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Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy

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EXPOSING SECRET EVIDENCE: ELIMINATING A NEW HARDSHIP OF UNITED STATES IMMIGRATION POLICY

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We must plan for freedom, and not only for security, if for no other reason than that only freedom can make security secure.[2]

I. INTRODUCTION

United States immigration law reflects a national duality. On the one hand, America prides itself on being a nation of immigrants, committed to accepting the world's downtrodden with a promise of a better life. On the other hand, prejudice and fear pervade; America is suspicious of outsiders, and acts quickly to neutralize its perceived foreign threats. Partially embracing each view, the United States has handed millions of immigrants the privilege of residence, but has yielded a swift and heavy fist for those determined undeserving.

Immigration policy often reflects the national mood.[3] The anti-Chinese laws enacted during the nineteenth century reflected a common national view that the Chinese were "a different race . . . who will not assimilate with us."[4] Similarly, the World Trade Center and Oklahoma City bombings, together with a "resurgence of anti-immigrant sentiment"[5] led to passage of immigration

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[2] K.R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 194 (vol. 2 1963).

[3] *See* Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 24 (1996).

[4] *Id.* (citing Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting)).

[5] *Id.* at 23.

legislation directed at Arab Muslims[6] and other groups perceived to be threats to national security.[7]

The Anti-terrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) made sweeping changes to the procedural rights of immigrants.[8] Among the most dramatic of the changes, the new laws authorize the use of "secret evidence"; that is classified evidence that cannot be revealed in public proceedings under the rationale of national security. These "secret evidence" provisions run counter to the basic constitutional guarantees afforded to aliens by the United States Constitution.

Part II illustrates the recent use of secret evidence against aliens facing deportation. Part III discusses how the constitutional argues that the use of secret evidence in immigration proceedings is rights of aliens have developed and have recently devolved. Part IV unconstitutional under the Fifth and Sixth Amendments of the United States Constitution. Part V concludes that the United States should abolish its use of secret evidence in deportation proceedings and offers suggestions for reform.

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6 *See* American-Arab Anti-Discrimination Committee, *Hearings Planned on Secret Evidence Repeal Act* (last modified Nov. 2, 1999) <http://www.adc.org/action/1999/2nov99.htm>.

7 "[T]he Oklahoma City bombing and earlier bombing of the World Trade Center demonstrate clearly that the United States must respond seriously to those, whether foreign or domestic, who kill and seek to make their point through killings and mass killings of Americans." 141 CONG. REC. S7484 (daily ed. May 25, 1995) (remarks of Sen. Biden).

8 *See* Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 (April 24, 1996) (codified at 8 U.S.C. § 1105) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (amended the INA and re-designated the section to be set out as 8 U.S.C. § 1227).

II. USE OF SECRET EVIDENCE

The United States has used secret evidence against alien defendants for over forty years.[9] Only recently, however, has the Immigration and Naturalization Service (INS) begun to use secret evidence systematically, as part of its standard procedures. Currently, the Department of Justice introduces claims using classified information in about twenty cases each year.[10] However, thirty aliens were removed using the terrorist provisions in 1996, while twenty were removed in 1997.[11] At this point, twenty-four aliens are being held by the government based on claims by anonymous sources.[12] Most of the crucial evidence in these cases has been kept secret under the rationale that it poses a threat to national security. Unfortunately, many law abiding individuals have fallen victim to these procedures.

Nasser Ahmed[13] legally immigrated from Egypt to New York City in 1986, where he lived with his wife and three children while working as an electrical engineer. He was a respected member of his community, and during the summer helped run a large summer school. Beginning April 23, 1999, he entered his

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9 *See The Use of Classified Evidence in Immigration Proceedings: Hearing Before the Senate Judiciary Subcomm. on Technology, Terrorism, and Government of the Senate Comm. on the Judiciary*, 105th Cong. (Oct. 8, 1998) (testimony of Paul W. Virtue, General Counsel, Immigration and Naturalization Service, Department of Justice).

10 *See id.*

11 *See* Hearing on H.R. 1745 Before the House Judiciary Committee, 106th Cong., (May 18, 1999) (testimony of Michael Wildes).

12 John F. Sugg, *Secret Evidence*, 32 THE LINK 1, 2 (1999) (Americans for Middle East Understanding, New York, N.Y.).

13 For a general factual discussion of Ahmed's case see JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION, 128-31 (1999); Kit Gage, *Other Secret Evidence Cases*, 32 THE LINK 8, 10-11 (1999) (Americans for Middle East Understanding, New York, N.Y.).

fourth year of solitary confinement in an unheated jail cell in New York City.

Ahmed regularly attended a mosque, which was under surveillance by the Federal Bureau of Investigation (FBI) because some of its members were politically opposed to the government of Egypt.[14] Their political opposition was based on reports by human rights organizations that Egypt engages in human rights abuses, including torture and indefinite detention. Ahmed came under further scrutiny when working as a court appointed paralegal and translator for the defense team of a defendant accused of conspiring to plant bombs in New York City. During this case, the INS and the FBI attempted to convince Ahmed to become an informant. When Ahmed declined the offer, the INS threatened to deport Ahmed and his family. On April 24, 1995, the INS arrested Ahmed for overstaying his visa. Ahmed was released on bond for one year but was rearrested on the basis of secret evidence. Ahmed was denied bail and remained in solitary confinement.

When arrested, he was not charged with a crime, nor did the government allege that he was in any way involved in illegal activity. Nevertheless, the INS accused Ahmed of being a "threat to national security,"[15] and detained him based on secret evidence that neither he nor his lawyers could examine. Specifically, Ahmed received a one sentence summary stating that the government had evidence "concerning respondent's association with a known [but unidentified] terrorist organization."[16] The immigration judge in this case admitted that the summary was "largely useless."[17] Since this proceeding, the government has gradually revealed some of the evidence against Ahmed. At most, the evidence accused Ahmed of associating with members of a non-violent political organization. Nevertheless, the evidence does not charge that "Ahmed himself had ever engaged in any illegal activity or supported any illegal

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14 *See id.*

15 DEMPSEY & COLE, *supra* note 13, at 129.

16 *Id.*

17 Gage, *supra* note 13, at 10.

activity."[18] Furthermore, most of the evidence "is double or triple hearsay."[19]

Recently, the immigration judge who heard this case ordered Ahmed's release. The INS Commissioner filed an appeal with Attorney General Janet Reno that Ahmed be detained pending her final approval, citing "national security concerns."[20] As Reno's deadline for a decision approached, the INS withdrew its request. After three and one-half years of solitary confinement --separated from his wife, family, work, and community--Ahmed was released.

Hany Kiareldeen[21] immigrated from the Gaza Strip to the United States in 1990. He is married to a United States citizen and has a four year-old child. Kiareldeen was separated from his family for nineteen months based on secret evidence.

In March of 1998, Kiareldeen and his brother were threatened by four INS agents that they would be "taught a lesson."[22] The INS charged Kiareldeen with overstaying his student visa. He was detained without bond solely on the basis of secret evidence. His unclassified summary of the evidence stated that he was a "suspected member of a terrorist organization," he had "associated" with a person connected to the World Trade Center bombing, and that he had threatened Attorney General Janet Reno.[23] His defense team believed, and it was implied by one district court judge, that the allegations originated from his embittered ex-wife.[24] She had been previously responsible for domestic and child abuse charges that were found by the government to be false. During Kiareldeen's

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18 DEMPSEY & COLE, *supra* note 13, at 130.

19 *Free Nasser Ahmed,* N.Y. TIMES, Nov. 23, 1999, at A26.

20 *Reno Still Mulling Egyptian's Release*, WASH. POST, Nov. 24, 1999, at A7.

21 For a general factual discussion of Kiareldeen's case, *see* Gage, *supra* note 13, at 12.

22 *Id.* at 12.

23 *Id.*

24 *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402 (1999); Gage, *supra* note 13, at 12. *See also*, John Kifner, *F.B.I. Says Man is Terrorist but Family Sees Plot by Ex-Wife,* N.Y.TIMES, June 27, 1998 at B1.

deportation hearing, the government refused to allow his ex-wife to be cross-examined, claiming the privilege of national security.

