2000

Secret Evidence Repeal Act of 1999, Part 1: Hearing Before the H. Comm. on the Judiciary, 106th Cong., Feb. 10, 2000 (Statement of David D. Cole, Prof. of Law, Geo. U. L. Center)

David Cole
Georgetown University Law Center, cole@law.georgetown.edu

CIS-No.: 2000-H521-125.3

SECRET EVIDENCE REPEAL ACT OF 1999, PART I

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 2121

FEBRUARY 10, 2000

Serial No. 97

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
64-352 WASHINGTON : 2000

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
ASA HUTCHINSON, Arkansas
EDWARD A. PEASE, Indiana
CHRIS CANNON, Utah
JAMES E. ROGAN, California
LINDSEY O. GRAHAM, South Carolina
MARY BONO, California
SPENCER BACHUS, Alabama
JOE SCARBOROUGH, Florida
DAVID VITTER, Louisiana

JOHN CONYERS, JR., Michigan
BARNEY FRANK, Massachusetts
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
STEVEN R. ROTHMAN, New Jersey
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York

THOMAS E. MOONEY, SR., *General Counsel-Chief of Staff*
JULIAN EPSTEIN, *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON IMMIGRATION AND CLAIMS

LAMAR S. SMITH, Texas, *Chairman*

BILL McCOLLUM, Florida
ELTON GALLEGLY, California
EDWARD A. PEASE, Indiana
CHRIS CANNON, Utah
CHARLES T. CANADY, Florida
BOB GOODLATTE, Virginia
JOE SCARBOROUGH, Florida

SHEILA JACKSON LEE, Texas
HOWARD L. BERMAN, California
ZOE LOFGREN, California
BARNEY FRANK, Massachusetts
MARTIN T. MEEHAN, Massachusetts

GEORGE FISHMAN, *Chief Counsel*
JIM WILON, *Counsel*
CINDY BLACKSTON, *Professional Staff*
LEON BUCK, *Minority Counsel*

CONTENTS

HEARING DATE

TEXT OF BILL

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

APPENDIX

hand, which is our standard practice. And then perhaps we would have avoided some of the inconvenience.

But more than anything, I will remind the minority member that the majority has every right to invite or not invite anybody that they want to. And I would appreciate your supporting a majority witness, but in this case, we were simply exercising the rights that we already have.

Ms. JACKSON LEE. Well, I thank you, Mr. Chairman.

In the interests of fairness and due process and all of the values that the House Judiciary Committee portends to protect, I respect the response of the chairman only to say that laymen who typically are not proficient at testifying before committees may have any number of reasons to delay or have delayed testimony. In fact, I have been before many witnesses whose testimony appeared on my desk right as they began to speak.

I would only indicate and say that I would rather another penalty for individuals as opposed to denial of testimony, because we have every right to cross-examine their testimony if it was not in the keeping and liking of any of us who might have invited them. I only ask again for that, and I appreciate the fact that you have given a response.

Mr. SMITH. Thank you.

Ms. JACKSON LEE. I thank the chairman.

Mr. SMITH. We will welcome our third panel today, consisting of Professor David Cole, Georgetown University Law Center; and Mrs. Nahla Al-Arian, a relative of an affected individual who is being held in detention.

We welcome you both, and Professor Cole, if you will begin by giving us your testimony.

STATEMENT OF DAVID COLE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. COLE. Thank you, Mr. Chairman. I want to thank you for holding this hearing and for inviting me to testify.

We heard a lot in the prior panel about national security and threats to national security. And of course, when the FBI General Counsel gets up and talks about threats to national security, it is very hard for us to question that. And when questions are raised, and he says, well, I am not at liberty to talk about specific cases, it gets more difficult to challenge the claim.

But I think the claim can be challenged, and I am here to do that. First, I want to look at what Mr. Alexander's testimony basically was, which is, despite the broad authority that you have given us, or that we have interpreted you to give us, we in fact only use this procedure where there are true threats to national security, where the alien poses a true threat to national security.

In other words, trust us. You give us this big authority, but we will only use it in narrow cases.

But then he says, there are 12 currently pending cases in which aliens pose a true threat to national security. It has been determined at the highest levels that they pose a true threat to national security.

But then he also tells us that only five of those aliens are being detained by INS. So INS, in the highest levels of justice, has de-

cided that seven aliens pose a true threat to national security, and nonetheless are free and at large in this country. Now, if they really posed a threat to national security, would the INS be allowing them out, free, at large? No, they would be detained.

So I think that, just from the current pending cases, suggests some reason to question what they say.

Now, I want to talk about the past a little bit. I have represented 13 people in the last 13 years against whom the INS has sought to use secret evidence. And the INS' track record in these cases belies Mr. Parkinson's general assurances that this power will be used only for true threats to national security.

That was the argument that the INS made in all 13 cases at one time. They were all alleged to be threats to national security. Yet in no case did the secret evidence charge that any of these individuals engaged in or supported any criminal conduct, much less criminal conduct that would threaten national security. In every case, the basic charge was guilt by association.

Twelve of those 13 people who the INS said posed direct threats to national security are now living freely and peaceably in the United States, without, as far as I can tell, any undermining of the national security. The thirteenth case is still pending, and Mrs. Al-Arian will talk about that.

In every case that has reached a resolution, the INS has lost. In the three cases that reached Federal court resolution, Federal courts have declared the use of secret evidence unconstitutional, and the INS has basically chosen not to pursue its appeals. The only appeal it has chosen to pursue is with respect to Mr. Kiareldeen, and there the only argument it is making on appeal is that the case should be dismissed as moot, because Mr. Kiareldeen is now released, not that the underlying decision was wrong.

Yet it continues to engage in the practice. In all the cases that did not reach Federal court, immigration judges ruled against the INS, rejecting claims that national security was in fact at stake, after considering the evidence. Now, it is a rare thing, as you know, for a judge to stand up to a Federal Government claim of national security. The fact that judges have done so in so many cases reflects both the due process concerns that this practice raises and the Government's failure to reserve the tool for the most egregious cases.

In my written statement, I have illustrated in detail the dangers of secret evidence by talking about these specific cases. Here I just want to touch on some of the most fundamental problems, first by focusing on a single case, Nassar Ahmed. Put yourself in the shoes of Nassar Ahmed, an Egyptian citizen living here for 10 years with three U.S. citizen children, put in deportation proceedings because he overstayed his visa.

But he has a strong case for asylum because he faces persecution if returned to Egypt. He shows up for a routine immigration hearing and he is suddenly taken into custody, told he is a threat to national security. He says, why? The INS says, we can't tell you, because disclosing anything, even summarizing the charges against you, would itself jeopardize national security.

