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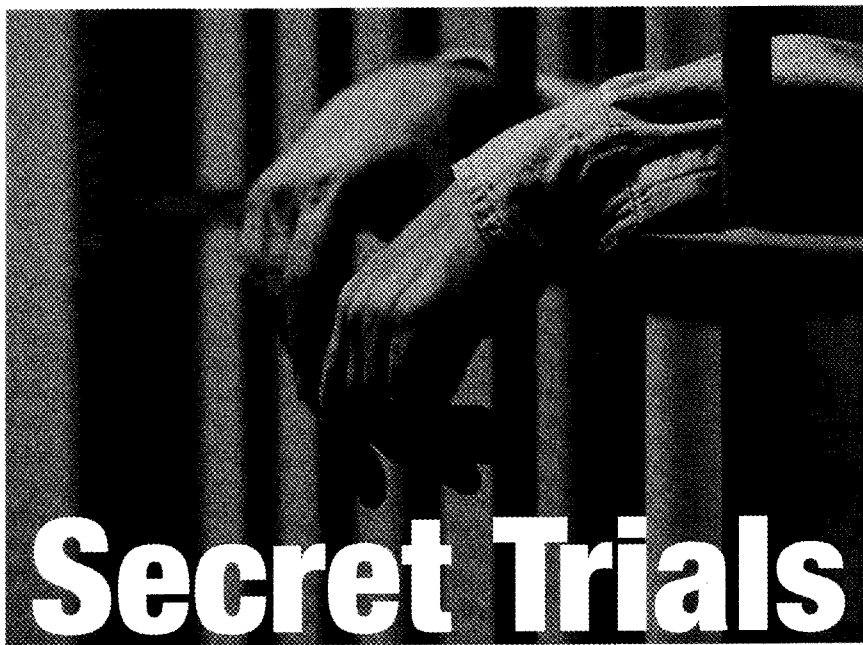
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Secret Trials

By David Cole

In March 1998, Hany Kiarledeen, a thirty-year-old Palestinian immigrant living in New Jersey, was arrested by United States immigration authorities and imprisoned. Immigration officials told him only that his presence in the United States threatened national security; when Kiarledeen asked why, he was told that the evidence supporting the charge was secret and could not be revealed to him. Kiarledeen spent nineteen months in prison, without seeing the evidence that placed him there, before a federal judge ruled in October 1999 that his detention was unconstitutional and ordered his release.

The government's principal source appears to have been Kiarledeen's ex-wife, with whom he was in a custody dispute over their child. She had made numerous false allegations against him in the course of the dispute, all of which had been dismissed by local officials. But one allegation, that he was associated with terrorists, was passed on to the FBI, and that wholly unfounded allegation landed him in jail for more than nineteen months.

Today, Hany Kiarledeen is a free man. But U.S. immigration authorities continue to use secret evidence to lock up immigrants in deportation proceedings, to exclude aliens at the border, and to oppose applications for "relief from deportation," including asylum. The practice of relying on secret evidence in immigration proceedings dates back to the 1950s, but INS used the tactic more

aggressively in the late 1990s, in part because in 1996 Congress expanded its authority to do so in two statutes—the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. Increased use of secret evidence by INS, however, has thus far backfired. The INS has suffered an unbroken string of losses in the courts, come under growing criticism from Congress, and had its practices criticized by both the Republican and Democratic candidates for president during the election. Yet the practice continues.

String of Losses

Nasser Ahmed. One month after Hany Kiarledeen was released, INS also released Nasser Ahmed, an Egyptian who had been detained for over three and one-half years in New York, most of that time in solitary confinement, based solely on secret evidence. At the outset of Ahmed's detention, INS officials took the position that the secret evidence against him could not even be summarized but was sufficient to detain him as a national security threat. As a result, he was told nothing about the government's evidence against him—and thus could not refute what he could not see. Years later—and only after Ahmed filed a constitutional challenge—INS disclosed some of its charges and declassified approximately fifty pages of previously secret evidence, and Ahmed was able to rebut the government's charges. The

same judge who had previously found Ahmed a national security threat reversed himself after hearing Ahmed's side of the story and sharply criticized the government for having misled him.

Much of the evidence declassified in Ahmed's case should never have been classified in the first place. One allegation, for example, maintained that Ahmed was associated with Sheik Omar Abdel-Rahman, convicted for plotting to bomb tunnels and buildings around Manhattan. But Ahmed's association with Abdel-Rahman was no secret; Ahmed had served as the sheik's court-appointed paralegal and translator during Abdel-Rahman's criminal trial. Another revelation was testimony that Ahmed's detention by INS had made him a hero in the Muslim community and his release would increase his political stature. In the end, the immigration judge ruled that INS evidence did not establish any threat to national security, the Board of Immigration Appeals affirmed, and the Attorney General declined to intervene.