One immigration judge called the evidence against Kiareldeen "meager."[25] In fact, every immigration judge who heard Kiareldeen's case ordered him to be released. With each victory, however, the INS appealed. The INS considered the unsubstantiated evidence sufficient to detain Kiareldeen. Fortunately, Kiareldeen was granted a Habeas Corpus review of the constitutionality of his detention. Federal District Judge William H. Walls was the first judiciary to declare the use of secret evidence unconstitutional, declaring that Kiareldeen's due process rights had been violated.[26] The Department of Justice decided not to appeal again, claiming that "the process ha[d] taken its course."[27] Kiareldeen was able to return to his family after a year and a half in a New Jersey prison.

As courts have become more suspicious of the use of secret evidence, the INS has sought to avoid a definitive ruling on the matter.[28] In this way, the INS has been willing to concede negative rulings on individual secret evidence cases in order to continue to engage in the practice on a larger scale.[29] Commentators have described this strategy as a "face-saving measure" since it allows them to avoid "bad decisions on the record" from the Attorney

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[25] Andy Newman, *Immigrant Freed after Being Held for 19 Months In Terrorism Case,* N.Y. TIMES, Oct. 26, 1999, at B1.

[26] Nat Hentoff, *Prosecution in Darkness,* WASH. POST, Nov. 6, 1999, at A25.

[27] Statement by the Justice Department on the Case Against Hany Kiareldeen, United States Department of Justice Press Release, Oct. 26, 1999. One INS spokesman believes that Kiareldeen presented so much evidence that it was eventually powerful enough to override the government's confidential claims. For example, he was able to provide an alibi for the times he would have had to have been with the alleged co-conspirator. Telephone Interview with Bill Strausberger, Public Affairs Officer, Immigration and Naturalization Service (Nov. 22, 1999).

[28] *See* David Cole, *No More Secret Evidence*, WASH. POST, Dec. 3, 1999, at A41.

[29] *See id.*

General or higher courts.[30] Secret evidence, therefore, continues to be used routinely by the INS, and remains mostly unchallenged as a general practice.

III. THE RISE AND FALL OF ALIEN RIGHTS

A. Legislative and Judicial Roles in Immigration

The United States Constitution grants Congress the authority to regulate immigration. Article I enumerates that "[t]he Congress shall have Power . . . To establish an uniform Rule of Naturalization[.]"[31] With this power, "Congress plays a central role in defining the processes through which citizenship is judged, and in fixing the consequences citizenship or non-citizenship entail."[32] Paramount in this power is Congress's ability to exclude nonresident aliens in the manner it determines.[33] The rationale is to preserve delicate foreign policy matters to the political branches.[34] It is well recognized that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[35]

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30 Lorraine Adams & David A. Vise, *INS Drops Pleas to Reno to Detain Egyptian*, WASH. POST, Nov. 30, 1999, at A5.

31 U.S. CONST. art. I, §8.

32 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 277 (1978).

33 *See, e.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

34 *See* William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 888, 907 (1997) ("Taken to its extreme, the doctrine lends itself as an intellectual justification for courts to turn a blind eye toward potential abuses and agency excesses.").

35 Sara A. Martin, Note, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 696 (1999).

As with many of its powers, however, Congress has delegated its authority over immigration. [36] Pursuant to the Administrative Procedure Act (APA), Congress delegates its powers involving immigration to the Immigration and Naturalization Service (INS). The INS is a federal administrative agency governed by the Immigration and Naturalization Act (INA). Administered by the executive branch, the INS is part of the Department of Justice and is ultimately accountable to the Attorney General.

Despite the broad powers granted to the INS, the judiciary may determine the constitutionality of immigration laws. To achieve this control, the Court gradually has developed judicial review of immigration matters. Initially, review of INS decisions was completed by internal by the executive branch rather than the judicial branch. The INA declares that "[t]he decision of the Attorney General shall be final."[37] The judiciary first began carving out its role in *Heikkila v. Barber*.[38] The Court held that the INA precludes judicial review except as required by the Constitution.[39] However, final review was soon modified to mean final "administrative procedure rather than cutting off the right of judicial review in whole or in part."[40]

There was no statutory authorization of judicial review for immigration decisions until 1961, even though it was mentioned in the INA of 1952. In 1961, amendments to the INA provided for judicial review. The INA provided that exclusive review of final deportation orders may be filed in the United States Court of Appeals where the litigant resides or where the proceedings are conducted. In *McNary v. Haitian Refugee Ctr.*,[41] the Court held that

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36 *See generally*, CHARLES GORDON, ET AL, IMMIGRATION LAW AND PROCEDURE (1999).

37 INA § 236(c), 8 U.S.C. § 1226(c) (1982).

38 345 U.S. 229 (1953).

39 *See id.* at 234-35.

40 Shaughnessy v. Pedreiro, 349 U.S. 48, 50 (1955).

41 McNary v. Haitian Refugee Ctr., Inc., 448 U.S. 479 (1991).

the judiciary must interpret statutes to favor judicial review.[42] This lit the "green light for . . . questioning the legality and constitutionality of administrative determinations and procedures."[43] Additionally, the Court has allowed judicial review under the doctrine of Habeas Corpus. Habeas Corpus is the ancient common law writ used to test illegal detention--it is required by the Constitution, and may not be suspended except in cases of rebellion or invasion.[44]

While a developed jurisprudence supports the judiciary's power to review the constitutionality of INS procedures, the ability of the judiciary to carry out this function has been severely weakened by recent legislation.[45] For example, aliens deported because of their commission of a past crime may find it very difficult to argue a constitutional claim. First, INS judges cannot review the constitutionality of the statute under which they

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[42] *See id.* (examining a 1986 statute which precluded judicial review of INS determinations except in a petition to review a subsequent deportation order).

[43] GORDON ET AL, *supra* note 36, at § 104.01[2].

[44] U.S. CONST. art. I, §9 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[45] Some of the new procedures radically change the shape of judicial review:

> Exclusive jurisdiction provision: Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INA § 242(g), 28 U.S.C. § 2241 (1996).

There is a rich body of scholarly work on the constitutionality of the new judicial review proceedings. For a thorough analysis of this topic *see* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997).

adjudicate.[46] Second, an alien usually may not appeal until a final order has been rendered by the INS. An alien cannot generally go to court to challenge constitutionality unless the litigant can show irreparable harm.[47] Third, a newly enacted provision in the AEDPA bars federal court review of final deportation orders based on criminal convictions.[48] The statute states that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in various sections of the INA shall not be subject to review by any court."[49] The circuits are split as to whether this bars even habeas review by the federal courts.[50] A difficult process is thus made worse since the use of secret evidence makes deportation hearings "mere formalities and the final orders of such hearings cannot be appealed or reviewed."[51] Despite these difficulties, many aliens have found their way to federal courts where they may challenge the constitutionality of secret evidence.

B. INS Authority to Use Secret Evidence

Although its use has become more pervasive, secret evidence has been sanctioned in part by the federal courts and the Board of Immigration Appeals (BIA) dating back over four decades.[52] In *Knauff v. Shaughnessy*[53] and *Shaughnessy v. U.S. ex*

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46 *See* DEMPSEY & COLE, *supra* note 13, at 200 n.2.

47 *See* Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947).

48 Carol Leslie Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, 24 HUM. RTS. 12, 12 (1997).

49 AEDPA §440(a), amending 8 U.S.C. § 1105 Pub. L. No. 104-32 (April 24, 1996).

50 *Compare* Hose v. INS, 141 F.3d 932, 935 (9th Cir. 1999) (denying habeas jurisdiction), withdrawn and reh'g en banc granted, 161 F.3d 1225 (1988), Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998) (denying habeas jurisdiction), *and* Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997) (denying habeas jurisdiction), *with* Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (upholding elimination of statutory revocation but preserving constitutional habeas jurisdiction).

51 Martin, *supra* note 35, at 689.

52 *See* Jay v. Boyd, 351 U.S. 345 (1956); United States ex rel. Knauff v.

rel. Mezei,[54] the INS detained aliens that were entering the country. The INS then used secret evidence to continue their detention. In *U.S. ex rel. Barbour v. District Director of Immigration and Naturalization Service, San Antonio Texas*,[55] an alien was denied an application for discretionary bail based on evidence submitted *ex parte* by the State Department to the INS. In *Jay v. Boyd*,[56] the Court considered a habeas petition brought by a resident alien whose application for suspension of deportation had been denied by the INS. The Court found that the INS had properly followed a regulation that allowed it to submit evidence secretly if the information would be "prejudicial to the public interest, safety, or security."[57]

In 1996, at a peak in anti-immigrant sentiment, the 104th Congress passed legislation that radically affected the rights of aliens.[58] The legislation was based on a growing fear of domestic terrorism.[59] Indeed, it was the recent terrorist events that provided the political momentum to pass the legislation.[60] Despite heavy criticism from immigration advocates, what "finally boosted the evidence over the top was the bombing of the federal building[.]"[61] However, in a rush to protect United States' security, Congress passed provisions of tenuous constitutionality.[62]

Shaghnessy, 338 U.S. 537 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953); United States ex rel. Barbour v. District Director of the Immigration and Naturalization Service, San Antonio, Texas, 491 F.2d 573 (5th Cir. 1974).