How do you defend yourself? In an ordinary immigration case, he would have the right to know the charges against him. In these

proceedings, he had no right even to a summary. In an ordinary immigration case, he would have the right to cross-examine witnesses. In secret evidence proceedings, you don't even know who the witnesses are, much less can you cross-examine them. And indeed, the Government declined even to tell the immigration judge behind closed doors who the witnesses were, and declined to bring the witnesses in to be questioned by the judge. They said, rely on our FBI agent's summary of what they have said.

In an ordinary immigration case, you have the right to object to the admission of evidence. Well, how can you object to the admission of evidence when it is being submitted behind closed doors?

In short, secret evidence short-circuits the adversary process. That is why three Federal courts, the only three Federal courts that have addressed this issue in the last decade, and I represented the aliens in all those cases, have declared that the use of secret evidence is unconstitutional.

Mr. Alexander said, aliens don't have a full panoply of due process rights, and citizens do, as if there is kind of a deluxe version of due process rights, and then a basic version of due process rights. Well, there is no case that supports that proposition. But even if there were, what right could be more basic under due process than the right to see the evidence against you?

Now, beyond the basic, general problems with the use of secret evidence that the courts have recognized, I want to talk about the particular problems raised by the way the INS has used this. And I want to particularly respond to the assurances you have had about how they engaged in very careful review.

First of all, there is no requirement in the law that this practice be reserved for persons who truly threaten national security. The only requirement in the law is that the information be classified, and of course, you know, millions of pages of information are classified every day, and that the information be relevant to the immigration proceeding. Not that it shows that the alien is a threat to national security, but merely that it be relevant. They can use it any time it is relevant. They have used it in cases where the INS's own actions indicate no threat to national security.

In one of the earliest cases I did, the case of the Los Angeles Eight, in 1987, the INS sought to detain eight immigrants on secret evidence at the same time than then-FBI Director William Webster was testifying before this Congress that the FBI had determined that none of the individuals had engaged in any criminal or terrorist activity whatsoever, that they were arrested solely for their political affiliations and that if they were U.S. citizens, there would be no grounds for their arrest.

Moreover, in all 12 of the cases in which the INS has lost and we have prevailed and the aliens have been freed, the Government has declined to pursue all of its appeals. Now, if a true threat to national security were presented, wouldn't you expect the INS to pursue all of its appeals? But instead, it has repeatedly dropped the case, allowed the alien who it was claiming posed a threat to national security to be released into the community and not even taken all the steps that it could take.

Secondly, summaries. There is no requirement under the law that a summary be provided. There is also no requirement that if

a summary be provided that it be meaningful. When Mr. Ahmed was first detained, he received no summary whatsoever. At a later point in his hearing, the INS used secret evidence again. The only summary they would give him then was, you are associated with a known terrorist organization. They wouldn't even tell him the group.

Now, how do you defend yourself against that? When we filed a constitutional challenge, all of a sudden the INS found itself able to disclose the name of the group and 50 pages of previously classified information.

And that brings me to the third point. The INS often uses this procedure where the evidence does not need to be kept secret, because it was improperly classified. The Iraqi Six, represented by former CIA Director, Jim Woolsey. Initially, the Government said they had to be kept out because they were threats to national security and all the evidence against them was secret. Well, then Jim Woolsey took the case, came here, brought a lot of attention to it, went on 60 Minutes, and all of a sudden, the INS was able to disclose 500 pages of what it previously said could not possibly be disclosed without threatening and jeopardizing national security. In Mr. Ahmed's case, the same thing happened.

Fourth, this ability to use secret evidence leads the INS to rely on very questionable evidence. In Mr. Kiareldeen's case, which we have heard about, and he is here, once a threat to national security, now sitting right here, because the INS did not deem him a serious enough threat to pursue its appeals, even though it deemed him a serious enough threat to hold him in jail on the basis of secret evidence for 19 months.

In his case, the evidence primarily came from his ex-wife who was in a custody dispute with him, who it was established had made repeated——

Mr. SMITH. Professor Cole, I am going to interrupt you for a minute. We have been generous with other witnesses this morning and let them go a minute or so past the customary 5 minute limit. You are almost doubling that limit.

Mr. COLE. Well, if I could just conclude.

Mr. SMITH. Please, thank you.

Mr. COLE. Just one other example of questionable evidence. In the Nassar Ahmed case, one of the arguments that the FBI agent made behind closed doors, and which was classified as secret, was that because the INS had imprisoned Mr. Ahmed, it had increased his stature in the community and therefore he should not be released.

The strongest argument against the use of secret evidence is that it is fundamentally unfair. But it is also unnecessary. We can't do it in criminal proceedings, and all the references to CIPA previously I think were quite misleading. CIPA does not permit introduction of secret evidence in criminal proceedings. It couldn't, because of the sixth amendment.

No matter how serious the crime is, we can't do it. And we have survived as a Nation for ? 0 years, and I think we are better for it, for having honored the basic right to see the evidence against us. We can continue to survive honoring that right.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF DAVID COLE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

INTRODUCTION

Mr. Chairman, members of the Committee, I thank you for inviting me to testify on the use of secret evidence in immigration proceedings.[1] I have an unfortunately long experience with this practice. Since 1987, I have represented 13 aliens against whom the INS has sought to use secret evidence. At one time, the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed—in many instances could not even be summarized—without jeopardizing national security. Yet in none of these cases did the INS's secret evidence even *allege*, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity. In most cases, the government's allegations, once revealed, consisted of no more than guilt by association: it claimed that the aliens were associated with disfavored "terrorist" groups, but not that they actually engaged in or furthered any terrorist activity themselves.

Today, one of the 13 remains in prison as his case is still pending. All the other clients are free, living a law-abiding and peaceable existence here in the United States, without any adverse consequences to the security of the nation. In every case that has reached a final determination, the INS has lost. Where the cases have been resolved in the federal courts, the courts have declared the use of secret evidence unconstitutional. Where the cases have been resolved in the immigration process, immigration judges have uniformly rejected the government's national security claims as unwarranted.

In the meantime, however, substantial harm has been done. Nasser Ahmed, an Egyptian man living in New York, spent 3 and ° years of his life incarcerated, most of it in solitary confinement, before his release last November, when the Attorney General declined to overrule the Board of Immigration Appeals' ruling that he did not pose a threat to national security and should be released. Hany Kiareldeen, a Palestinian from New Jersey, spent a year and a half in detention before the BIA and a federal court ordered his release in October 1999. And Mazen Al Najjar, a Palestinian from Tampa, Florida whose case is still pending, this week will pass his 1000th day in captivity, without criminal charges and on the basis of evidence he has never seen.

But it is not simply years of human beings' lives that have been lost. More broadly, America's image as a country that cares about fairness, openness, and due process has been seriously tarnished. Secret evidence is a tactic one associates with totalitarian regimes and military juntas, not free democracies. A remedy is needed, and H.R. 2121 is it.

