UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs–Appellants,

v.

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

Defendants–Appellees.

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Docket Nos.

13-422(L), 445(Con)

APPELLANTS' OPPOSITION TO APPELLEES' MOTION FOR LEAVE TO FILE EX PARTE AND IN CAMERA CLASSIFIED SUPPLEMENTAL SUBMISSIONS

Appellants American Civil Liberties Union and American Civil Liberties Union Foundation (together, "the ACLU") respectfully request that this Court deny the motion of Appellees the United States Department of Justice, the United States Department of Defense, and the Central Intelligence Agency (together, the "government") for leave to file, *ex parte* and *in camera*, "a classified supplemental submission that addresses questions posed by the panel during the oral argument held in this matter on October 1, 2013." Gov't Mot. ¶ 2.

The ACLU opposes the government's motion for substantially the same reasons expressed in the October 14, 2013 declaration filed by The New York

Times Co. *See* Declaration of David E. McCraw in Opposition to Government's Motion to File Classified Supplement, *N.Y. Times Co. v. U.S. Dep't of Justice*, No. 13-422 (2d Cir. Oct. 14, 2013), ECF No. 168. The Court did not request that the government provide "an additional answer to a question posed during oral argument that could not be adequately and completely answered in a public setting," Gov't Mot. ¶ 6, and the government lacks any basis for substituting an entirely secret answer now for one given during oral argument. Moreover, the government has not attempted to explain why its new answer cannot be provided, or even summarized, on the public record. *See, e.g.*, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996). As such, the government's request is fundamentally incompatible with the FOIA and the Court should deny it. *See, e.g.*, *Local 3, Int'l Bhd. of Elec. Workers, AFL–CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988) ("*In camera* review is considered the exception, not the rule . . . .").

Dated: October 15, 2013

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