53 338 U.S. 537 (1950).

54 345 U.S. 206 (1953).

55 491 F.2d 573 (5th Cir. 1974).

56 351 U.S. 345 (1956).

57 *Id.*

58 Floor debate frequently invoked the recent terrorist attacks in arguing for passage of the legislation. *See e.g.*, 142 Cong. Rec. H3605, H3608 (1996).

59 *See id.*

60 *See id.*

61 Sugg, *supra* note 12, at 2.

62 Many of the Bill's key provisions were hotly contested in floor debates.

Nevertheless, carried by a Republican majority, most of these provisions became law. The AEDPA and IIRAIRA amended the INA to provide for many controversial new changes. For example, the law bars re-entry for overstaying visas except in "exceptional circumstances." [63] A new summary exclusion procedure provides that a criminal can be retroactively deported for any crime of moral turpitude, including shoplifting. [64] The new legislation has had a startling effect on the number of deportations. Almost 112,000 immigrants were deported in 1997, compared to approximately 69,000 in 1996.[65]

Among the most controversial of the new enactments were the provisions providing for the use of secret evidence; that is, classified information that the government will not reveal.[66] For example, one section provides for a special procedure for aliens suspected of being terrorists and bars them from seeking important forms of relief from deportation. The proceeding is administered by a panel of federal judges. During the proceeding, aliens are barred from applying for any mandatory relief, such as asylum or waiver of deportation, even if it is evident that the alien will be persecuted upon returning to his original country. Further, the alien has no right

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See e.g., 142 Cong. Rec. H3605, H3608 (1996) (remarks of Rep. Hyde) (arguing that the AEDPA does not violate the Sixth Amendment).

63 Wolchok, *supra* note 48, at 12; IIRAIRA § 632, 8 U.S.C. § 1227 (1996).

64 *See* Wolchok, *supra* note 48, at 12; IIRAIRA § 604, 8 U.S.C. § 1227 (1996).

65 *See* Martin, *supra* note 35, at 691. This problem is compounded by the rising numbers of immigrants seeking asylum, increasing by seventy-five percent between 1996 and 1998. Most of these detainees are forced to wait for their hearing in jail. *See,* Amnesty International News Release, Selected Statistics on Human Rights Violations in the USA (Oct. 6, 1998), <http://www.amnesty.org/news/1998/25106398.htm.>.

66 "Classified information is any information or material that has been determined by the United States' government pursuant to Executive Order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." Memorandum from the Office of the Chief Immigration Judge to Immigration Judges, Judicial Law Clerks, Court Administrators, and Court Staff (July 21, 1999) (on file with author). *See also,* Exec. Order No. 12,958 60 Fed. Reg. 19825 §1.1(c) (1995).

to suppress unconstitutionally or illegally obtained evidence. These proceedings are labeled "Alien Terrorist Special Removal Proceedings."[67] The statute states that:

> The judge shall examine, *ex parte* and *in camera*, any evidence for which the Attorney General determines that the public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to this paragraph and, in the case of classified information, after coordination with the originating agency, elect to introduce such evidence in open session.[68]

The procedure requires that a summary of the evidence be provided that is "sufficient to enable the alien to prepare a defense."[69] In practice, however, this may be no more than a short sentence indicating that the government possesses the evidence, without any description of its substance or source.[70] Moreover, summary can be waived if:

> the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and . . . the provision of

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67 *See* 8 U.S.C. § 1531(1996).

68 INA S504(d)(3)(A) (*amended by* Sec. 354 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208) (codified at 8 U.S.C. S1534(e)(3)(A) (Supp. 1997)).

69 8 U.S.C. § 1534(e)(1)(1996). *Compare with* the Foreign Intelligence Surveillance Act which provides the defendant with the ability to suppress evidence if it was illegally obtained.

70 *See* DEMPSEY & COLE, *supra* note 13, at 125.

> the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.[71]

The statute specifically defines an "alien terrorist" group as including people who have merely supported a terrorist organization's lawful activities, including humanitarian or political work.[72] The INS, however, can interpret this definition broadly. For example, the statute can be invoked when the INS determines that disclosure of the evidence would "pose a risk to the national

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71 8 U.S.C. § 1534(e)(1)(1996).

72 *Id. Compare with* the State Department's definition of foreign terrorist organizations. To "engage in terrorist activity . . . [means] to commit an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iii). The State Department designates the following groups as foreign terrorist organizations: Abu Nidal Organization (ANO), Abu Sayyaf Group (ASG), Armed Islamic Group (GIA), Aum Shinrikyo (Aum) , Euzkadi Ta Askatasuna (ETA), Democratic Front for the Liberation of Palestine-Hawatmeh Faction (DFLP), HAMAS (Islamic Resistance Movement), Harakat ul-Ansar (HUA), Hizballah (Party of God), Gama'a al-Islamiyya (Islamic Group (IG)), Japanese Red Army (JRA), al-Jihad, Kach, Kahane Chai, Khmer Rouge, Kurdistan Workers' Party (PKK), Liberation Tigers of Tamil Eelam (LTTE), Manuel Rodriguez Patriotic Front Dissidents (FPMR/D), Mujahedin-e Khalq Organization (MEK, MKO), National Liberation Army (ELN), Palestine Islamic Jihad-Shaqaqi Faction (PIJ), Palestine Liberation Front-Abu Abbas Faction (PLF), Popular Front for the Liberation of Palestine (PFLP), Popular Front for the Liberation of Palestine-General Command (PFLP-GC), Revolutionary Armed Forces of Colombia (FARC), Revolutionary Organization 17 November (17 November), Revolutionary People's Liberation Party/Front (DHKP/C), Revolutionary People's Struggle (ELA), Shining Path (Sendero Luminoso, SL), Tupac Amaru Revolutionary Movement (MRTA). *See* United States State Department, <http://www.state.gov/www/global/terrorism/terrorist_orgs_list.html>.

However, the government's classification of terrorist groups has been notoriously inaccurate. For example, declassified information has revealed that the FBI once misidentified the Dutch airline KLM as a terrorist organization. *See* American Arab Anti-Discrimination Committee, Hearings Planned on Secret Evidence Repeal Act (last modified Nov. 2, 1999) <http://www.adc.org/action/1999/2nov99.htm>.

security of the United States or to the security of any person."[73] In effect, this allows the government to make this claim whenever evidence is classified or has been able to get its evidence classified prior to the proceeding.[74]

The new procedure radically changes the rights of aliens. It allows for even harsher treatment of aliens suspected of having disfavorable associations. Constitutional scholars James Dempsey and David Cole summarize the detention process as:

> [I]mmediate detention without bail of all aliens subject to this procedure. Noncitizens here on student visas, tourist visas, or special labor visas are denied any hearing whatsoever regarding their detention. Lawful permanent resident aliens are entitled to a hearing, but the government is able to use classified information, and instead of the government having to prove that there are grounds for detention the alien bears the burden of proving that there is no basis for detention.[75]

The INS has not specifically invoked the "alien terrorist" designation. Some scholars have argued that the INS has avoided this procedure because it provides certain advantages to some aliens.[76] First, the procedure requires that the alien be given a summary of the evidence, despite the broad rule for waiver. Second, the panel is comprised of federal judges who may rule directly on the constitutionality of the statute. Since INS judges lack constitutional jurisdiction, aliens might be unable to voice a constitutional claim quickly, thus circumventing the review process that takes years. Third, the INS attempts to deport those who do not fit within the already expansive definition of "terrorist activity."

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73 8 U.S.C. § 1534(e)(3)(1996).

74 DEMPSEY & COLE, *supra* note 13, at 125.

75 *Id.*

76 *See id.* at 200-01 n.2.

Specifically, the INS is trying to include "mere membership and/or fundraising for peaceful activities."[77]

Despite specifically avoiding this procedure, the INS regularly uses secret evidence. First, secret evidence is used in summary deportations of arriving aliens. Second, secret evidence is used in regular deportation hearings against aliens seeking discretionary relief. Third, secret evidence is used in proceedings where it is not allowed by statute.