The use of secret evidence poses insuperable challenges to the administration of justice. First, and most fundamentally, it is simply not possible to hold a fair adversary proceeding where one side presents its evidence behind closed doors. The adversary process is the best mechanism for determining the truth that we have yet identified, but it depends on each side being able to examine and respond to the other's evidence. Accordingly, every court to address the use of secret evidence in immigration proceedings in the last decade has declared it unconstitutional.

Second, the INS's use of secret evidence contains practically no safeguards against abuse. It uses secret evidence against people who do not pose any threat to the national security, because in its view evidence can be submitted behind closed doors whenever it is classified and relevant, even if the individual involved does not himself pose a threat to national security. It uses secret evidence where there is no legitimate need for the evidence to be secret, because it has been improperly classified by another agency and the INS has no authority to declassify. It uses secret evidence where it has no affirmative statutory authority to do so, such as in detaining aliens without bond. It has failed to keep any record of many of its secret evidence presentations, thereby defeating meaningful review. And while the INS has occasionally provided aliens with declassified summaries of its secret evidence, neither statute nor regulation requires such a production, nor that the summary provided afford the alien a meaningful opportunity to respond. Accordingly, summaries are often not provided at all, and when provided, are often so general as to be entirely unhelpful.

---

[1] I speak here in my personal capacity, and not as a representative of Georgetown University Law Center or any other entity or person. I attach my curriculum vitae as Exhibit A. Pursuant to House Rule XI, clause 2(g)(4), I hereby disclose that in the past three years I received a $2500 honorarium for speaking at a Justice Department conference, and $300 each year from the Administrative Office for U.S. Courts for conducting an annual training session for U.S. magistrates.

Third, reliance on secret evidence that cannot be challenged by one's adversaries leads the government to engage in sloppy practices that would never be tolerated were it required to make its case in open court. As far as I can determine, the INS has relied almost entirely on hearsay presentations by FBI agents, and has failed to produce any original declarants, even in the closed-door proceedings. The FBI agents' presentations have sometimes taken the form of barebones assertions, not even providing the judge with sufficient information to make an independent assessment of the reliability of or basis for the allegations. And the INS and FBI have relied on innuendo and rumor, even where its own records raise serious questions about the validity of its charges.

Fourth, there has never been any showing that the use of secret evidence is necessary. In no other setting is the government permitted to deprive someone of his liberty without affording him a meaningful opportunity to respond to the evidence against him. In criminal cases, secret evidence is *never* permitted, no matter how serious the charges, and no matter how much confidential or classified information the government has implicating the defendant. This rule applies to the prosecution of terrorists, spies, and mass murderers. We have survived as a nation for over 200 years abiding by that basic rule of due process. There is no reason we cannot and should not extend the same rule to immigrants when we seek to deprive them of their liberty and either imprison them or deport them.

Finally, the use of secret evidence is counterproductive. It poisons the truth-finding process, so we cannot even be certain of whether we have properly identified threats to national security. It embroils the government in protracted litigation because the adversary process is ill-suited to this practice. And most problematically, it encourages cynicism, paranoia, and distrust in immigrant communities, because closed-door proceedings understandably make people fear the worst. That paranoia and distrust in turn impedes the ability of law enforcement to identify true threats in immigrant communities, because it means that the FBI and INS will be viewed as enemy rather than protector.

I support H.R. 2121 because it seeks to end this practice. It would repeal existing statutory authority for the use of secret evidence to deport aliens, to deny them relief from deportation, or to detain them. Its premise is that the practice cannot be mended, and therefore should simply be ended. I agree with that premise, because at bottom the use of secret evidence cannot be squared with the due process guarantee of notice and a fair hearing. In this testimony, I will show why that is so as a matter of constitutional law and illustrate why it is so by pointing to the INS's dismal track record in secret evidence cases.

I. A CASE STUDY

I want to begin with a case study. Hany Kiareldeen is a thirty-one year old Palestinian who came to the United States on a student visa in 1990 and lives in Newark, New Jersey. From March 1998 to October 1999, he spent 19 months in prison solely on the basis of secret evidence—an uncorroborated bare-bones hearsay report—that neither he nor his lawyers ever have had an opportunity to see.

In 1997, Kiareldeen applied for adjustment of status to permanent resident based on his marriage to a U.S. citizen. On March 26, 1998, however, without ruling on his application for permanent resident status, the INS arrested Kiareldeen, charged him with being deportable for failing to maintain his student visa status, and took him into custody as a threat to national security.

Kiareldeen has never seen the only evidence that the INS ever offered to justify his detention, because the INS presented it *in camera* and *ex parte*. According to the undisputed claims of the immigration judges who reviewed it, however, the secret evidence consisted of a report prepared by an FBI Joint Terrorism Task Force relaying extremely general hearsay allegations. Declassified summaries of the evidence provided to Kiareldeen disclosed three allegations: (1) that Kiareldeen was associated with an unidentified "terrorist organization," and "maintains relationships" with other members and "suspected members" of "terrorist organizations," also unidentified; (2) that "[an unidentified] source advised" that about a week before the World Trade Center ("WTC") bombing, Kiareldeen hosted a meeting at his residence in Nutley, New Jersey, where some individuals discussed plans to bomb the World Trade Center; and (3) that "[an unidentified] source advised Kiareldeen expressed a desire to murder Attorney General Janet Reno." The INS never introduced any evidence in open court to substantiate any of these allegations. *Kiareldeen* v. *Reno*, 1999 WL 956289, *15 (D.N.J. Oct. 20, 1999).

The immigration judge handling Kiareldeen's case initially ruled, in May 1997, that the government's secret evidence justified his detention as a security threat. At that time, the INS told Kiareldeen only that the evidence showed that he was

associated with terrorists and posed a threat to the Attorney General, charges so general that he could not possibly rebut them.

After Kiareldeen obtained more detailed summaries of the evidence, he did rebut the government's case in open court. He proved, for example, that he did not even live in the apartment where he supposedly met with World Trade Center bombers until a year and a half *after* the alleged meeting took place. (The FBI's own records confirmed this fact.) He also showed that one of the sources of secret evidence against him, his ex-wife, had made numerous false allegations against him in the course of a custody battle over their child. Kiareldeen sought to examine his ex-wife in open court, but the INS vigorously opposed his attempts to do so, and she refused to testify about her discussions with the FBI.

Seven immigration judges ultimately examined Kiareldeen's case on the complete record, including the government's secret evidence presentation and Kiareldeen's open court rebuttal—the judge who conducted the immigration hearing and two separate three-judge panels of the Board of Immigration Appeals. It is rare for any judge—even an Article III judge—to reject to a claim of national security by the federal government. Yet in this case, all seven judges flatly rejected the government's contention that Kiareldeen posed a threat to national security.

