UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

 AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; and MARION E. BOWMAN, in his official capacity as Senior Counsel to the Federal Bureau of Investigation, Defendants.	04 Civ. 2614 (VM) **SEALED**

PLAINTIFFS' MOTION TO EXCLUDE EX PARTE DECLARATION FILED IN SUPPORT OF THE GOVERNMENT'S CROSS-MOTION TO DISMISS THE COMPLAINT OR FOR SUMMARY JUDGMENT

For the reasons stated below, plaintiffs respectfully move to exclude the *ex parte* declaration submitted by defendants in support of their opposition to plaintiffs' motion for summary judgment and cross-motion to dismiss the complaint or for summary judgment.

I. The Submission Of Secret Evidence To Defend Against A Constitutional Challenge To Government Action Violates Fundamental Principles Of Justice.

In an extraordinary move, defendants have submitted an *ex parte* declaration in support of their opposition to plaintiffs' motion for summary judgment and cross-motion to dismiss the complaint or for summary judgment. The submission of secret evidence

violates the fundamental principles of our adversary system of justice as well as the clear rules of federal civil procedure. The *ex parte* declaration must be excluded and expunged from the record.

The consideration of *ex parte* material as the basis for judgment in civil cases is antithetical to our democratic, adversial system of justice. As the Supreme Court has explained, "Democracy implies respect for the elementary rights of men . . . . [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)."); *id.* at 143 (Black, J., concurring). The use of secret evidence is thus uniformly prohibited by the courts. "Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) (quoting *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)); *see also Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) ("our adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case") (quoting *Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. Unit B Sept. 1981)); *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) ("[A] court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions").[1]

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[1] In an extremely rare exception to the rule against consideration of *ex parte* evidence, the District of Columbia Circuit has held that a court must ultimately dismiss a plaintiff's case if the government properly invokes the state secrets privilege to deny plaintiff access to documents necessary to prove her case. *See Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984); *see also United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (setting strict standards for use of the states secrets privilege, which is "not to be lightly invoked"); *Abourezk*, 785 F.2d at 1061 (noting that only in "the most extraordinary circumstances" does precedent allow reliance "on *ex parte* evidence to decide the merits of a dispute"). Here, plaintiffs have not sought and have no need for the information in defendants' *ex parte* declaration to prove their case. Defendants have

Disputes must be resolved openly through the adversary system to ensure fairness in the administration of justice. "It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts." *Abourezk*, 785 F.2d at 1061; *see also Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D. Mass. 1985) ("the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment"). Our system of justice depends on "open adversarial guidance by the parties." *United States v. Zolin*, 491 U.S. 554, 571 (1989); *see also American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069-70 (9th Cir. 1995) ("the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error) (citing *Abourezk*).

Thus, in chiding a lower court for relying on *ex parte* evidence "for the purpose of assisting it to make factual determinations or to evaluate other evidence," the Ninth Circuit explained that it "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately." *Lynn v. Regents of University of California*, 656 F.2d 1337, 1346 (9th Cir. 1981). "The system functions properly and leads to fair and accurate resolutions ... only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court." *Id.*

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not properly invoked any privilege, let alone one that would justify consideration of *ex parte* material in deciding the merits.

The courts have recognized that the absolute rule prohibiting consideration of *ex parte* evidence in deciding the merits of any case is fundamentally distinct from the rule governing consideration of such evidence to resolve claims of privilege in discovery disputes. If a party refuses to provide material responsive to a discovery request based on a claim of privilege, either party may then submit material *ex parte* for review by the court *in camera* to support or refute the claim of privilege. *See, e.g.*, *Frost v. Perry*, 919 F. Supp. 1459, 1467-68 (D. Nev. 1996) (court may review secret affidavit *in camera* to support a claim of military and state secrets privilege); *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982) (court may review *ex parte* evidence to refute claim of attorney-client privilege by grand jury witness). But a defendant simply cannot wield information presented *ex parte* "as a sword to seek summary judgment and at the same time blind plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment." *Bane v. Spencer*, 393 F.2d 108, 110 (1st Cir.1968).

As one court clarified, "If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment." *Abourezk,* 785 F.2d at 1043; *see also Ass'n for Reduction of Violence*, 734 F.2d at 67 (reversing and remanding grant of summary judgment based on *ex parte* evidence, and holding that "[i]f the defendants renew their motion for summary judgment, the district court will have to rule on the motion without relying on any privileged materials"). In *Kinoy v. Mitchell*, Judge Wald of the Southern District of New

York explained the fundamental difference between relying on a privilege to withhold information, and relying on secret evidence on the merits:

> [T]he government presents the Court, *in camera*, with material which it asserts must be withheld from plaintiffs as privileged, yet which it requests the Court to consider in ascertaining material facts and drawing legal conclusions concerning dispositive issues in the case. In this Court's view such a course is wholly unacceptable.... Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits.

67 F.R.D. at 15. Defendants' reliance on an *ex parte* declaration to oppose plaintiffs' motion for summary judgment and support their cross-motion is clearly prohibited by long-standing case law.

