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AMERICAN BAR ASSOCIATION

COORDINATING COMMITTEE ON IMMIGRATION LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF INTERNATIONAL LAW AND PRACTICE
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
THE BAR ASSOCIATION OF SAN FRANSISCO

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association opposes the use of "secret evidence," evidence that is presented to the trier of fact *in camera* and *ex parte,* in immigration proceedings, including but not limited to: (1) using secret evidence to deport noncitizens; (2) denying immigration benefits to noncitizens based on secret evidence; (3) refusing to release on bond noncitizens based on secret evidence; and (4) denying admission to returning lawful permanent residents, people who have been paroled into the United States, and asylum seekers, based on secret evidence;

FURTHER RESOLVED, that in extraordinary cases where there are legitimate national security concerns, the noncitizen and the court or the adjudicator should, at a minimum, be provided with an unclassified summary of the classified information, prepared in accordance with appropriate judicial standards and supervision, that preserves the individual's ability to confront the evidence and prepare a defense.

[redacted]

REPORT

Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.
-- *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)

Background

No person should be deprived of liberty on the basis of evidence kept secret from them. This simple statement is a fundamental prerequisite of any fair legal system. "Star chamber" secret proceedings may be a feature of some totalitarian governments, but not ours. Professor David Cole of the Georgetown University Law Center points out that "every court to address the use of secret evidence in immigration proceedings in the last decade has declared it unconstitutional."[1] Nevertheless, current immigration law authorizes the use of secret evidence in some immigration proceedings.

The Antiterrorism and Effective Death Penalty Act of 1996[2] established a new court charged with hearing only cases in which the government seeks to deport aliens accused of engaging in terrorist activity based on "secret evidence"[3] submitted in the form of classified information. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] expanded the use of secret evidence so that such evidence could be more easily used to deport even lawful permanent residents as terrorists. It also included provisions allowing the government to deny various discretionary immigration benefits such as asylum to all noncitizens, including those not accused of being terrorists.[5]

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[1] *Secret Evidence Repeal Act of 1999: Hearing on H.R. 2121 Before the Subcomm. On Immigration and Claims of the House Comm. On the Judiciary*, 106th Congress (2000) (statement of David Cole, Professor at Georgetown University Law Center).

[2] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258 (enacting a new Title V within the INA).

[3] For the purposes of this report the term "secret evidence" is used to refer to evidence that is presented to the trier of fact *in camera* and *ex parte*.

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 354, 110 Stat. 3009, 3009-641).

[5] INA § 235(c), 8 USC § 1225(c); INA § 208(b)(2)(A)(iv), 8 USC § 1158(b)(2)(A)(iv), as amended by IIRIRA § 605. *See also* Title V of the INA, 8 USC §§ 1531-1537, as amended by IIRIRA §§ 354-357.

To date, the secret evidence court has not convened to hear a case. However, the Immigration and Naturalization Service (INS) has used secret evidence in dozens of other proceedings to deny noncitizens residence, asylum, and withholding of deportation, or to keep them in detention.

Underlying the issue of secret evidence in immigration proceedings are the constitutional rights of noncitizens. The due process clauses of the fifth and fourteenth amendments of the U.S. Constitution do not distinguish between citizens and noncitizens; they guarantee due process for all "persons." Indeed, the Supreme Court has held that due process rights apply even to undocumented aliens residing in the United States unlawfully.[6] Secret evidence used against noncitizens violates this constitutional guarantee.

Historically, the Supreme Court has approved the use of secret evidence against noncitizens, but only in exceptional circumstances. In *United States ex rel. Knauff v. Shaughnessy*[7] the Court allowed the INS to bar the admission of a German-born wife of a naturalized U.S. citizen who had served as a civilian in the U.S. military during World War II. Pursuant to the Passport Act of 1918, the State Department issued regulations defining eleven categories of aliens whose admission to the United States would prove prejudicial to the national interest.[8] The regulations permitted the Attorney General to exclude such aliens without a hearing based on classified information.[9] The Passport Act enabled the Department of State and the Department of Justice to take such measures when the United States was at war or in a state of national emergency. In *Shaughnessy v. United States ex rel. Mezei*,[10] the same regulations were at issue, this time in the case of a former permanent U.S. resident who had left the United States for nineteen months and was attempting to return.