Two judges directly discussed the quality of the government's evidence. The Immigration Judge who presided at trial, Daniel Meisner, stated that Kiareldeen had "raised formidable doubts about the veracity of the allegations contained in the [classified information]," and that in the face of repeated requests for more information, the INS had refused "to answer those doubts with any additional evidence, be it at the public portion of the hearing or even *in camera*." *Matter of Kiareldeen*, A77–025–332, Decision of Immigration Judge (Apr. 2, 1999). He concluded that the classified evidence was "too meager to provide reasonable grounds to believe that [Kiareldeen] was actually involved in any terrorist activity." *Id.*

BIA Judge Anthony Moscato, dissenting from a preliminary bond panel decision not to release Kiareldeen, wrote that the bare-bones character of the government's *in camera* evidence made it "impossible" for the BIA to exercise independent judgment in assessing "either the absolute truth or the relative probity of the evidence contained in the classified information." *Matter of Kiareldeen*, A77–025–332, Decision of BIA Denying Request to Lift Stay of Release Order (June 29, 1999) (Moscato, J., dissenting). Judge Moscato criticized the INS for having provided no original source material and "little in the way of specifics regarding the source or context of the classified information." *Id.* He further noted that despite the immigration judge's continuing requests, the INS had provided "no witnesses, neither confidential informant nor federal agent, to explain or document the context of the actions and statements referenced in the classified information or to document the way in which the classified information became known to the source of that information." *Id.* at 1–2.[2]

On August 18, 1999, Kiareldeen filed a habeas corpus petition in federal district court in New Jersey, arguing that the use of secret evidence to deprive him of his liberty pending resolution of the deportation proceedings was both unauthorized by statute and unconstitutional. On October 20, 1999, the district court granted the petition and issued a writ of habeas corpus. The court ruled that the INS's reliance on secret evidence violated Kiareldeen's due process right to a fair hearing, finding that "reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness." *Kiareldeen* v. *Reno*, 1999 WL 956289, *11 (D.N.J. Oct. 20, 1999). The court also ruled that Kiareldeen had been deprived of his due process rights because the secret evidence at issue consisted of uncorroborated hearsay that "could not be tested for reliability" and did not allow the immigration judges "to conduct a meaningful administrative review." *Id.* at *14–18. The court ordered Kiareldeen's immediate release.

Later the same day, a three-judge bond panel of the BIA also ordered Kiareldeen's release, unanimously rejecting the INS's appeal of the immigration judge's decision to grant bond, and lifting its prior preliminary stay of Kiareldeen's release. Five days earlier, on October 15, 1999, a separate three-judge merits panel had unanimously affirmed the immigration judge's decision granting Kiareldeen permanent

[2]The other two judges on this panel declined to lift the stay of Kiareldeen's release order pending appeal, but did not dispute in any respect Judge Moscato's characterization of the evidence.

resident status, also finding that Kiareldeen had successfully rebutted the INS's charges against him.[3]

After obtaining temporary stays of Kiareldeen's release from the Attorney General and a Third Circuit judge, the INS decided, on October 25, 1999, not to pursue further appeals available to it, and released Kiareldeen. The INS apparently concluded, after contending for more than a year and a half that Kiareldeen posed a national security threat, that he did not even pose a sufficient threat to justify pursuing its appeals. Kiareldeen is now a permanent resident alien, but has never received even an apology from the INS for taking a year and a half of his liberty from him.

Kiareldeen's case is just one of many stories that could be told. I will now turn to the range of legal and practical problems raised by the INS's use of secret evidence.

II. THE USE OF SECRET EVIDENCE VIOLATES DUE PROCESS

The use of secret evidence denies an alien the most basic guarantees of due process: notice of the evidence against him and a meaningful opportunity to rebut it. Accordingly, every court to address the issue in the last decade has found this practice unconstitutional.[4]

As the Supreme Court has stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. *McElroy*, 360 U.S. at 496. "'Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'" *Goss* v. *Lopez*, 419 U.S. 565, 580 (1975) (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J. concurring).

Accordingly, even in ordinary civil litigation where physical liberty is not at stake, "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." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987); *see also Kinoy* v. *Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975) (refusing to grant summary judgment on the basis of materials submitted *in camera*, because "[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation"). "[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process," and therefore "use of undisclosed information in adjudications should be presumptively unconstitutional." *American-Arab Anti-Discrimination Committee* v. *Reno*, (*ADC* v. *Reno*), 70 F.3d 1045, 1069–70 (9th Cir. 1995).[5]

Applying these principles, a federal district court recently declared unconstitutional the use of secret evidence to detain aliens without bond. In *Kiareldeen* v. *Reno*, 1999 WL 956289 (D.N.J. Oct. 20, 1999), the district court granted habeas corpus relief to an alien who had been detained by INS on the basis of secret evidence allegedly demonstrating that he was a threat to national security. As noted above, the court found that "reliance on secret evidence raises serious doubts about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness." *Id.* at *11.

---

[3] Under the BIA's rules, separate panels consider appeals of bond determinations and appeals of the merits of deportation proceedings. 8 C.F.R. § 3.19(d); 8 U.S.C. § 1226; *Gornika* v. *INS*, 681 F.2d 501, 505 (5th Cir. 1982).

[4] The Due Process Clause protects all persons living in this country, whether citizen or alien. It protects even aliens living here unlawfully:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivations 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.*

Mathews v. *Diaz*, 426 U.S. 67, 77 (1976) (emphasis added) (citations omitted); *see also Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality."); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954) ("since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded a citizen.").

[5] A later decision in *ADC* v. *Reno*, addressing a separate selective prosecution claim, was reversed and vacated by the Supreme Court under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, *Reno* v. *American-Arab Anti-Discrimination Comm.*, ___U.S.___, 119 S. Ct. 936 (1999), but that decision had no bearing on the 1995 decision's holding on the use of secret evidence.

The Court in *Kiareldeen* followed the two most recent federal appellate court decisions reviewing INS attempts to use secret evidence in immigration proceedings, both of which also held the practice unconstitutional. In 1988, the INS asserted national security concerns and sought to rely on secret evidence of Fouad Rafeedie's alleged high-ranking membership in the Popular Front for the Liberation of Palestine (PFLP), an allegedly terrorist group, to exclude him from the country upon his return from a trip abroad. A district court preliminarily enjoined the INS's actions on due process grounds, and the D.C. Circuit affirmed the injunction. *Rafeedie* v. *INS*, 688 F. Supp. 729 (D.D.C. 1988), *aff'd in part, rev'd in part, and remanded*, 880 F.2d 506 (D.C. Cir. 1989). On remand, the district court granted summary judgment and held that the INS's attempt to rely on secret evidence violated due process. *Rafeedie* v. *INS*, 795 F. Supp. 13 (D.D.C. 1992). The INS chose not to appeal, and abandoned its effort to expel Rafeedie.