Ali Yasin Mohammed Karim. In August 2000, Dr. Ali Yasin Mohammed Karim was released after having spent years in custody based on secret evidence. In 1998, INS relied on secret evidence to detain and deny entry to Dr. Karim and several other Iraqis who were accused of being double agents after the U.S. airlifted them from Iraq on the heels of a failed CIA-backed coup attempt against Saddam Hussein. After former CIA Director James Woolsey brought substantial congressional and media pressure to bear on INS, the agency declassified more than 500 pages of previously secret evidence, and Dr. Karim was able to rebut the government's charges.

These are not isolated instances. Since 1987, I have represented thirteen aliens against whom INS sought to use secret evidence. At one time, INS claimed that all thirteen 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. In none of these cases did the evidence even *allege*, much less prove, that the aliens had engaged in or supported criminal or terrorist activity. The government's allegations amounted to

only guilt by association. In virtually all of the government's secret evidence cases in the 1990s, the aliens targeted were Arabs and/or Muslims.

Today, all thirteen persons whom I represented are free, living law-abiding and peaceable lives here in the U.S., with no apparent adverse consequences to the security of the nation. Where the cases have been resolved in the federal courts, the courts have declared the use of secret evidence unconstitutional. Where the cases were resolved in the immigration process, immigration judges uniformly rejected the government's national security claims as unwarranted.

Can Secret Trials Be Fair?

The INS track record in these cases illustrates why adjudications of human liberty should never be based on undisclosed evidence, and why every court to address the issue in the last thirteen years has declared the practice unconstitutional. As the Supreme Court said, "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (*Goss v. Lopez*, 419 U.S. 565, 580 (1975).)

The immigration statute and regulations impose virtually no safeguards on the use of secret evidence. If it can, INS is supposed to provide the alien with an unclassified summary of the evidence, but the law does not require a summary of the charges, which may consist of a single sentence. Ahmed was given a summary that said only that he had an "association with a known terrorist organization." The INS would not even reveal the name of the group, much less when and how Ahmed had been associated and what, if anything, he allegedly did for the group. The immigration judge in his case characterized the summary as "largely useless," but found that it complied with INS regulations.

Declassified summaries will rarely afford an alien a fair opportunity to defend himself, for the simple reason that one cannot cross-examine a summary. In many instances, the source is the most important piece of information; yet in most cases, it is the source that the government seeks to keep confidential. When Hany Kiardeed surmised that the source in his case might be his ex-wife, he subpoenaed her to testify, and INS fought his efforts every step of the way. On the stand, she admitted to hav-

ing spoken with the FBI but refused to provide details, and INS objected to any questioning along those lines.

Knowing that one's evidence cannot be challenged by one's adversaries contributes to sloppy practices. In its *in camera* presentations, INS has often relied on double and triple hearsay assertions by FBI agents and has failed to produce original declarants, even when asked to do so by the immigration judge.

Aliens' Rights

The government defends its practice by arguing that aliens do not deserve the full panoply of due process protections in deportation proceedings. But the Due Process Clause protects all "persons"—it is not limited to citizens. The Supreme Court held that it protects even aliens here unlawfully. (*Mathews v. Diaz*, 426 U.S. 67 (1976).) Even if aliens enjoyed diminished due process protection, the rights denied by the use of secret evi-

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dence are the bare minima required by due process—nothing is more fundamental than the rights to notice of the evidence against one and a meaningful opportunity to defend oneself.

The government also argues that it should not have to make the "Hobson's choice" of disclosing classified information and thereby imperiling the national security or allowing a dangerous alien to remain at large. But, the government makes such decisions every day with regard to citizens. In no other setting is the government permitted to deprive someone of liberty without affording him a meaningful opportunity to defend himself. In criminal cases, the government is never permitted to rely on secret evidence, no matter how serious the charge and no matter how much confidential or classified information implicates the defendant. This rule applies to the prosecution of terrorists, spies, and mass murderers. We have survived as a nation for more than 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 imprison or deport them.

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

Under Attack

For all of these reasons, the practice of secret evidence is under attack. In the last Congress, Representatives Tom Campbell (R-CA) and David Bonior (D-MI) introduced legislation to end the

practice. The bill garnered more than 100 co-sponsors from both parties. Late in the session, the House Judiciary Committee sent an amended version of the bill to the house floor. The bill would have permitted the government to use classified information in immigration proceedings only where it could provide the alien with a summary that afforded him substantially the same opportunity to defend himself. It did not come up for a vote on the floor by session's end, but the issue will no doubt be taken up again in the new Congress. President George W. Bush openly condemned the practice of secret evidence in the second televised presidential campaign debate.

The bottom line, however, is that INS continues to use secret evidence and to maintain its right to do so. No system of justice can be deemed legitimate that denies to incarcerated human beings the right to examine and confront the evidence used to detain them.

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