In both cases, the Court found the regulations to be constitutional but emphasized that the decision had no relevance to the case of aliens already in the United States, or persons with lawful status in the United States seeking to re-enter.[11] The Court also pointed out that the regulations were issued during a state of war, and, at the time of the decisions, Congress had not yet lifted the state of war.[12]

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[6] *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (the due process clause protects even an alien "whose presence in this country is unlawful, involuntary, or transitory") (citing *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950)).

[7] 338 U.S. 537 (1950).

[8] 8 C.F.R. § 175.53 (1945).

[9] 8 C.F.R. § 175.57 (1945).

[10] 345 U.S. 206 (1953).

[11] *Knauff* 338 U.S. 537, 542; *Mezei* 345 U.S. 206, 213, 214.

[12] *Knauff* at 547, *Mezei* at 211.

[redacted]

However, even in these cases, the Court was divided and the majority opinion has been highly criticized. In his dissent in *Knauff*, Justice Jackson questioned the wisdom of protecting the freedom of those in the United States by excluding noncitizens through unconstitutional means:

> The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.[13]

In *Mezei*, Justice Black delivered a dissent with a similar message:

> No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous." Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices.[14]

This truth was again vehemently advocated by the dissent in *Jay v. Boyd*.[15] This case is frequently cited by the INS in defense of using secret evidence although the Court specifically noted that the case was brought on statutory, rather than constitutional grounds. Jay was a British citizen who had been a U.S. resident for 40 years when the INS tried to deport him. He was 65 years old at the time of the Supreme Court decision. Between 1935 and 1940, Jay was a member of the Communist Party. Ten years after he left the Party, Congress made Communist Party membership a deportable offense. Jay applied for suspension of deportation (a form of deportation relief), but was denied that relief based on secret evidence supposedly showing the 65-year-old British citizen to be a threat to national security. The Court's majority held that because the exercise of discretion is an act of grace which the Attorney General is not obligated to take, Jay was not entitled to suspension of deportation.

The *Jay* decision was published in 1956, three years after *Mezei*. *Jay* was decided on a 5-4 vote, with vigorous and spirited dissents coming from Justices Black, Frankfurter, and Douglas, and Chief Justice Earl Warren.

The dissenting Justices in *Jay*, like the dissenters in *Mezei*, likened the flawed use of secret evidence to the actions of totalitarian regimes. According to Justice Black:

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[13] *Knauff* at 551 (Jackson, J., dissenting) (citation omitted).

[14] *Mezei* at 217-18 (Black, J., dissenting).

[15] 351 U.S. 345 (1956).

[redacted]

> The destruction of judicial protections for fair and open determinations of guilt is essential to maintenance of dictatorships. After the murderous purge of hundreds of German citizens Hitler said: "If anyone reproaches me and asks why I did not resort to the regular courts of justice for conviction of the offenders, then all that I can say to him is this: in this hour I was responsible for the fate of the German people, and thereby I became the supreme Justiciar of the German people!"[16]

Since those decisions, the Supreme Court has affirmed that due process protections extend to noncitizens in the United States. Courts have repeatedly found that the use of secret evidence in immigration proceedings violate due process rights if used against a person admitted to the United States or a legal resident returning from a trip abroad. For example, *In Rafeedie v. INS*, the court rejected INS efforts to use secret evidence to exclude a legal permanent resident returning from a trip.[17]

The INS continues to use secret evidence against noncitizens and admits to using secret evidence approximately 50 times from 1992-98. In addition, under current INS policy the use of secret evidence is not limited to national security risks. The INS uses secret evidence anytime it deems classified information relevant to an adjudication for an immigration benefit even if the individual in question is not viewed as a national security risk.[18]

The case of Hany Kiareldeen illustrates some of the recent tactics that the INS has chosen to employ.[19] Kiareldeen is a Palestinian who entered the United States from Israel on a student visa in 1990. In 1997, Kiareldeen married a U.S. citizen, who filed an immigrant visa petition on his behalf. Kiareldeen was then arrested by INS and charged as an overstay. He conceded that he had overstayed a student visa but sought discretionary adjustment of status and mandatory relief in the form of asylum. In opposition to his petition for relief, the INS presented *ex parte in camera* evidence that purportedly demonstrated Kiareldeen's membership in a terrorist organization. The INS did not present any evidence in open court. Nor did the INS present a witness from the FBI force that produced the classified evidence. The INS sought to detain Kiareldeen despite the fact that the FBI had already closed its investigation, and Kiareldeen was not charged with any crime. Nevertheless the INS maintained that Kiareldeen was a threat to national security.