First, secret evidence is used to oppose admission of arriving aliens.[78] This includes any non-citizen who is arriving at a border. In reviewing the entrance of an arriving alien, the Attorney General may use "confidential information that the alien is inadmissible . . . and . . . disclosure of the information would be prejudicial to the public interest, safety, or security[.]"[79] This procedure may be harsh, but it lacks some of the major constitutional problems present in other provisions. Entering aliens are considered not to be within the country and, therefore, cannot be considered resident aliens. As non-resident aliens, these individuals lack constitutional rights.

Second, secret evidence is used against deportable aliens seeking discretionary relief. For those aliens who have successfully entered the country (either legally or illegally), they are treated as resident aliens. Resident aliens can be deported for violating immigration regulations or certain domestic laws. Those aliens

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77 *Id.*

78 INA S235(c)(2), 8 U.S.C. § 1225(c)(1982).

79 *Id.*

facing deportation typically apply for discretionary relief. An alien applies for discretionary relief when the alien is otherwise deportable, but has compelling reasons not to be deported. For example, an alien who overstays his student visa is legally deportable. However, if the alien has a family or children that are legal residents or citizens, his deportation will likely be waived. Secret evidence may be used when deportable aliens seek discretionary relief. When applying for discretionary relief in a deportation proceeding:

> [T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief.[80]

Following this provision, the INS regulations call for "a reasonable opportunity to examine and object to evidence against him or her" except "such national security information as the government may proffer in opposition[.]"[81] The INS has used secret evidence against many aliens who have fairly sought legitimate and deserving discretionary relief. Since many aliens are simply unable to put forth a true defense in light of the strict protocols of secret evidence, and their ability to rebut or impeach is usually very limited, secret evidence often means the end for those seeking this privilege.

Third, the INS has utilized secret evidence more broadly than the statute allows on its face, thus using secret evidence in a manner more resembling the harsher procedures provided for in the "alien terrorist" provisions.[82] For example, the INS has used secret

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80 INA § 240(b)(4)(B), 8 U.S.C. § 1229a (b)(4)(B)(Supp. II. (1996)).

81 8 C.F.R. § 240.10 (a)(4)(1998).

82 The federal district court judge in *Kiareledeen* considered arguments as

evidence in support of deportation itself, rather than limiting its use to hearings for discretionary relief as the statute requires. [83] Regardless, the INS's use of secret evidence against resident aliens has violated the fundamental rights guaranteed by the Constitution.

IV. USING SECRET EVIDENCE IS UNCONSTITUTIONAL

The INS's use of secret evidence is unconstitutional in three ways. First, the use of secret evidence derives from an improper and inaccurate analysis of congressional powers to regulate immigration. Second, use of secret evidence violates the Due Process Clause of the Fifth Amendment. Third, the use of secret

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to whether INS's use of secret evidence in a bond hearing was made *ultra vires*. While implying that this argument at least had some merit, the case was decided on other grounds. If the INS acts outside of its statutory powers, it also raises a serious separation of powers problem. Since the Anti-Terrorism Act, for the first time, specifically granted INS statutory authority to use secret evidence, it is logical that Congress intended for INS to solely follow these statutory procedures. If Congress had recognized INS's extra-statutory power to use secret evidence it would have been redundant to provide for such power in the statute. Moreover, the INS's extra-statutory use of secret evidence is more broad than the use provided for by statute. Therefore, using secret evidence absent the statutory procedures may violate congressional intent. As a legislatively created agency, the executive branch may not operate the INS contrary to congressional intent. While this argument is not treated in this paper, it may be a viable argument worthy of additional examination.

[83] *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp. 2d 402 (1999). Secret evidence has also been used to oppose the legal re-entry of a resident alien. This practice, however, was declared unconstitutional. *See,* Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992) (holding that use of secret evidence violates due process in opposing re-entry as applied to a long-time resident with several children suspected of being a Palestinian activist).

INS regulations provide for various uses of secret evidence. *See, e.g.*, 8 C.F.R. § 240.11(c)(3)(iv)(1988) (allowing use of classified evidence in application for asylum and withholding of removal in removal proceedings); 8 C.F.R. § 240.33(c)(4)(1988) (allowing use of classified evidence in applications for asylum and withholding of deportation in exclusion proceedings); 8 C.F.R. § 240.49(a)(1988) (allowing use of classified evidence in adjustment of status reports); 8 C.F.R. § 3.19(d)(1988) (allowing use of classified evidence in custody and bond redetermination).

evidence violates the Confrontation Clause of the Sixth Amendment.

A. Congressional Power Over Immigration Does not Preclude Alien Constitutional Rights

The INS has justified its use of secret evidence by arguing that Congress has full and unlimited power to regulate immigration, and that by extension, aliens are not entitled to the same constitutional protection afforded to citizens. Furthermore, the INS argues that case law supports the use of secret evidence in immigration proceedings. However, this argument errs in two regards. First, this argument ignores cases holding that resident aliens are entitled to full constitutional protection. Second, it misapplies cases upholding the use of secret evidence.

First, resident aliens, or aliens who have entered the United States, have traditionally been afforded constitutional rights. The Constitution delineates between rights afforded to citizens and rights afforded to all persons. The right to vote requires citizenship, while the right to due process of law is linked solely to the status of personage. Constitutional rights afforded to persons are afforded to both citizens and to aliens within United States jurisdiction. The Court noted that "there is a notion of fundamental human rights that protects individuals," notwithstanding their alien status. [84] Therefore, aliens need only pass through the border to gain and maintain full constitutional rights not otherwise reserved for citizens.[85] These rights apply throughout immigration law. For example, aliens maintain constitutional protections even if they overstay a visa or otherwise remain illegally.[86] Similarly, the Court

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[84] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[85] *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 409 (1999); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 (1953) (holding that resident aliens are afforded Fifth Amendment due process rights, though nonresident aliens are not).

[86] *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 409 (1999) (claiming that it is an "axiomatic, constitutional premise that aliens once legally admitted into the United States, are entitled to the shelter of the Constitution"). *See also,* Landon

has held that "it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[87]

Second, the INS misapplies those cases upholding the use of secret evidence. The cases that the INS uses to justify secret evidence do not apply to resident aliens. These cases are distinguishable because the aliens involved have not technically entered United States jurisdiction. For example, *United States ex re. Knauff v. Shaughnessy* denied due process protection to an alien facing secret evidence in an exclusion proceeding.[88] However, this proceeding blocks the admission of arriving aliens. Aliens facing this proceeding are denied due process protection because they have not yet entered United States jurisdiction. Relying only on these cases for support, however, the INS uses secret evidence against aliens who have entered the United States. The INS may not properly rely on these cases to justify use of secret evidence against resident aliens.[89]

B. Secret Evidence Violates Due Process

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v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . . [but having gained admission] begins to develop the ties that go with permanent residence his constitutional status changes correspondingly.").

87 Reno v. Flores, 507 U.S. 292, 306 (1993).

88 United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

89 The other cases that the INS uses to support its claims can easily be distinguished as well, but on different grounds. The Court in *Jay v. Boyd*, 351 U.S. 345 (1956), upheld the INS's use of secret evidence, but it did so only on statutory grounds, and the providing regulations clearly allowed for it. The Court did not, however, reach the question of whether secret evidence was constitutional. The Court in *United States ex rel. Barbour v. District Director of the Immigration and Naturalization Service, San Antonio, Texas*, 491 F.2d 573 (5th Cir. 1974), upheld the use of secret evidence. This case, however, was decided before *Matthews v. Eldgridge*, 424 U.S. 319 (1976), which presently controls due process jurisprudence. As will be further argued, the use of secret evidence does not meet the due process requirements set forth in *Matthews v. Eldgridge*, 424 U.S. 319 (1976).

