

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.

Docket Nos.

13-422(L), 445(Con)

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

Defendants–Appellees.

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**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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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Appellants’  
Opposition to Appellees’ Motion for Leave to File Ex Parte and In Camera  
Classified Supplemental Submissions was filed electronically with the Courts’  
CM/ECF system by the undersigned on this 15th day in October, 2013, to the  
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