Kiareldeen was allowed to see declassified summaries of the evidence against him. It made three allegations: (1) Kiareldeen was associated with an unidentified terrorist organization and maintained relationships with other unidentified members of that organization; (2) Kiareldeen hosted a conference at his apartment one week before the World Trade Center bombing at which

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[16] *Id.* at 370 n.12 (Black, J., dissenting) (citing speech delivered by Hitler in the Reichstag on 13 July 1934, 1 Hitler's Speeches 321-23 (Baynes ed. 1942)).

[17] 880 F.2d 506 (D.C. Cir. 1989). *See also American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) and H.R. Rep. No. 106-981 at 7 (2000).

[18] H.R. Rep. No. 106-981, at 8 (2000).

[19] *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999).

guests discussed the bombing; and (3) an unidentified source asserted that Kiareldeen had expressed a desire to murder Attorney General Janet Reno.

Kiareldeen was able to rebut the second allegation, showing that he had not even lived in the apartment in question until a year and a half after the alleged meeting. He also showed that one of the sources the FBI was believed to have relied upon, his ex-wife, had a history of making false allegations against him. The INS refused to allow Kiareldeen's ex-wife to testify in open court.

Ultimately, a federal court ruled that the government had violated Kiareldeen's due process rights, and a three-judge panel of the Board of Immigration Appeals ordered his release. The government chose not to pursue an appeal. Apparently Kiareldeen, who had posed such a threat to national security for a year and a half, was so innocuous that he did not even warrant an appeal.

Another prominent deportation case involves Dr. Mazen Al-Najjar, a former professor at a think tank affiliated with the University of South Florida. Al-Najjar is a 42-year-old Palestinian refugee who has lived in the United States for more than 16 years. He is accused of associating with the Palestine Islamic Jihad, a group the U.S. government has designated as a "terrorist" organization. Al-Najjar was ordered deported in 1997 for overstaying his student visa but had requested relief from deportation and the INS has not found a country to take him, his wife and their three young daughters, all of whom are U.S. citizens. Although never charged with a crime, Al-Najjar has been detained by the INS for three and a half years as a threat to national security.

Al-Najjar challenged his long detention in federal court as violating due process. In August 2000, a U.S. District Judge ordered that Al-Najjar receive a two stage hearing. In the first hearing, the government was required to present all of its evidence in open court and the immigration judge was to decide based on that evidence whether bond could be denied. Classified evidence was permitted in the second phase but the government was instructed to provide Al-Najjar with "access to the decisive evidence to the fullest extent possible." [20]

This first hearing was held and the immigration judge ruled in Al-Najjar's favor finding that there were no "facially legitimate or bona fide reasons to conclude that [Al-Najjar] is a threat to national security."[21] The INS proceeded with the second stage, the secret evidence proceedings, in order to justify why his continued detention was necessary. In this hearing, the government presented classified evidence to the immigration judge *in camera* and *ex parte* but Al-Najjar received only a summary. After looking at all the evidence, the immigration judge ordered Al-Najjar released on bond.

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[20] *Najjar v. Reno*, 97 F.Supp. 2d 1329 (S.D.F.L. 2000).

[21] *Matter of Al-Najjar*, A26 599 077 (IJ Oct. 27 2000) (Bradenton, Fla.) (McHugh, IJ).

Legislation

During the 106th Congress, proposals to end the use of secret evidence in immigration proceedings were introduced in both Houses. The Secret Evidence Repeal Act of 1999, H.R. 2121 was sponsored by House minority whip Rep. David Bonior (D-MI) along with Rep. Tom Campbell (R-CA), Rep. John Conyers (D-MI) and Rep. Bob Barr (R-CA). As introduced, the Secret Evidence Repeal Act would have prohibited the use of secret evidence to remove an alien accused of being removable as a terrorist, and deny relief from removal or bond. Thus, while the government is already prohibited from using secret evidence to prove deportability in removal proceedings, the Secret Evidence Repeal Act as introduced would have extended this prohibition to all removal cases, and to denial of bond and immigration benefits.