The jurisprudence is well settled that resident aliens are granted certain constitutional rights, among them the right of due process. The INS's use of secret evidence does not provide sufficient process when balanced against the state's interest in national security. For this reason, the INS's use of secret evidence violates the Due Process Clause of the Constitution. The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"[90] The Court has consistently held that this right is guaranteed to resident aliens.[91] The court in *Kwong Hai Chew v. Colding et al.*[92] held that aliens within U.S. borders are "persons" protected by the Constitution, and implicitly, the Fifth Amendment.[93] In this case, an alien returning from a merchant trip was excluded without a hearing or even notice of the "nature and cause of any accusations against him."[94] The Court held that "[a]lthough Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."[95]

In *Shaughnessy v. United States ex rel. Mezei,*[96] an alien faced indefinite detention on Ellis Island pending deportation. The alien had resided in the United States for twenty-five years, and was returning home from a two year trip abroad. The government refused to reveal its classified information to the federal judge, even *in camera*. The Court rejected that a resident alien at the border was not guaranteed due process.[97] When applied to aliens, "[p]rocedural safeguards are thus necessary to ensure that the substantive law is administered fairly-not arbitrarily-with respect to the specific individual."[98] In *Matthews v. Diaz*,[99] the Court plainly stated that:

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90 U.S. CONST. amend. 5.

91 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

92 344 U.S. 590 (1953).

93 *See id.* at 595.

94 *Id.* at 597.

95 *Id.* at 597-98.

96 345 U.S. 206 (1953).

97 *See id.* at 212.

98 Scaperlanda, *supra* note 3, at 25. *See also*, 2 KENNETH C. DAVIS &

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons form deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[100]

In determining what due process the government must afford to an individual the government must follow the *Mathews v. Eldgridge* "balancing test."[101] Specifically, the government must weigh the private interest affected, considering the risk to the interest and the value of additional safeguards, against the government's interest in not providing additional procedure. The private interest in not facing deportation is high. The use of secret evidence presents a serious risk to aliens because they are disallowed a fair hearing. The government interest in national security, while important, does not outweigh the risk to the private interest. Therefore, the INS's use of secret evidence does not meet the balancing test requirements, and thus violates the Due Process Clause.[102]

The first step of the balancing test is to weigh the private interest in having more procedure. An alien has a high interest in not being detained and deported. First, aliens have an interest in their physical liberty.[103] While awaiting deportation, aliens may

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RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2 at 9 (1994) ("When . . . government singles out an individual for adverse action, the political process provides little protection. Individuals singled out for adverse action can be protected only by forcing the government to use a decision-making process that ensures fairness to the individual.").

99 426 U.S. 67 (1976).

100 *Id.* at 77.

101 424 U.S. 319 (1976).

102 *But see* Scaperlanda, *supra* note 3, at 27-30.

103 *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413 (1999) (enunciating

have to spend years in jail where they may face harassment, abuse, and emotional trauma in being separated from their families. Once deported, an alien will be isolated from the nation that he has chosen to call home. Upon returning to their country of origin, aliens may also face persecution. For many, being forced to return to their countries may put them at a high risk of death due to their political and religious beliefs.

Second, aliens have an interest in their families. In many cases, aliens facing deportation have families that they seek to maintain, support, and enjoy. This type of family unity has received constitutional protection when applied in other areas of law.[104] In *Moore v. City of East Cleveland,*[105] the Court held that a right of a family to remain together was a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment.[106] Similarly, the remaining family has an interest in the alien not being deported. That is, "[d]eportation also affects those left behind, often U.S. citizens, by banishing their loved ones,

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that physical liberty "must be accorded the utmost weight.").

104 *See* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 763-64 (1996).

105 431 U.S. 494 (1977).

106 *See id.* at 503 (arguing that the right of a family to live together is "deeply rooted in this Nation's history and tradition.").

tearing families apart, and eliminating any economic support the loved one provided."[107]

Third, aliens have an interest in maintaining ties to their community. This may include friends and neighbors, as well as connections to specific institutions such as a church or school. Many aliens facing deportation have lived in the United States for decades and have developed strong bonds in their communities. Further, aliens may have developed an identity based on their new nation. The uprooting and deportation of aliens can strip them of this identity.

Fourth, aliens have an interest in maintaining their work. Deportation takes away an alien's livelihood and deprives that person of the means with which to support themselves and their families. Aside from this economic value, depriving aliens of their work takes away a part of their human dignity by taking away their ability to be productive, self-sufficient, and a provider.

Plainly, aliens have important interests at stake in immigration proceedings. Aliens have an interest in their physical liberty, preservation of family unity, maintaining ties in their community, and continuing their livelihood. For these reasons, aliens have a high interest in not being detained and deported.

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[107] Martin, *supra* note 35, at 687.

The second step of the balancing test is to consider the risks involved with allowing secret evidence. The rationale for this step of the analysis is that "[p]rocedural requirements entail the expenditure of limited resources, so that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection."[108] The risks aliens face by being deported with secret evidence is high.

Aliens who must face secret evidence risk a proceeding which lacks many of the basic elements of a fair trial. First, when secret evidence is used against aliens, they are unable to confront their accusers. Aliens have little ability to defend themselves when they do not know the charges against them or the source of those charges. Second, secret evidence disables aliens from explaining the substance and context of the evidence to the fact finder. A proper explanation of the meaning and context allows the fact finder to properly weigh the probative value of that evidence. Third, secret evidence disallows aliens from cross-examining or otherwise impeaching witnesses against them. Cross-examination is one of the most powerful tools used to get to the truth in a case. Lacking cross-examination, aliens may face biases or inaccurate evidence without the chance to expose these weaknesses to the fact finder.

One can get a sense for how weak secret evidence usually is based on specific secret evidence that has been reclassified. For example, most of the evidence is usually nothing more than charges of association.[109] Not only is this lacking in probative value, but it violates the detainee's First Amendment interests.[110] An alien facing such an accusation in secret cannot expose the constitutional infirmity of this evidence. Furthermore, the government has an extremely poor record on convictions involving secret evidence.

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[108] Henry J. Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1276 (1975).

[109] DEMPSEY & COLE, *supra* note 13, at 150-51.

[110] This is another objection raised against recent immigrant legislation. *See, e.g.,* AADC v. Reno, 70 F.3d 1045, 1070 (1995). *See also,* DEMPSEY & COLE, *supra* note 13, at 150-51.

The FBI's internal security and terrorism cases that were referred to federal prosecutors between 1992 and 1996 yielded a conviction rate of only twenty-two percent.[111] Considering this dismal success rate, along with the fact that "the mere weight of caseloads can make immigration decision-makers unsympathetic to an alien's plight . . . [and] the agency's increasing caseload burden contributes to an anti-immigrant, pro-enforcement bias,"[112] it is likely that most secret evidence is of very poor quality.

In an attempt to define these risks, Judge Friendly has elucidated the essential qualities of a fair hearing.[113] Included is the right "to call witnesses," the right "to know the evidence against one," the right "to have the decision based only on the evidence presented," and the right that evidence be presented in a public proceeding.[114] Using secret evidence makes all of these rights impossible. Furthermore, the district court held in *American-Arab Anti-Discrimination Comm. v. Reno,*[115] that the disclosure of evidence against aliens exists at "the core of constitutional due process," and that the "use of undisclosed information in adjudications should be presumptively unconstitutional."[116]

Finally, other changes in immigration policy have heightened the interest in providing a fair hearing. Previously, immigration policies allowed broad discretion to provide waivers and suspensions of deportation.[117] Utilizing these means, judges could take into account the interests in family, friends, and community.[118] Unfortunately, the new immigration legislation has

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111 *See* Sugg, *supra* note 12, at 2.

112 Underwood, *supra* note 34, at 917. *See also*, Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of the Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 444 (1993).

113 Friendly, *supra* note 104, at 1279-95. (1975).

114 *Id.*

115 70 F.3d 1045 (9th Cir. Cal. 1995).

116 *Id.* at 1070.

117 *See* INA § 212 (c), 8 U.S.C. § 1182(c)(1991); INA § 244, 8 U.S.C. § 1254 (1988 & Supp. V. 1993).

118 *See id.*; INA § 212 (c), 8 U.S.C. § 1182(c)(1991); *see generally*,

largely eliminated this discretion.[119] Thus, aliens have much more at risk with an unfair hearing now than they had previously.

Therefore, including secret evidence at immigration proceedings, presents important risks to aliens. Having to contend with secret evidence allows poor quality evidence to influence decisions and largely eliminates many of the qualities of a fair hearing. For these reasons, the risks of using secret evidence are high.

The third step of the balancing test is to consider the interests of the government in using secret evidence. The INS bases its use of secret evidence on the rationale that it is justified by national security. Concededly, national security is an important government goal. However, secret evidence is often not important to national security. Rather, the government is concerned more with the source of its information than with the substance of its information. Therefore, the government's interest in using secret evidence is low.

