

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**JOHN DOE; AMERICAN CIVIL LIBERTIES
UNION; AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,**

Plaintiffs,

v.

**ATTORNEY GENERAL ALBERTO
GONZALES**, 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;
JOHN MOE, in his official capacity, Federal
Bureau of Investigation,

Defendants.

**PLAINTIFFS' MOTION TO PREVENT
THE FILING OF EVIDENCE EX
PARTE**

Civ. Action No. 3:05cv1256 JCH

September 1, 2005

PLAINTIFFS' MOTION TO PREVENT THE FILING OF EVIDENCE EX PARTE

Plaintiffs respectfully move to prevent defendants from filing any evidence to be considered *ex parte*. As discussed below, it is black letter law that courts may not consider *ex parte* evidence in deciding the merits of a dispute. Accordingly, if the Court determines that the consideration of the government's evidence is necessary and proper to determining plaintiffs' motion, plaintiffs' counsel must be granted access to it under a protective order.¹

¹ As plaintiffs stated at the hearing held before this Court on August 31, the evidence that the government now proffers should have been filed last week. Plaintiffs filed this case on August 9th; the government has been on notice since then that it would have to defend the constitutionality of the challenged gag. Further, as plaintiffs have repeatedly emphasized, time is of the essence in this challenge; Doe wants to speak now, not weeks or months from now, and the First Amendment protects Doe's right to do so. The Court should not permit defendants to further delay a resolution of plaintiffs' preliminary injunction motion by proffering evidence now that should have been filed on August 29th, when the government's opposition brief was due.

I. CONSIDERATION OF SECRET EVIDENCE TO DECIDE THE MERITS OF THIS DISPUTE WOULD VIOLATE FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

“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) (“[o]ur 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”). The rule against secret evidence reflects a recognition that “fairness 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). As the D.C. Circuit has recognized, “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 1060-61; *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).

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 use of the *ex parte* evidence “violated principles of due process upon which our

judicial system depends to resolve disputes fairly and accurately.” *Lynn v. Regents of Univ. 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.*; *see also American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (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”).

While there are exceptions to the rule governing secret evidence, the exceptions to the “main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions” are “both few and tightly contained.” *Abouezk*, 785 F.2d at 1060-61. In carving out an extremely rare exception to the rule against consideration of *ex parte* evidence on the merits, the District of Columbia Circuit has held that a court may 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. FBI*, 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 state secrets privilege, which is “not to be lightly invoked”); *Abouezk*, 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”). Defendants have not invoked the state secrets privilege here.

Even where a court is not deciding the *merits* of a dispute, the courts have allowed the consideration of *ex parte* evidence only where the question before the court is the applicability of an evidentiary privilege. 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., *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 5 (D.C. Cir. 1978) (stating that court may review secret affidavit *ex parte* and *in camera* to evaluate a claim of military and state secrets privilege); *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982) (stating that court may review *ex parte* evidence to refute claim of attorney-client privilege by grand jury witness). The courts have recognized, however, that the use of *ex parte* evidence to resolve claims of privilege in discovery disputes and the use of *ex parte* evidence to determine the outcome of a case are fundamentally distinct. In contrast, litigants are flatly prohibited from submitting *ex parte* evidence for the court to consider in disposing of a case. A defendant cannot wield information presented *ex parte* “as a sword to seek [a dispositive legal ruling] 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 [a dispositive legal ruling].” *Bane v. Spencer*, 393 F.2d 108, 109 (1st Cir. 1968); see also *Abourezk*, 785 F.2d at 1061 (“inspection of materials by a judge isolated in chambers may occur when a party seeks to *prevent use* of materials in the litigation,” not when the party seeks to use it affirmatively); see also *Naji v. Nelson*, 113 F.R.D. 548, 552 (N.D. Ill. 1986) (“While it is not unusual for a court to engage in the inspection of *in camera* materials when a party seeks to *prevent* the use of materials in litigation, reliance on *ex parte* evidence to decide the merits of a dispute can be permitted in only the most extraordinary of circumstances.”).

In *Kinoy v. Mitchell*, the court 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; *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”); *Abourezk*, 785 F.2d at 1061.

The other extremely narrow circumstance in which courts have allowed the introduction of *ex parte* evidence is where the evidence has been introduced under a statutory or regulatory scheme that itself balances considerations of due process against the government’s interest in protecting classified information. *See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (discussing 50 U.S.C. § 1702(c), a provision of the International Emergency Economic Powers Act governing the designation of foreign terrorist organizations); *Allen v. CIA*, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980) (noting that in FOIA litigation, the government may present *ex parte, in camera* information to support an exemption claim “where absolutely necessary”). Indeed, the sole case cited by the government to support its authority to introduce *ex parte* classified evidence is *Jifry v. F.A.A.*, 370 F.3d 1174 (D.D.C. 2004), which concerned a statutory and regulatory scheme, namely 49 U.S.C. § 44701 and 49 C.F.R. § 1540.117(g), that specifically allowed for the consideration of classified *ex parte* evidence with regard to pilot licensing.² Here, the government seeks to introduce *ex parte* evidence without citing any applicable statutory or regulatory authority. *Cf. Abourezk*, 785 F.2d at 1061 (expressing “grave concern about the district court’s heavy reliance upon *in camera ex parte*

² Plaintiffs focus specifically on the introduction of *classified* evidence because the government has not contested that plaintiffs are entitled to *unclassified* evidence.

evidence” in part because “[n]o statutory scheme permitting the closeted inspection of evidence is implicated in this case”).