As introduced, the Secret Evidence Repeal Act has five relevant functions. First, the government would not be able to use secret evidence to deport noncitizens. It deletes from current law the secret court established in the 1996 antiterrorism law. It requires the government to use the same removal procedures against aliens accused of being terrorists that it uses to remove aliens accused of being deportable for other reasons.

Second, the government would not be permitted to deny an immigration benefit to any noncitizen based on secret evidence. This would be the case regardless of whether the alien seeks the benefit in removal proceedings or has affirmatively applied for the benefit. Access to immigration benefits is critical to a noncitizen. Sometimes, it can mean the difference between life and death, as is the case with asylum. If it is denied, a noncitizen can be sent back to his or her country to face torture, imprisonment, or death.

Third, the government would not be able to deny release on bond to any noncitizen based on secret evidence. Bond determinations would be made based on evidence in the public record. Aliens could still be held while their removal proceedings are pending if, based on evidence in the public record, the alien is a flight risk or a danger to the community.

Fourth, the government would not be able to deny admission to returning lawful permanent residents, people it has "paroled"[22] into the United States, and asylum seekers based on confidential information and without independent review. The Secret Evidence Repeal Act excepts these noncitizens from the group of arriving aliens who can be denied admission based on security-related grounds merely because an immigration official or immigration judge suspects that they are inadmissible and the Attorney General supports that decision based on secret evidence. Under current law, confidential information need not even be classified, and there is no review of the Attorney General's decision.

Fifth, in pending cases, where the government is detaining an alien without bond based on secret evidence, or it is denying an application for relief such as political asylum based on secret evidence, it would restore fairness. The Secret Evidence Repeal Act directs the INS to either disclose the evidence to the noncitizen or withdraw it from the record, and in either event, the

[22] Parole is a mechanism to allow someone into the United States while the INS determines if they can be "admitted" or qualify for some form of immigration benefit.

case would be reheard on the basis of the evidence in the public record, unless the government should decided not to proceed.

It is important to emphasize that the Secret Evidence Repeal Act would not require the release of dangerous terrorists into the United States. It simply requires that the government apply the same due process to a suspected noncitizen terrorist as it does to a suspected citizen terrorist. If the government believes its evidence supports removal of the alien, then that evidence should be made public and put through the scrutiny of our adversarial justice system. In the case of the Oklahoma City and World Trade Center bombings, the government was able to prosecute the offenders without damaging national security. The same process should be applied in the immigration context.

On September 26, 2000, the Secret Evidence Repeal Act was amended by a 26-2 vote of the House Judiciary Committee to apply in immigration proceedings the same procedures for handling classified information as are used in criminal cases under the Classified Information Procedures Act (CIPA). This amended version was introduced in the Senate as S. 3139 by Senators Abraham (R-MI), Kennedy (D-MA) and Feingold (D-WI).

Specifically, as amended, the Secret Evidence Repeal Act would authorize the government to suspend the immigration proceedings and take the classified information into federal district court. As it does in criminal cases under CIPA, the federal court would oversee the creation of an unclassified summary of the classified information that is sufficient to allow the alien to defend him- or herself to substantially the same degree as if the information had been fully disclosed. The court would transmit the summary to the immigration judge and to the alien, and immigration proceedings would resume on the basis of the summary. Under this system, unlike the system under AEDPA, the immigration judge would not see the classified information, the alien and the judge would receive the same information.

The legislation would also require the Attorney General to bring proceedings within 30 days of enactment against any alien already in detention on the basis of secret evidence into conformance with the legislation, or to release the alien. The Attorney General would have the same amount of time to apply legislation to pending applications for immigration benefits.

Because all cases involving classified information would go to the district court, the Alien Terrorist Removal Court would become unnecessary. While not a perfect solution, CIPA works in the criminal context and ensures that the accused has the same information as the trier of fact. While the FBI and the INS testified in opposition to the original version of H.R. 2121, the administration has not opposed the legislation in its current form.[23] In addition, organizations, including the Anti-Defamation League, American Jewish Congress B'nai B'rith Hadassah and the Jewish Council for Public Affairs, had testified against the original version of the bill but expressed support for a CIPA model.

[23] H.R. Rep. No. 106-981 at 20 (2000).