In describing how national security is implicated in secret evidence cases, William O. Studeman, Acting Director of Intelligence explained that in order to combat terrorism, it is:

Underwood, *supra* note 34 (outlining the erosion of judicial review and discretionary decisionmaking under the AEDPA and IIRAIRA).

[119] *See* Martin, *supra* note 35, at 700.

> critical that the United States obtain the close and continual cooperation of other countries. One of the best ways to ensure this cooperation is to protect the information that these countries share with us about terrorists. Foreign governments simply will not confide in us if we cannot keep their secrets. One goal . . . is to provide a mechanism to do just that by protecting classified information . . . [and] permit the court to consider classified information as evidence without risking the compromise of **sensitive intelligence** sources and methods or foreign government provided information.[120]

While the government does have a high interest in national security, the use of secret evidence is not vital to that interest. Secret evidence may not be relevant to a national security interest or reliable. For example, the government regularly "over-classifies evidence."[121] This phenomenon is revealed as secret documents become unclassified. Much of this material fails to disclose strategic data or vital sources. At any rate, much secret evidence is not probative. Many declassified documents show a high degree of racism among INS agents.[122] Moreover, "[m]ost of the material turns out to be garbage-rumor, innuendo, [and] newspaper clippings."[123] Not surprisingly, sixty-five percent of security and terrorism cases were dismissed between 1992 and 1996 because the evidence was weak or otherwise legally flawed.[124]

Furthermore, the national security interest is more concerned with the source of the information rather than with the information itself. Secret evidence, nevertheless, disallows aliens and their

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120 *International Terrorism, 1995: Hearing on H.R. 896 Before the House Judiciary Committee*, 104th Cong., 1st Sess. (1995) (statement of William O. Studeman, Acting Director Central Intelligence).

121 DEMPSEY & COLE, *supra* note 13, at 130.

122 *See* Sugg, *supra* note 12, at 2.

123 *Id.*

124 *See id.*

counsel from viewing any of the substantive evidence. An alien's right to view the evidence against him might be accomplished in other ways without interfering with the ability to respond. For example, the substance of evidence could be revealed after redacting sources and methodology. Admittedly, aliens attempting to impeach this evidence would not be able to question the reliability of the information. Nevertheless, courts should counteract this problem by taking an active role in making determinations of the reliability of evidence.

The government clearly has an interest in national security. However, secret evidence often does not implicate national security. Furthermore, the private interests of aliens facing deportation is very high and the risks imposed by using secret evidence are great. Thus, these interests outweigh the government's interest in using secret evidence. Therefore, resident aliens have a due process right not to be subjected to secret evidence in immigration proceedings.

C. Secret Evidence Violates Confrontation Rights

In addition to violating due process rights, the INS's use of secret evidence violates the Confrontation Clause of the Sixth Amendment. Using secret evidence violates aliens' confrontation rights for several reasons. First, confrontation rights extend to an accused facing government punishment. Immigration procedures can result in the punishment of detention and deportation. Second, using secret evidence violates the basic confrontation rights that are presently extended to aliens.

Secret evidence procedures do not comport with these rights.[125] For one, the Federal Rules of Evidence do not apply in administrative immigration proceedings.[126] Moreover, the INA is

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[125] Despite the INS regulations to the contrary, the Administrative Procedure Act prohibits the use of ex parte evidence "relevant to the merits of the proceeding." 5 U.S.C. § 557(b)(1994) and § 557(c)(1994). The APA also prohibits ex parte communication if the administrative proceeding is an adjudication. 5 U.S.C. § 554(a) (1994).

[126] *See* Pub. L. No. 104-132, 401, 8 U.S.C. 1534(h) (1999); Cunanan v. INS, 856 F.2d 1373, 1374 (9th Cir. 1988); Felzcerek v. INS F.3d 112, 116 (2nd Cir.

statutorily authorized to use unlawfully obtained evidence by government.[127] Aliens facing deportation may not be allowed to view the evidence before them, let alone to confront their accusers.[128] These practices are purportedly justified under the doctrine of *United States v. Reynolds*.[129] In *Reynolds*, the Court allowed for the protection of classified information that was submitted at trial.[130] Nevertheless, the Court also stated that it is "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions."[131] Furthermore, the Court stated that privileges have no place in the criminal context because "the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[132] While recognizing the dangers of secret evidence in the criminal trial, the *Reynolds* Court was unwilling to extend the Confrontation Clause protections to aliens because it did not consider immigration procedures to be criminal procedures.[133]

The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him." [134] Since they lack any punitive character, it is argued, immigration

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1996).

127 *See* U.S.C. 1534 (e)(1)(b)(1996) ("An alien subject to removal under this subchapter shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained[.]").

128 *See* U.S.C. § 1534 (e)(1)(a)(1996).

129 345 U.S. 1 (1953).

130 *See id.* (holding that the Secretary of the Air Force may assert a privilege protecting military secrets).

131 Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

132 Reynolds, 345 U.S. at 12.

133 *See id.*

134 U.S. CONST. amend. VI, §1.

matters should not be considered "criminal prosecutions," and the confrontation right does not apply. The Court recently declared that since "deportation is not a criminal proceeding and has never been held to be punishment . . . no judicial review is guaranteed by the Constitution."[135] Moreover, the INA recognizes that deportation is not technically a criminal proceeding.[136]

Confrontation rights should be extended to aliens because immigration procedures result in government punishment.[137] Aliens risk punishment sufficiently as grave as the punishment a criminal receives.[138] The government punishes aliens in two ways: detention and deportation.

First, aliens are punished by detention. Aliens facing immigration charges are imprisoned. These aliens lose their liberty

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[135] Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) (quoting Carlson v. Landon, 342 U.S. 524, 537 (1952)) (upholding retroactive portions of the AEDPA that eliminate the Federal Court of Appeals jurisdiction to review an alien's final deportation order). *See also,* Boston-Bollers v. INS, 106 F.3d 352, 355 (11th Cir. 1997) ("no judicial review is guaranteed by the Constitution.").

[136] *See* GORDON, *supra* note 36, at § 104.01.

[137] *See* Gregory C. Clark, *(D)evolution of Recent British and American Antiterrorist Legislation*, 27 FORDHAM URB. L.J. 247, 270 (1999).

[138] *See supra* notes 13-27 and accompanying text. In *Reno v. AADC*, 525 U.S. 471, 497-98 (1999), Justice Ginsburg stated that:

> Deportation, in any event, is a grave sanction. As this Court has long recognized, 'that deportation is a penalty-at times a most serious one-cannot be doubted[.]' Deportation places 'the liberty of an individual . . . at stake . . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.'

525 U.S. 471, 490 (Ginsburg, J., concurring) (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945). Similarly, Justice Souter argued that a constitutional protection applies "to the like degree in immigration litigation, and is not attenuated because the deportation is not a penalty for a criminal act [.]" *Id.* at 511. (Souter, J. dissenting). *But see, id.* at 491. (opinion of Scalia, J.) ("While the consequences of deportation may be assuredly be grave, they are not imposed as a punishment.").

just as if they had been charged with a penal violation. Moreover, aliens are often subjected to some of the worst prison conditions in the country. Due to overcrowded facilities, detainees are often shipped to remote abandoned prisons where they are far from their communities and family, and "have little access to legal counsel, translators, or immigration information."[139] Furthermore, aliens may be detained for a much longer time than required by most criminal punishments.[140]

Second, aliens are punished by deportation. Deportation has been characterized as a penalty: "a forfeiture for misconduct of the privilege of residing in this country."[141] In fact, the consequences of deportation may be worse than many criminal punishments since deportation is sometimes the equivalent of banishment or exile.[142] Exile has been considered a legal punishment since Roman times.[143] Along these lines, Justice Brandeis noted that deportation may deprive a person of home, family, and "of all that makes life worth living."[144] As one scholar described:

> Deportation has a far harsher impact on most resident aliens than many conceded 'punishments,' . . . Uprooting the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these

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139 Jason H. Ehrenberg, Note, *A Call for Reform of Recent Immigration Legislation,* U. MICH. J.L. REF. 195, 199 (1998).

140 *See* Sugg, *supra* note 12, at 2.

