the government's requests to submit materials *ex parte* and *in camera*, where necessary to address specific classified or privileged material. By Order dated August 27, 2013, the Court granted the government's motion for leave to file classified inserts to its brief on appeal. By Order dated October 18, 2013, the Court granted the government's motion for leave to file *ex parte* and *in camera* a classified supplemental submission to address questions posed at the oral argument held on October 1, 2013.

7. If the Court grants this motion, the government will use the same procedure employed with respect to its earlier classified submissions. Specifically, the Government will lodge its petition for rehearing with the Department of Justice's Court Security Officer, on or before June 5, 2014, for transmission to the Court under appropriate security protocols.

8. In addition, the government intends to prepare and to provide for public filing a version of the OLC-DOD Memorandum that includes the redactions in the Court-redacted version of the OLC-DOD Memorandum and the additional redactions that will be at issue in the petition for rehearing.

9. Counsel for plaintiffs do not consent to the relief requested in this motion.

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

Dated: New York, New York
May 27, 2014

/s/ Sarah S. Normand
SARAH S. NORMAND
Assistant United States Attorney