In *Rafeedie*, every judge to review the INS's actions found "'the government's basic position . . . profoundly troubling.'" *Rafeedie*, 880 F.2d at 525 (Ruth Bader Ginsburg, J., concurring). The district court found that such a procedure "afford[s] virtually none of the procedural protections designed to minimize the risk that the government may err." *Rafeedie*, 795 F. Supp. at 19. The court of appeals compared the position of an alien having to disprove charges based on secret information to that of Joseph K. in Franz Kafka's *The Trial*, and stated that "[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden." *Rafeedie*, 880 F.2d at 516.

In 1995, the Ninth Circuit unanimously held that the INS could not constitutionally rely on undisclosed information to deny legalization, an immigration benefit, to two aliens accused of associating with a terrorist organization. *ADC* v. *Reno*, 70 F.3d at 1066–71. The Ninth Circuit held that "[o]nly the most extraordinary circumstances could support one-sided process." *Id.* at 1070. The fact that the government asserted national security and charged aliens with membership in a terrorist organization was not sufficient to justify reliance on secret evidence. *Id.* Again, the government chose not to pursue further appeals, and granted the aliens legalization.

These cases in turn followed *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), in which the Supreme Court relied on due process concerns to interpret an INS regulation not to permit the use of secret evidence to exclude aliens who live here and have due process protections. Chew was a lawful permanent resident of the United States who had left the country for four months as a seaman on a merchant vessel. Upon his return, he was threatened with permanent exclusion based on an immigration regulation that allowed the exclusion of aliens on the basis of confidential information without a hearing. To avoid a "constitutional conflict" with the Due Process Clause, the Supreme Court construed the regulation not to apply to returning lawful resident aliens, who have due process rights. *Id.* at 600–03.

These cases establish a simple proposition: the use of secret evidence cannot be squared with due process. It makes a mockery of the adversary process. Ordinarily, aliens have a right to confront all the evidence against them, and to cross-examine the government's witnesses. In secret evidence proceedings, the alien cannot cross-examine, and often has no idea even of what the charges against him are. Ordinarily, aliens can object to the introduction of evidence in immigration proceedings; where evidence is produced in secret, the alien cannot make any objections, because he cannot know what the evidence consists of. Ordinarily, an alien is provided with notice of the charges against him; in a secret evidence proceeding he is not. In short, all of the requisites of a fair adversarial process are abandoned when the government is free to introduce its evidence behind closed doors.

The government generally cites three cases in arguing that it is constitutional to use secret evidence in deportation proceedings. None provides the support the government seeks. The first, *Jay* v. *Boyd*, 351 U.S. 345 (1956), expressly disclaimed any constitutional holding. The case presented only a statutory challenge to the use of secret evidence to deny suspension of deportation as a matter of discretion, and the Court expressly noted that the alien had presented no constitutional challenge. *Jay*, 351 U.S. at 357 n.21. Quite plainly, a case that does not even present a constitutional claim cannot resolve that claim. The other two cases the government cites, from the Fifth and Eighth Circuits, engage in virtually no constitutional analysis. They each dismiss the due process issue in a paragraph by misreading *Jay* v. *Boyd* as if it decided the constitutional issue, wholly disregarding the fact that the Court in *Jay* explicitly said it was *not* deciding that issue.[6]

---

[6] *United States ex rel. Barbour* v. *District Director*, 491 F.2d 573, 578 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *Suciu* v. *INS*, 755 F.2d 127, 128 (8th Cir. 1985). Indeed, the court in Suciu

Continued

III. THE INS'S USE OF SECRET EVIDENCE IS DEVOID OF MEANINGFUL SAFEGUARDS

The basic due process problem with relying on secret evidence is exacerbated by the fact that the INS's regulations and procedures contain no meaningful safeguards against its abuse. And as the INS's track record illustrates, the abuses have been endemic.

A. The Use of Secret Evidence is Not Restricted to Individuals Posing a Threat to National Security

First, the INS does not limit its use of secret evidence to national security risks. Its regulations permit it to use this extraordinary procedure anytime that it has classified evidence relevant to an application for an immigration benefit. If the INS had classified evidence that an individual's marriage was not bona fide, for example, an issue that in itself poses no security concern, its regulations would nonetheless permit it to present that evidence behind closed doors. There is no requirement that it first attempt to make its case without relying on secret evidence. And most problematically, there is no requirement that it limit its use of this procedure to individuals who truly pose a threat to national security, such as, for example, individuals who have committed or were planning to commit criminal conduct threatening national security.

Accordingly, the INS used secret evidence in 1997 to oppose Imad Hamad's application for permanent resident status, even though its evidence (which it subsequently disclosed because it was improperly classified), showed no more than that Hamad had attended a Palestinian dinner/dance, on the basis of which the INS argued that he was associated with the Popular Front for the Liberation of Palestine. Both an immigration judge and the BIA held that this evidence did not support denying Mr. Hamad adjustment of status, and the INS did not pursue further appeals. Mr. Hamad now lives in Dearborn, Michigan.

More frequently, the INS maintains that individuals pose a threat to national security when the INS's own subsequent actions make clear that the evidence simply does not support the charge. Thus, in 1987, the INS arrested eight aliens in Los Angeles, charged them as deportable for being members of a group that advocated world communism, and sought to detain them as national security threats on secret evidence. When the immigration judge refused to take evidence *in camera* and *ex parte*, the INS simply allowed the eight to go free, belying its national security claims. At the same time, then-FBI Director William Webster testified that an FBI investigation had found no evidence of terrorist or criminal conduct on the part of any of the eight, that they were arrested for their political affiliations with the Popular Front for the Liberation of Palestine (PFLP), and that if they had been U.S. citizens, there would have been no basis for their arrest.[7] Thus, in this case the government sought to use secret evidence at the same time that it admitted that the individuals had engaged in no criminal or terrorist activity. Later in the same case, the INS again tried to use secret evidence to deny two of the eight aliens legalization under an amnesty law. The district court examined the evidence *in camera* and found that it demonstrated nothing other than First Amendment-protected activities. *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045, 1069–70 (9th Cir. 1995) (discussing district court finding and noting that the government's claims of national security were premised not on any individual conduct but on general assertions about the PFLP).

Similarly, the INS initially claimed that Fouad Rafeedie posed a threat to national security because he was a high-ranking member of the PFLP, it allowed him to remain free on parole, thus undermining its own claims. And when a district court granted summary judgment against the INS and held both its use of secret evidence and a provision of the INA unconstitutional, the government did not pursue further appeals, even though there is a strong presumption in favor of appealing decisions declaring statutes unconstitutional. Mr. Rafeedie now lives a peaceful and law-abiding existence in Texas.