In addition to violating fundamental rules of our adversarial system, defendants' submission is prohibited by the plain language of Federal Rule of Civil Procedure 56. Fed. R. Civ. P. 56(e) (on motion for summary judgment, "[s]upporting and opposing affidavits . . . shall set forth such facts as would be admissible in evidence"). *See Ass'n for Reduction of Violence*, 734 F.2d at 67 (holding that consideration of *ex parte* evidence on motion for summary judgment was improper because Rule 56(c) prohibits consideration of material that would not be admissible at trial). Defendants' submission also violates Rule 5 of the Federal Rules of Civil Procedure, which specifies that "every pleading subsequent to the original complaint . . . . shall be served upon each of the parties." Fed. R. Civ. P. 5(a). *See Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884-85 (9th Cir. 1989) (remanding for evidentiary hearing on question of whether *ex parte* submission by the IRS, which violated Tax Court Rules of Practice and Procedure, also violated due process).

Even where consideration of an *ex parte* submission is allowed to support or refute a claim of privilege in discovery – a situation far removed from the facts of this case – courts routinely insist on a detailed justification and public disclosure *prior to in camera examination* of as much detail as possible about the material without compromising the privilege. See, e.g., *Abourezk*, 785 F.2d at 1061 (court could rely on *ex parte* affidavit to support claim of state secrets privilege only "upon proper invocation of the privilege; a demonstration of compelling national security concerns; and public disclosure by the government, prior to any in camera examination, of as much of the material as it could divulge without compromising the privilege."); *Allende*, 605 F. Supp. at 1226 ("defendants have offered neither a summary of the information contained in the classified materials, ... nor a detailed explanation for their inability to do so") (internal citations omitted); *Kinoy*, 67 F.R.D. at 12-14 (declining to review *in camera* evidence to support claims of privilege before they had been properly invoked). Courts prohibit reliance on *ex parte* evidence even in ordinary, garden-variety civil lawsuits. For the government to rely on secret evidence to defend the constitutionality of a controversial federal statute is manifestly unjust and undemocratic. *See Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 170.

Here, defendants have provided no justification whatsoever for submitting the *ex parte* declaration. They have provided no summary of its contents and have failed even to identify the name, title or job description of the declarant. Defendants have offered no explanation for why the declaration is necessary or even relevant to the case. Defendants offer only the most cursory description of the declaration, asserting that it is "from the FBI, describing some of the details of the authorized [redacted] investigation in

connection with which the National Security Letter challenged by plaintiffs was issued." Kotler Decl. ¶3.

II. If The Government Insists On Relying On The Ex Parte Declaration, It Must Provide Plaintiffs With Full Access To It.

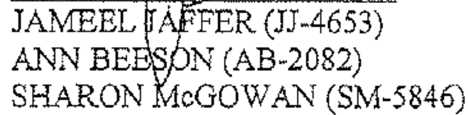
If the government insists that the contents of the declaration are necessary to their case, they must provide plaintiffs with full access to it. It is rarely proper for courts to rely on material not available to the general public to decide the merits of a civil dispute. *See generally Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (discussing the historically recognized public interest in monitoring the processes of the judicial system); *New York Times Co. v. United States*, 403 U.S. 713, 732-33 (1971) (White, J., concurring) (discussing frustration to proper functioning of judicial system if courts do not have access to the basis of other courts' judgments). Plaintiffs recognize, however, that all information submitted in this case is already governed by the existing sealing order. *See* Decision and Order, May 12, 2004 (Rec. Doc. 15). Presumably then, even if plaintiffs were given access to the *ex parte* declaration, defendants would invoke the sealing order to resist disclosure of all or most of the declaration to the general public. Plaintiffs, of course, continue to believe that the gag provision relied upon in the sealing order is unconstitutional. But defendants have no argument for resisting disclosure of the *ex parte* declaration to plaintiffs where a sealing order is already in place.[2]

[2] Protective orders are similarly used in the criminal context to prevent the release of information that is properly classified subject to executive order. *See generally* Classified Information Procedures Act (CIPA), 18 U.S.C. app. III § 1 *et seq.*; *see, e.g.*, United States v. Musa, 833 F. Supp. 752, 758-61 (E.D.Mo.1993) (implementing protective order to protect from disclosure by a criminal defendant classified information subject to discovery); 18 U.S.C. app. III § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of classified information

For the foregoing reasons, the *ex parte* declaration is manifestly improper.

Plaintiffs respectfully ask the Court to exclude the declaration.

Respectfully submitted,



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July 30, 2004

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disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of "Plaintiffs' Motion to Exclude *Ex Parte* Declaration Filed in Support of the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment" was personally delivered to the counsel of record on July 30, 2004:

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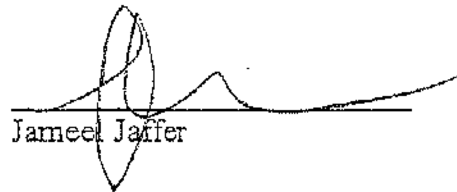

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