II. THE RULE AGAINST SECRET EVIDENCE APPLIES WITH FULL FORCE IN THE NATIONAL SECURITY CONTEXT.

Numerous courts have emphasized that secret evidence is disfavored even in the national security and foreign policy context. *See, e.g., American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) *vacated on other grounds in* 525 U.S. 471 (1999); *Abourezk*, 785 F.2d at 1061 (D.C. Cir. 1986); *Naji v. Nelson*, 113 F.R.D. 548 (N.D. Ill. 1986); *Allende*, 605 F. Supp. at 1226; *Kinoy*, 67 F.R.D. 1 (S.D.N.Y. 1975). *Cf. Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 18 (1st Cir. 2004) (Lipez, J. concurring). Indeed, many of these courts explicitly rejected the presentation and consideration of *ex parte classified* evidence to decide the merits of the dispute. In *Abourezk*, the D.C. Circuit held that a lower court had improperly relied on classified affidavits submitted *ex parte*, explaining that either “the other side must be given access to the [classified] information,” or “the court must not rely upon the information in reaching its judgment.” *Abourezk*, 785 F.2d at 1061; *see also Kinoy*, 67 F.R.D. at 15 (“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.”) (internal citations omitted); *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985) (summary judgment could not be granted based on *in camera* inspection of classified material that was not provided to opposing party).³ Fundamental rules of fairness, even in the face of

³ It is notable that the bipartisan 9/11 Commission recently concluded that a culture of secrecy has led to improper classification of documents that ought to be shared with the public. *See National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report*, at 417 (G.P.O. 2004) (“Current security requirements nurture overclassification No one has to pay the long-term costs of over-classifying information, though these costs—even in literal financial terms—are substantial.”).

national security concerns, require that “no party [should] be faced . . . with a decision against him based on evidence he was never permitted to see and to rebut.” *Abourezk*, 785 F.2d at 1061.

More generally, there is no merit to the contention that national security concerns lessen or vitiate constitutional protections. *See, e.g., New York Times*, 403 U.S. at 719 (Black, J., concurring) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”); *United States v. Moussaoui*, 65 Fed. App. 881, 887 (4th Cir. 2003) (rejecting government’s argument for closed appellate argument and noting that “the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to information”); *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1987); *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) *aff’d*, 469 U.S. 1200 (1985). (“Even the country’s interest in national security must bend to the dictates of the First Amendment”).

For these reasons, if the Court determines that consideration of classified information is necessary and proper in order to resolve plaintiffs’ motion, the defendants must provide plaintiffs with full access to the information. That evidence is classified does not mean it must be presented *ex parte*. The Court has wide latitude to control the introduction and protection of sensitive or classified information in the litigation process. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that “the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent’s need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission”).

In other civil litigation, courts have allowed plaintiffs' counsel access to classified information under a protective order. *See, e.g., In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 452 (D.D.C. 2005) (noting that pursuant to a protective order, the government "served on counsel for the petitioners with appropriate security clearances versions [of relevant documents] containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their 'enemy combatant' status"); *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. May 29, 1998) (setting parameters of protective order to protect any classified information that may come out in depositions of defense contractors in civil litigation); *see also Doe v. Tenet*, 329 F.3d 1135, 1149, *rev'd on other grounds in Tenet v. Doe*, 125 S.Ct. 1230 (2005) (suggesting that measures to protect sensitive and classified information in civil litigation include "sealing records, and requiring security clearances for court personnel and attorneys with access to the court records"); *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (discussing protective orders and seals among the mechanisms that may be employed to protect classified or sensitive evidence). Protective orders have been granted in the criminal context as well. *See generally* Classified Information Procedures Act (CIPA), 18 U.S.C. app. III § 1 *et seq.* Indeed, disclosure of classified information to attorneys under a protective is routine under CIPA. *See, e.g., United States v. Pappas*, 94 F.3d 795, 799-800 (2d Cir. 1996); *United States v. Rezaq*, 156 F.R.D. 514, 524 *vacated in part on reconsideration on other grounds*, 899 F. Supp. 697 (D.D.C. 1995); *United States v. Musa*, 833 F.Supp. 752, 753-54 (E.D. Mo. 1993); 18 U.S.C. App. III § 3.⁴

⁴ As discussed above, the government is not entitled to introduce *ex parte* evidence here. However, if the Court finds that the government may introduce evidence *ex parte*, plaintiffs must be given a summary of the *ex parte* classified evidence provided to the Court. *Abourezk*, 785 F.2d at 1060 (cautioning the district court on remand "to make certain that plaintiffs are accorded access to the decisive [classified] evidence to the fullest extent possible, without jeopardizing

CONCLUSION

For the reasons stated above, plaintiffs respectfully ask the Court to grant Plaintiffs'

Motion to Prevent the Filing of Evidence Ex Parte.

Respectfully submitted,

Handwritten signature of Ann Beeson in cursive, with the initials "MG" written above the signature.

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legitimately raised national security concerns"); *Allende*, 605 F. Supp. at 1226 (in rejecting classified *ex parte* evidence, stating that "it is noteworthy that the defendants have offered neither a summary of the information contained in the classified materials, like that which the court provided in *Abourezk*").

CERTIFICATE OF SERVICE

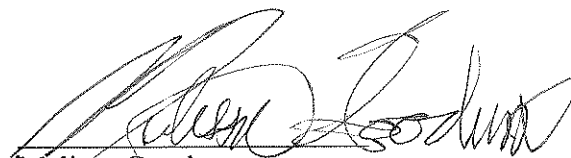
I hereby certify that on September 1, 2005, I caused true and correct copies of Plaintiffs'

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