Imad Hamad, yet another man accused of posing a national security threat, is also a permanent resident today. A Palestinian living in Michigan, he was also charged with being associated with the PFLP, again on the basis of secret evidence. The immigration judge reviewed the evidence, but found nothing in it that war-

---

acknowledged that "as a matter of fairness and logic, the [due process] argument has considerable appeal," but then erroneously considered it "foreclosed" by *Jay* v. *Boyd*. *Id.*

[7] Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987), quoted in *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045, 1053 (9th Cir. 1995).

ranted denying Hamad's application for permanent resident status. On appeal, the BIA affirmed, and the INS did not seek further review by the Attorney General.

As detailed above, the INS never charged Hany Kiareldeen with any criminal activity despite claiming that he posed a threat to national security. All seven judges to view the complete record in his case found no basis for the government's claim that he posed a national security threat, and the INS then declined to pursue its appeals Nasser Ahmed spent 3 and ½ years detained, ostensibly as a threat to national security.

When an immigration judge and the BIA both ruled in 1999 that Nasser Ahmed, an Egyptian man who had been imprisoned for 3 and ½ years, should be released because the INS's evidence did not show that he posed a threat to national security, the INS initially sought Attorney General review. At the eleventh hour, however, minutes before the deadline the Attorney General set for herself to decide whether Ahmed should go free or continue to be detained, the INS withdrew its request for Attorney General review. Quite plainly, the Attorney General was not convinced that Ahmed actually posed a national security threat.

The only person I represent who is still detained on the basis of secret evidence is Mazen Al Najjar. We have just filed a habeas corpus petition on his behalf, and the case is still being briefed. But in his case, too, there are strong reasons to doubt the government's claims of national security. First, Al Najjar remained a free man until his deportation hearing concluded, yet the INS has never explained why he became a threat to national security only *after* the hearing was complete. He has been the subject of grand jury investigations since at least January 1996, yet the government has filed no criminal charges against him or those with whom he is associated. And the *only* reason that either the immigration judge or the BIA gave for detaining him as a national security threat was his alleged political association with a terrorist group—neither the immigration judge, the BIA, nor the INS itself has ever claimed that Al Najjar himself engaged in or supported any terrorist activity. *Matter of Al Najjar*, A26–599–077, Bond Decision of Immigration Judge 6 (June 23, 1997); *Matter of Al Najjar*, A26–599–077, Bond Decision of BIA 12 (Sept. 15, 1998).

It is my view that the use of secret evidence to deprive an individual of his liberty or to adjudicate an alien's request to remain here is nearly always unconstitutional. But even if one believed that it could be used in extreme cases posing extreme dangers, the INS regulations do not restrict it to such cases. On the contrary, the INS has repeatedly used secret evidence even where it lacks sufficient evidence to charge any criminal conduct, much less criminal conduct threatening national security.

B. The INS Often Uses Improperly Classified Evidence, and Only Declassifies it When Its Actions are Challenged

Whatever one thinks of the validity of secret procedures where evidence is properly classified, we can all agree that there is no justification for the procedure where evidence does not in fact need to be confidential. Yet the INS has repeatedly presented evidence *in camera* and *ex parte* that could and should have been disclosed from the outset. This is more the fault of the FBI, which is generally the classifying agency, than the INS, but it is a critical problem with current practices.

For example, in 1998, the INS initially relied on secret evidence to exclude several Iraqis who were accused of being double-agents after the United States airlifted them from Iraq on the heels of a failed coup attempt against Saddam Hussein. When former Director of Central Intelligence James Woolsey took their case on and brought substantial congressional and media pressure to bear on the INS, the government found that it was suddenly able to declassify over 500 pages of the previously secret evidence.

Similarly, in Nasser Ahmed's case, the government initially took the position that it could not even provide a summary of any the secret evidence against him without jeopardizing the national security. Yet when Ahmed filed a constitutional challenge to the INS's actions, it suddenly found itself able to provide a summary of many of its charges, and it eventually turned over more than 50 pages of declassified material that had originally been submitted in secret. The fact that the INS was able to disclose the evidence indicates that there was no need to submit it in secret in the first place. Moreover, on its face much of the evidence could not possibly have been properly classified. One allegation, for example, maintained that Ahmed was associated with Sheikh Omar Abdel Rahman, but that was hardly a secret, as Ahmed had served as Sheikh Abdel Rahman's court-appointed paralegal and translator during the criminal trial of the Sheikh. Other evidence initially classified but ultimately disclosed revealed that the INS's witness in the *in camera* proceedings, an FBI agent, argued that Ahmed should be detained because his detention by INS had made him a hero in the Muslim community and his release would increase his

political stature. *Matter of Ahmed*, Decision of Immigration Judge and Declassified Excerpts from Classified Attachment (July 30, 1999).

In still another case, that of Imad Hamad, it turned out that the "secret evidence" that the INS presented at Mr. Hamad's hearing in 1997 had previously been produced publicly and disclosed to the alien at an earlier stage of the proceeding. When the INS learned of this, it "declassified" the document and submitted it as part of the open record when the case was on appeal to the BIA. Quite plainly, the document never should have been classified.

These cases illustrate an inherent structural problem. The evidence that the INS generally presents in secret is not classified by it, but by another agency, usually the FBI. If the FBI overclassifies, as it apparently did in the cases described above, the INS has no authority to second-guess the FBI's judgment. Nor does the immigration judge. Moreover, when an FBI agent makes a decision to classify, it is usually in the context of a counterterrorism investigation, where he is effectively weighing an abstract public right to know against the need for confidentiality of an investigation. In that situation, agents naturally err on the side of classifying. But when that evidence is then used to deprive an alien of his liberty, there is no requirement that anyone review the classification decision. In other words, no one asks whether the classification decision might come out differently when the interest on the other side of the balance is not an abstract public right to know, but the very specific interest of a human being seeking to regain his liberty.

This structural flaw can lead to years of wholly unnecessary detention. If Nasser Ahmed had been provided at the outset of his detention with the information he was ultimately given, he would have been able to put on his defense immediately, and he would presumably have been released in short order. Instead, when he was initially detained he was told that nothing could be revealed about the secret evidence, and the immigration authorities, denied any meaningful response from Ahmed, ordered his detention. Only after he had sat for years in prison did the INS disclose what could and should have been disclosed at the outset. Thus, here the overclassification literally cost a man years of his life.