ABA Policy

The ABA has long-standing interests in and has played an active role in protecting the due process rights of immigrants and asylum seekers. Over the years the House of Delegates has adopted a number of policies respecting the right to fair hearings and due process safeguards in all immigration matters (exclusion, deportation and asylum). These policies range from strenuously objecting to expedited processes where the applicant is denied a hearing before an impartial adjudicator (February, 1983), to defending the availability and scope of administrative and judicial review (February, 1983), and supporting the right to retain counsel and enjoy full representation. The ABA has appeared as *amicus curiae* in the Supreme Court on related due process issues.

Conclusion

As acknowledged in the House of Representatives Committee on the Judiciary report, the right of each party to examine and confront the evidence against it is fundamental to a fair legal process. "When we deny that right to aliens, we not only denigrate their rights, but demean our own system of justice. As a matter of consistent constitutional policy, procedures for the use of secret evidence should be corrected to reflect the values articulated by our courts and the Constitution."[24]

Respectfully submitted,

Neal R. Sonnett, Chair
Coordinating Committee on Immigration Law

February 2001

[24] H.R. Rep. No. 106-981 at 15 (2000).

GENERAL INFORMATION FORM

Submitting Entity: **Coordinating Committee on Immigration Law**

Submitted By: **Neal R. Sonnett, Chair**

1. Summary of Recommendation(s).

   This recommendation opposes the use of secret evidence in immigration proceedings, including but not limited to: (1) using secret evidence to deport noncitizens; (2) denying immigration benefits to noncitizens based on secret evidence; (3) refusing to release on bond noncitizens based on secret evidence; and (4) denying admission to returning lawful permanent residents, people who have been paroled into the United States, and asylum seekers, based on secret evidence.

   This recommendation also proposes that in extraordinary cases where there are legitimate national security concerns, the noncitizen and the court or adjudicator should, at a minimum, be provided with an unclassified summary of the classified information, prepared in accordance with appropriate judicial standards and supervision, that preserves the individual's ability to confront the evidence and prepare a defense. As in criminal cases under the Classified Information Procedures Act (CIPA), a federal court would oversee the creation of an unclassified summary of the information that is sufficient to allow the alien to defend him- or herself, and would transmit the summary to the immigration judge and to the alien. Immigration proceedings would resume on the basis of this unclassified summary.

2. Approval by Submitting Entity.

   The Coordinating Committee on Immigration Law approved this recommendation on November 14, 2000.

3. Has this or a similar recommendation been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   The ABA has long-standing interests in and has played an active role in protecting the due process rights of immigrants and asylum seekers. This recommendation would complement the existing polices that the House of Delegates has adopted respecting the right to fair hearings and due process safeguards in all immigration matters (exclusion, deportation and asylum).

5. What urgency exists that requires action at this meeting of the House?

   There is current legislation in both houses of Congress addressing this issue. The INS is using secret evidence, evidence presented *in camera* and *ex parte*, to deny

people immigration status or to continue to detain them. With such fundamental principles of due process and fairness, at stake, the ABA needs to continue its leadership in protecting the due process rights of all.

6. Status of Legislation.

The recommendation supports the approach taken in the Secret Evidence Repeal Act, HR 2121, as amended and approved by the House Judiciary Committee on September 26, 2000. Similar legislation was also introduced in the U.S. Senate. Legislation will almost certainly be introduced in both Houses in the 107th Congress.

7. Cost to the Association.

None

8. Disclosure of Interest.

Not Applicable

9. Referrals.

In November 2000 this Report and Recommendation was referred to the ABA sections which are the constituent members of the Coordinating Committee on Immigration Law through their committee representatives. These sections, namely, the Sections of Administrative Law, Criminal Justice, General Practice, Solo and Small Firm, Individual Rights and Responsibilities, International Law and Practice, Labor and Employment Law, and Litigation, the Young Lawyers Division, and the American Immigration Lawyers Association (an ABA-affiliated organization), are, by definition, the ABA entities with any interest in immigration law. All were initially notified through their designated representatives at the Committee business meeting during the Annual Meeting, and through a subsequent mailing to representatives who did not attend the meeting.

This recommendation was also referred to the chairs or presidents and staff directors of the National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Lesbian and Gay Law Association as well as a number of state and local bar associations.

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12. Contact Person Regarding Amendments to This Recommendation.

There are no known proposed amendments at this time.