141 GORDON ET AL, *supra* note 36, at § 104.01[1]. *See also,* Tan v. Phelan, 333 U.S. 6 (1948).

142 GORDON ET AL, *supra* note 36, at § 104.01[1]. *See also,* Barber v. Gonzales, 347 U.S. 637 (1954).

143 Exile existed as a formal punishment in Rome beginning in 63 B.C. when Cicero sponsored a law against bribery punishable by ten years of exile. *See* Michael C. Alexander, *Ancient Law and Custom: The Western Legal Tradition: Compensation in Roman Criminal Law,* 1984 U. ILL. L. REV. 521 (1984).

144 Ng Fung Ho v. White, 259 U.S. 276 (1922).

> attachments inflicts more pain than preventing them from being made.[145]

Plainly, deportation is punishment. Thus, immigration proceedings are properly characterized as criminal proceedings. Aliens, therefore, should be afforded the confrontation rights set forth in *Reynolds*. These rights prohibit basing the merits of a decision on secret evidence.

Using secret evidence also violates the basic confrontation rights that are presently extended to aliens. Immigration cases have established certain confrontation rights for aliens based on common law. For example, hidden evidence was disallowed because it violated the fundamental right to a fair trial.[146] The Court in *Bridges v. Wixon,* held that an alien had a due process right to confront his accusers,[147] and that for *ex parte* communications, "[m]eticulous care must be exercised lest the procedure . . . not meet the essential standards of fairness."[148]

Courts have also established an alien's right to cross-examine.[149] When *ex parte* evidence has been allowed, courts have applied strict controls on its admissibility. For example, some courts have held hearsay admissible only if it is both probative and "fundamentally fair."[150] Other courts have admitted hearsay only "when the

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145 G. NEUMAN, STRANGER TO CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 162 (1996).

146 *See* Gregory C. Clark, *History Repeating Itself: the (D)evolution of Recent British and American Antiterrorist Legislation,* 27 FORDHAM URB. L.J. 247 (1999).

147 Bridges v. Wixon, 326 U.S. 135, 150-54 (1945) (holding that detention based on unreliable hearsay evidence violates the right to confront one's accusers).

148 *Id.* at 154.

149 *See* Cunnanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988); Olabanji v. INS, 973 F.2d 1232, 1236 (5th Cir. 1992); Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997).

150 *See* Felzcerek v. INS, 75 F.3d 112, 115 (2nd Cir. 1996). *See also,* Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1997); Cunnanan v. INS, 856 F.2d 1373, 1374 (9th Cir. 1988); Olabanji v. INS, 973 F.2d 1232, 1234 (5th Cir. 1992).

government demonstrates repeated, diligent, but unsuccessful attempts to locate its witnesses,"[151] or at the minimum requires that the government submit a sworn statement by a witness who can address the reliability of the evidence.[152] Along these lines, some judges have insisted that the evidence be trustworthy and reliable.[153]

The INS's use of secret evidence violates these confrontation rights. First, aliens are often disallowed from knowing who has submitted evidence to the government. Second, aliens are not able to cross-examine secret evidence statements. These statements are made out of court and the declarants are not required to substantiate their statements in court. Third, secret evidence often contains multiple hearsay. This hearsay evidence is often admitted without any government effort to bring the declarants to court. In contrast, the government often goes to great lengths to keep those declarants from testifying. Fourth, secret evidence usually contains unsworn statements, and the government does not provide witnesses who can substantiate the reliability of those statements. Finally, secret evidence has proven very untrustworthy and unreliable. For these reasons, secret evidence precludes the confrontation right protections already afforded to aliens.

Regardless, detention and deportation constitute punishment. Therefore, immigration proceedings should be considered criminal proceedings. Thus, secret evidence may not be used to judge the merits of an immigration proceeding. For these reasons, the INS's use of secret evidence violates the protections granted by the Confrontation Clause.

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151 Kiareldeen v. Reno, 71 F. Supp. 2d 402, 409, 415 (1999) (disapproving of Board of Immigration Appeals reliance on unsworn, out of court statements of an alien's ex-wife). *See also*, Dallo v. INS, 765 F.2d 581 (6th Cir. 1985) (upholding INS use of an affidavit of an alien's ex-wife who was subpoenaed three times, attempts made to locate with a private investigator, and the judge telephoned her house).

152 *See* Kiareldeen at 409, 415.

153 Felzcerek, 75 F.3d at 114.

V. CONCLUSION

The INS's use of secret evidence is unconstitutional in two ways. First, secret evidence violates aliens' rights to due process. Using secret evidence provides inadequate procedure for aliens who wish to protect their important interests. These interests outweigh the government's interest in national security. Second, the use of secret evidence violates alien rights under the Confrontation Clause because aliens are subject to government punishment. Furthermore, common law establishes that secret evidence may not be used against aliens in immigration proceedings.

In spite of being unconstitutional, the future of secret evidence is unclear. Some have argued that the doctrine is "crumbling."[154] Now that some courts have had the courage to order the release of aliens, more courts will follow their lead. This new trend is perhaps based on the realization that the fear that "these really could be terrorists," is unfounded.[155] Others have argued that the government will fight hard to continue using secret evidence.[156] With the "whole anti-terrorism mechanism resting on this process" the government is not likely to give it up without a fight.[157] By eliminating the secret evidence practice, it would be harder for the government to use foreign intelligence sources in general, and will make it more difficult to use political affiliation in prosecutions.[158]

Along these lines, the INS states that the issue of secret evidence is "far from being over."[159] The INS believes that using secret evidence is a good policy, a "tool available to use," and will

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154 Telephone Interview with Kamal Nawash, Legal Director, American-Arab Anti-Discrimination Committee (Nov. 22, 1999).

155 *Id.*

156 *See* Letter from Kit Gage, National Coordinator, National Coalition to Protect Political Freedom, to D. Mark Jackson (Nov. 23, 1999) (on file with author).

157 *Id.*

158 *Id.*

159 Telephone Interview with Bill Strausberger, Public Affairs Officer, Immigration and Naturalization Service (Nov. 22, 1999).

continue to use it so long as it is allowed.[160] While the INS argues that there are some "terrorist dangers," it acknowledges that serious constitutional issues still need to be answered.[161] The INS is aware of the loud opposition voiced by community organizations, local groups, and human rights organizations. Furthermore, the INS recognizes that the use of secret evidence must be "very carefully weighed," and purports that the INS is "doing it for the right reasons."[162] Accordingly, the INS would like more discretion in its policymaking, but has lost much of its latitude with the passage of AEDPA and IIRAIRA. The INS concedes that secret evidence is the law and that it is required to use it. In essence, the INS feels constrained by the will of Congress that it continue to use secret evidence.[163]

In response, several United States Representatives have sponsored House Bill 2121, the Secret Evidence Repeal Act of 1999.[164] This Bill is designed "[t]o ensure that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien."[165] So far the Bill has 64 co-sponsors.[166] The viability of the Bill has improved due to the critical media coverage following the recent decisions involving Kiareldeen and Ahmed.[167] In February of 2000, the House Immigration Subcommittee held hearings on the Secret Evidence Repeal Act.[168]

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160 *Id.*

161 *Id.*

162 *Id.*

163 *See id.*

164 Authored by David Bonior (D-MI) and Tom Campbell (R-CA).

165 H.R. 2121, 106th Cong. (1999).

166 *See* Letter from Kit Gage, National Coordinator, National Coalition to Protect Political Freedom, to D. Mark Jackson (Nov. 23, 1999) (on file with author). Of the sponsors, 54 are democrats and 10 are republicans.

167 *Id.*

168 *Secret Evidence Repeal Act of 1999: Hearings on H.R. 2121 Before the House Comm. on the Judiciary Subcomm. on Immigration and Claims*, 106th Cong. 81 (2000). The Department of Justice and the FBI opposed the Bill. Counsel from the FBI and INS argued that secret evidence was necessary because

This is a responsible step by Congress. First, where the judiciary has been slow in striking down an unconstitutional law, Congress should seek to eliminate that law. The political branches have a duty not to enact and enforce legislation that violates the fundamental guarantees of the Constitution.[169] As the Country's policymaker, Congress should eliminate a policy that has had devastating results. Second, the INS relies heavily on Congress to establish its procedures. By changing the law, Congress can provide the legal and political leadership to allow the INS to discontinue the use of secret evidence.