C. The INS Uses Secret Evidence Where it Lacks Statutory Authority to Do So

One of the most common uses of secret evidence by INS is to justify detaining an alien without bond while his deportation hearing is pending. This practice can and has resulted in the detention of aliens for years without ever seeing the evidence against them, even where the only formal charge against them is that they overstayed their visa. *Yet there is no statutory authority for this practice.*

Congress has authorized the INS to use secret evidence in a variety of settings, and H.R. 2121 seeks to repeal much of that authority. Thus, the INA today authorizes the use of secret evidence to deny various forms of relief from removal, to exclude certain aliens, and to deport "alien terrorists." But the only statutory authorization to use secret evidence to detain an individual while his deportation proceedings are pending is 8 U.S.C. §1536(a)(2)(B) (1997), which applies only to "alien terrorists" under special deportation hearings held in the Alien Terrorist Removal Court. The INS has never invoked the Alien Terrorist Removal Court procedures, but nonetheless has repeatedly used secret evidence to detain aliens *not* in these procedures, and *not* accused of being "alien terrorists."

D. INS Regulations Do Not Require That the Alien be Provided a Meaningful Declassified Summary of Secret Evidence

INS regulations permit the use of secret evidence without even providing a summary of the evidence to the alien. While the regulations state that a summary should be provided *when possible*, there is no requirement that a summary be provided, or that the summary afford the alien a meaningful opportunity to respond. *See, e.g.*, 8 C.F.R. §103.2(a)(16) (1996), 242.17(a), (c)(4)(iv)(1996); 8 CFR §240.11(c)(3)(iv) (1997). An alien may be told only that secret evidence shows that he must be detained, without even a hint as to what the evidence consists of or charges him with. That is the situation Nasser Ahmed faced when he was initially detained. The INS maintained that it could not tell him *anything* about the secret evidence whatsoever. In such a situation, it is literally impossible to present a defense.

Where summaries are provided, there is no requirement that they be meaningful. Thus, when Nasser Ahmed next faced secret evidence, in the course of his deportation hearing, the INS did give him a summary. But the summary consisted solely of the allegation that he had an "association with a known terrorist organization." *Matter of Ahmed*, Deportation Decision of Immigration Judge 20 (May 5, 1997) The INS would not even disclose the name of the group. The immigration judge correctly

characterized that summary as "largely useless," *id.*, but the regulations impose no requirement that the summaries meet any standard whatsoever.

The use of secret evidence virtually always makes a meaningful defense impossible, but it indisputably does so where the government does not give the alien notice of the specific allegations against him. Yet in none of the cases in which I have been involved has the INS provided an adequate summary, and there is no regulation or requirement in place to ensure that it do so.

E. The INS Has Failed to Keep Records of Its Secret Evidence Presentations, Thereby Defeating Meaningful Review

Finally, the INS has failed to keep records of many of its secret evidence presentations. In Ahmed's and Al Najjar's cases, the immigration judges initially took evidence *in camera* but made no record of the hearing. The absence of a record, of course, defeats any semblance of meaningful appellate review, particularly where the hearing was never open to the public so there is no check on government assertions regarding what transpired. In these cases, the Board of Immigration Appeals, an appellate body, took new evidence outside the record and again *ex parte* and *in camera*, and based its decisions on that extra-record showing.

III. SECRET PROCEDURES ENCOURAGE RELIANCE ON QUESTIONABLE EVIDENCE

In open proceedings, each party's knowledge that its evidence will be subjected to cross-examination and rebuttal by its adversary creates crucial incentives. It means that any good advocate will test his or her evidence first, before it is subjected to testing in open court, and will not rely on weak or questionable evidence. When one knows, by contrast, that the other side will never see the evidence, those checks do not operate. The INS's track record illustrates that secret procedures invite abuse.

First, the INS has relied heavily in its secret evidence presentations on hearsay, often in the form of reports drafted by FBI agents relaying accusations by hearsay sources. In the cases of Nasser Ahmed and Hany Kiareldeen, the immigration judges harshly criticized the government for its reliance on double and triple hearsay, its failure to provide sufficient information to permit an independent assessment of the allegations, and its failure, when questioned by the immigration judges, to produce any first-hand witnesses. In effect, it appears that the government sought to have the immigration judges simply defer to the judgment of its FBI witness that the alien posed a threat to national security.

The Supreme Court and the courts of appeals have held that reliance on hearsay in immigration proceedings, while not absolutely prohibited, poses serious due process problems because it defeats the possibility of examining the witnesses. *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945); *United States* v. *Matlock*, 415 U.S. 164, 172 n.9 (1974) (describing *Bridges* as holding that due process bars use of hearsay "as substantive evidence bearing on . . . A charge upon which a deportation order had been based"). Thus, many courts hold that the INS may not present hearsay unless it first shows that the original declarant is unavailable. *See, e.g., Cunanan* v. *INS*, 856 F.2d 1373, 1375 (9th Cir. 1988); *Olabanji* v. *INS*, 973 F.2d 1232, 1234–35 (5th Cir. 1992); *Dallo* v. *INS*, 765 F.2d 581, 586 (6th Cir. 1985); *Kiareldeen*, 1999 WL 956289, at *14–*18. Yet the INS relies heavily on hearsay in its secret evidence hearings, and as far as I know, has never made a showing that the original declarants are unavailable. The presentation of evidence in secret makes it impossible for the alien to cross-examine the witnesses against him. When the secret evidence consists of hearsay, it is impossible even for the judge to question the sources.

Second, the INS has relied on extremely weak evidence in its secret presentations. In Hany Kiareldeen's case, it appears to have relied principally on accusations made by Kiareldeen's ex-wife, who was in a custody dispute with Kiareldeen and had made repeated false accusations against him. Its evidence alleged that Kiareldeen had hosted a meeting at his Nutley, New Jersey apartment a year and a half *before* he even moved into the apartment.

In Nasser Ahmed's case, the FBI initially claimed in its secret evidence that Ahmed had disseminated to the press a letter from Sheikh Omar Abdel Rahman, who was then in prison, to the press. The letter complained of the Sheikh's prison conditions, but called for no violence. The FBI claimed in its secret evidence presentation that the letter had nonetheless sparked a terrorist bombing in Egypt. Ahmed denied disseminating the letter, and proved that many other persons could have done so. The FBI subsequently admitted that it had no idea who had disseminated the letter, and the State Department reported that the terrorist incident had nothing to do with the Sheikh, but was a retaliatory attack for an Israeli bombing in Southern Lebanon. *Matter of Ahmed*, Deportation Decision of Immigration Judge and Declassified Excerpts from Classified Attachment (July 30, 1999). In Ahmed's

case, the FBI agent also argued in secret hearings that Ahmed should be detained because the INS's detention of him had increased his stature in the Arab community, and that as a result upon his release he would be a more effective leader. *Id.* Finally, some of the secret evidence in Ahmed's case may have come from the Egyptian government, the very country that the immigration judge found would imprison and likely torture Ahmed for his affiliations with Sheikh Abdel Rahman if Ahmed were returned there. *Id.*

These examples illustrate that one cannot short-circuit the adversary process without substantial costs, not only to the rights of those against secret evidence is used, but to the legitimacy of the truth-finding process itself.

