

UNITED STATES DISTRICT COURT

[REDACTED]

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, adversarial 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."

Disputes must be resolved openly through the adversary system to ensure fairness

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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

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The courts have recognized that the absolute rule prohibiting consideration of

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

Even where consideration of an experts 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*

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 rely on the basis of other courts' judgments). Plaintiffs recognize, however

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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CERTIFICATE OF SERVICE

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 20, 2004.