Nevertheless, disallowing the use of secret evidence may be difficult. The INS claims to rely on a power to use secret evidence that exists beyond its statute. Therefore, it remains to be seen whether the INS would actually discontinue its use of secret evidence in response to an act revoking its statutory authority. Such unaccountability may be a casualty of the administrative state. However, Congress should use its oversight powers to hold the INS accountable to its intent. A move in this direction might be indicated by the House Immigration Subcommittee, which has launched new oversight hearings in order to more closely monitor the INS .[170]

One human rights lawyer believes that secret evidence is a problem that must be solved domestically.[171] Nevertheless, the

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of a high national security interest in these cases. Further, they argued, the limited rights afforded to aliens do not preclude the use of this procedure in immigration cases, though this procedure would be unconstitutional if used in criminal cases involving U.S. citizens. In response to a barrage of suspicious questions by many of the committee members, the Department refused to comment on any specific case. On the other hand, Professor David Cole presented forceful testimony in favor of the legislation, citing both the Ahmed and Kiareldeen cases. Support for the Bill was split mostly down partisan lines, with the republican chairman of the committee, Lamar Smith (R-TX), arguing strongly against its adoption.

169 *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 350 (1994) (arguing that "non-judicial actors-Congress, the President, state officials, ordinary citizens-to engage in deliberation about the meaning of the Constitution's broad guarantees.").

170 *See* Wolchok, *supra* note 48, at 13.

171 Telephone Interview with Kamal Nawash, Legal Director, American-

United States has come under international scrutiny for its use of secret evidence. Some scholars have attacked many of these provisions as violations of international law.[172] Aside from specific treaty obligations, the United States may be in violation of its international obligations if it fails to operate according to the Constitution. The United States has incorporated the International Covenant on Civil and Political Liberties and has declared that it parallels the United States' obligations under the Constitution.[173]

Thus, if the United States violates the Constitution, it violates international law as well.[174] Therefore, opponents of secret evidence should also utilize a variety of international mechanisms.

Arab Anti-Discrimination Committee, (Nov. 22, 1999).

[172] Martin, *supra* note 35, at 685. *See also,* Ehrenberg, *supra* note 130, at 200-204 (arguing that several provisions of the immigration law violate international law of which the United States is a party). *See, e.g.,* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 3.

[173] *See generally,* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that international law is incorporated into the common law of the United States). In a letter to Senator Pell, President George Bush stated that "'[t]he Covenant codifies the essential freedoms people must enjoy in a democratic society[.]' With few exceptions, he added, 'it is entirely consonant with the fundamental principles incorporated in our own Bill of Rights [.]'". RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW AND POLICY PRACTICE, 248 (3d ed. 1995) (citing Senate Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102d. Cong., 2d Sess., App. A at 25 (1992)). *See also,* Restatement (Third) of the Foreign Relations Law of the United States, § 701, Reporters' Note 8 at 159-60 (1987) ("The International Covenant on Civil and Political Rights requires states parties to the Covenant to respect and ensure rights generally similar to those protected by the United States Constitution.").

[174] The International Covenant on Civil and Political Rights requires that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and be promptly informed of any charges against him." Part III. Art. 9 §2. Furthermore, detainees have the right "[t]o be informed promptly and in detail . . . the nature and cause of the charge against him." Part III. Art. 14 §3(a), and "[t]o be tried without undue delay." Part III. Art 14 §14(c). International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

First, opponents should voice their objections to the United Nations. This year, the United Nations Commission on Human Rights met to review international progress on civil and political rights. Several non-governmental organizations (NGOs) addressed the Commission on current abuses of judicial standards. Amongst the allegations cited were arbitrary arrests and secret detentions in Algeria and Turkey.[175] Similarly, the Arab Organization for Human Rights and North-South XXI condemned the detention of Lebanese "hostages" held without trial in Israeli prisons.[176] Additionally, Amnesty International has opposed the treatment of immigrants who seek asylum in the United States.[177] According to one human rights organization, Amnesty International will include United States' use of secret evidence in next year's annual report.[178]

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175 *See* United Nations Press Release, Non-Governmental Organizations Decry Torture, Disappearances, Religious Intolerance, Problems with Administration of Justice (April 9, 1999).

176 *See id.*

177 One report states:

> Everyone has the right to seek and enjoy asylum if they are forced to flee their country to escape persecution. The USA accepts this principle-it was one of the main architects of the international system of refugee protection. Yet US authorities violate the fundamental human rights of asylum-seekers[.] They are often detained indefinitely on grounds beyond those allowed by international standards . . . are frequently denied any opportunity of parole . . . one official can keep a person who has committed no crime in jail for months or years[.]

Amnesty International Report, United States of America: Lost in the Labyrinth: Detention of Asylum-Seekers (Sept. 1999).

178 *See* Telephone Interview with Kamal Nawash, Legal Director for the American-Arab Anti-Discrimination Committee, (Nov. 22, 1999). According to one INS spokesperson, the Department of Justice is already aware of Amnesty International's report and is planning a rebuttal to the allegations that the use of secret evidence violates international human rights law. *See* Telephone Interview with Bill Strausberger, Public Affairs Officer, Immigration and Naturalization Service (Nov. 22, 1999).

Reports by NGOs to the United Nations will make the United States accountable to the world community. As many nations seek higher human rights standards, the United States will be compelled by international pressure to discontinue its secret evidence policy. The United States may be persuaded by this pressure for several reasons. First, the United States will need to maintain a good reputation for human rights if it seeks to use its military to enforce human rights abroad. Second, as the United States continues to open up new trade markets, it will need the cooperation of other nations. These nations may be less inclined to support the proposals of a country which violates international human rights standards. Third, the United States' negotiating power may be damaged in specific regions. For example, the United States may have difficulty maintaining the fragile diplomacy in Middle East countries, as it continues to violate the rights of many of their nationals who take residence in the United States.

Second, the United Nations should utilize its own mechanisms. Entities of the United Nations such as the High Commissioner for Human Rights, rapporteurs, and working groups should further investigate and report on United States' policy. The Commission already mandates several relevant entities, including the Working Group on arbitrary detention, the Working Group on racism and xenophobia,[179] and the Special Rapporteur on torture and detention.[180] In addition, the Commission should consider a U.S. specific rapporteur. Finally, NGOs should continue to work closely with the High Commissioner for Human Rights to outline human rights goals that will discourage the use of secret evidence.[181] Establishing these monitors will force the U.S. to vigorously defend its record and to cooperate with an international investigation. These groups should focus their attention on U.S. policy that violates international recommendations. For example, the Working

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[179] *See* LILLICH & HANNUM, *supra* note 173, at 393.

[180] *See* United Nations Press Release, Commission Report on the Question of Torture and Detention (April 9, 1999).

[181] *See* Amnesty International Report, United Nations Agenda for a New United Nations High Commissioner for Human Rights (April 1997).

Group on arbitrary detention set forth criteria stating that immigrants and asylum seekers should only be detained "as a last available measure."[182] The group added, "that detention should only be for legitimate reasons; that detainees should be informed of the reasons for detention[.]"[183] The Special Rapporteur on religious intolerance and the independence of judges and lawyers has stated that improper detention without compensation may constitute a "grave violation of human rights."[184] These entities can apply further pressure on the U.S. by calling attention to its violations of international human rights standards.

International measures, however, should be utilized in tandem with continued constitutional challenges in United States domestic courts. Indeed, interpreting the Constitution to give the same human rights to aliens within its borders as it does to its citizens, accords with the goals of international human rights law. Assuming that individual rights were contingent on the power of the state reflects an antiquated positivist jurisprudence.[185] Human rights law, in contrast,

recognizes that certain rights attach to the individual, and exist independent of states. Providing constitutional protection to aliens bolsters this recognition of universal human dignity.

Moreover, using secret evidence under the rationale of national security is ultimately self-defeating. First, overreaching national security policies make nations unsafe. Denying individuals a proper hearing means that innocent people are more likely to be punished, and guilty people are more likely to go free. Second, marginalizing groups on the basis of their associations, ethnicities, and nationalities creates discontent and distrust in government. Eventually, this leads to a less stable nation. Finally, ostracizing

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182 United Nations Press Release, Report of the Working Group on Arbitrary Detention (April 9, 1999).

183 *Id.*

184 United Nations Press Release, Special Rapporteurs on Religious Intolerance and Judicial Independence, Independent Expert on Compensation Addresses Human Rights Commission (April 12, 1999).

185 *See* TRIBE, supra note 32, at 278.

certain groups may provoke the very "anti-American" sentiments of which some are fearful. Ironically, this may unnecessarily incite the action of real terrorists.

Freedom is also an end in itself. Losing freedom means losing a value that this Country holds as fundamental. In short, if freedom must be sacrificed in order to achieve security, then there may be little left that is worth keeping secure.