IV. THE USE OF SECRET EVIDENCE IS UNNECESSARY AND COUNTERPRODUCTIVE

The government typically responds to the above concerns by claiming that the government's interest in national security, coupled with the political branches' "plenary power" over immigration matters, nonetheless justifies the use of secret evidence. But there has never been any showing that national security in fact requires the use of secret evidence, and the government's track record strongly suggests that its identification of "national security" concerns is by no means trustworthy.

As I noted at the outset, I have represented 13 aliens against whom the INS sought to use secret evidence. In all 13 cases, the INS claimed that national security would be threatened. In 12 of the 13 cases, the aliens are now living freely in the United States, after the INS lost in court and then decided not to pursue avenues of appeal available to it. The very fact that in these cases the INS did not even pursue all of their appeals only underscores the weakness of the national security claim. If national security were genuinely at risk, one would expect the government to leave no stone unturned in its attempt to safeguard the nation.

Even where national security concerns are bona fide, the use of secret evidence to deprive an alien of his liberty is unconstitutional. It is indisputable that secret evidence could never be used in a criminal case, whether the crime charged was espionage, sabotage, or terrorism, and no matter how serious the national security concern. We have survived as a nation for over 200 years despite our adherence to that absolute principle. There is no reason to believe that adoption of a similar practice in deportation cases would pose any greater threat.

The Supreme Court has made clear that it will not countenance the use of secret evidence, even where claims of national security are advanced, to deprive aliens living here of their liberty. It refused to permit secret evidence in *Kwong Hai Chew* v. *Colding*, even though the Attorney General had *personally* determined that the information could not be disclosed without prejudicing the national interest. 344 U.S. at 592. When faced with INS claims that labor organizer Harry Bridges's continued residence here was contrary to national security due to his associations with the Communist Party, the Supreme Court nonetheless held that hearsay could not be used to establish deportability because he must be afforded the opportunity to confront the evidence against him. *Bridges* v. *Wixon*, 326 U.S. 135, 152, 156 (1945).[8] As Justice Frankfurter wrote, "[t]he requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 162.

Finally, the use of secret evidence is counterproductive, even as a tool for fighting terrorism. It makes error all too likely, meaning that we may well focus on the wrong people. And more fundamentally, secrecy encourages distrust of government. And that distrust can itself impede law enforcement. Many aliens in Arab communities are deeply suspicious of federal agents now, and for good reason. Nearly all of the secret evidence cases of the past five years have involved Arab and/or Muslim aliens. If we believe that the Arab community is more likely to contain terrorists, a supposition that as Timothy McVeigh showed, is debatable, the last thing we should do is adopt tactics that make the entire community view law enforcement as the enemy.

V. H.R. 2121 RESPONDS TO THE ABOVE CONCERNS BY REPEALING STATUTORY AUTHORITY TO USE SECRET EVIDENCE IN DEPORTATION PROCEEDINGS AND IN THE ADJUDICATION OF IMMIGRATION BENEFITS

H.R. 2121 provides a direct and straightforward remedy to all of the above problems. It repeals statutory authority for the use of secret evidence in deportation proceedings and the adjudication of immigration benefits. If enacted, it would accord

[8] In enacting the deportation provision at issue in *Bridges*, Congress specifically found that the Communist Party posed a threat to national security. S.Rep. No. 1515, 81st Cong., 2d Sess. 788–89 (1950).

to all aliens the fair procedures now provided to most. Because the use of secret evidence is unconstitutional, unworkable, and unwise, I fully support this remedy.

First, it would repeal authority for using secret evidence to deport aliens. That authority has only existed since 1996, and has never been invoked by the INS, so it is quite plain that we can survive without it. This provision would simply place all aliens living here on equal footing in removal hearings.

Second, it would repeal authority for the government to deny immigration benefits based on secret evidence. Currently, the INA authorizes the government to deny even asylum on the basis of secret evidence. In Nasser Ahmed's case, the immigration judge initially found that although Nasser Ahmed had shown his eligibility for asylum on the public record, because he would be imprisoned and very likely tortured if returned to Egypt, his application had to be denied based on secret evidence that Ahmed never saw.

Third, the bill would make clear that aliens may not be detained on the basis of secret evidence while their removal proceedings are pending. As noted above, there is no existing affirmative statutory authority for this practice under current law outside the Alien Terrorist Removal Court, but the INS maintains that it has the authority implicitly, and therefore it is wise to make clear that no such authority exists.

Fourth, the bill would bar the government from using secret evidence to deny admission to returning permanent resident aliens, individuals paroled into the United States, and asylum seekers at the border. The bar on use against returning permanent residents is already supported by *Rafeedie* v. *INS*, 795 F. Supp. 13 (D.D.C. 1992). Persons paroled into the United States and asylum seekers under current law lack constitutional protection, but the use of secret evidence in these cases presents all the same problems that its use presents in proceedings against aliens who have entered the country, and accordingly I support this reform as well.

CONCLUSION

The defects of legal proceedings conducted in secret have been recognized for centuries. In the Bible itself provided that under Roman law, a man charged with criminal conduct should "have the accusers face to face, and have license to answer for himself concerning the crime laid against him."[9] Similarly, Wigmore, the noted expert on evidence, has written that "[f]or two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."[10] It would be difficult to identify anything more as fundamental to a fair legal process than the right of each party to examine and confront the evidence against it. When we deny that right to aliens, we not only denigrate their rights, but demean our own system of justice.

Mr. SMITH. Thank you, Professor Cole.

Mrs. Al-Arian.

STATEMENT OF NAHLA AL-ARIAN

Mrs. AL-ARIAN. Thanks, Mr. Chairman, thanks, Ms. Jackson Lee for inviting me today to talk about this very much needed issue and the secret evidence procedure.

My name is Nahla Al-Arian, and I am a proud American citizen of Palestinian descent. I am also a mother of five, and the proud sister of Dr. Mazen Al-Najjar, who's been deprived of his freedom for almost 1,000 days now because of the use of secret evidence. On May 19th, 1997, Mazen was handcuffed in front of his three young daughters and taken to a detention facility for supposedly a visa violation. We thought that he would be released on bail in a day or two, like thousands of many similar cases.

However, our hopes were quickly dashed when the Government used secret evidence against him. The immigration judge in the hearing said that my brother is respectable socially, religiously and professionally and has strong family and community ties. He then

[9] Acts 25:16 (King James).

[10] 5 *Wigmore on Evidence* 1367 (3d ed. 1940) (quoted in *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959)).