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SECRET EVIDENCE REPEAL ACT OF 2000

OCTOBER 17, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 2121]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2121) to ensure that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Secret Evidence Repeal Act of 2000".

SEC. 2. FINDINGS.

The Congress makes the following findings:

(1) No person physically present in the United States, including its outlying possessions, should be deprived of liberty based on evidence kept secret from that person, including information classified for national security reasons.

(2) Removal from the United States can separate a person from the person's family, may expose the person to persecution and torture, and amounts to a severe deprivation of liberty.

(3) Use of secret evidence in immigration proceedings deprives the alien of due process rights guaranteed under the United States Constitution and undermines our adversarial system, which relies on cross-examination as an engine of truth-seeking.

SEC. 3. APPLICATION OF PROCEDURES USED UNDER CLASSIFIED INFORMATION PROCEDURES ACT (CIPA) TO IMMIGRATION PROCEEDINGS.

(a) APPLICATION OF PROCEDURES USED UNDER CLASSIFIED INFORMATION PROCEDURES ACT (CIPA) TO IMMIGRATION PROCEEDINGS.—Chapter 9 of title II of the Immigration and Nationality Act (8 U.S.C. 1351 et seq.) is amended by adding at the end the following new section:

"APPLICATION OF PROCEDURES USED UNDER CLASSIFIED INFORMATION PROCEDURES ACT TO IMMIGRATION PROCEEDINGS

"SEC. 295. (a) NOTICE OF INTENDED USE OF CLASSIFIED INFORMATION.—

"(1) IN GENERAL.—In any immigration proceeding in which the Attorney General seeks to use classified information, the Attorney General shall inform the alien and the presiding officer in advance. To the maximum extent practicable, if the Attorney General is initiating such proceeding, the Attorney General shall provide such notice within 15 days after initiating the proceeding.

"(2) LIMITATION.—The Attorney General may seek to use classified information only in an immigration proceeding in which the alien is alleged to be deportable under section 237(a)(4)(B) or to oppose an application for admission or an application for discretionary relief from removal and only after issuing the following certification:

"(A) Substantially the same information could not reasonably be developed from open sources.

"(B) The Attorney General has informed the classifying agency of its intent to use the classified information in connection with immigration proceedings and has requested such agency to declassify such information as is permitted to be declassified under the President's Executive Order on classification.

"(b) REFERRAL OF CLASSIFIED MATTERS TO DISTRICT COURT.—

"(1) IN GENERAL.—In the case of an immigration proceeding in which the Attorney General or the alien moves for a referral under this section to consider matters relating to classified information that may arise in connection with the proceeding, the presiding officer shall forward the petition for review to a Federal district court for the district in which the alien resides or the place where the immigration proceedings are pending, of the use of such information in such proceeding under subsection (c). Any evidence which is the subject of a petition shall not be considered in the immigration proceeding and shall not be examined by the presiding officer, except as provided in paragraph (3).

"(2) SUSPENSION OF IMMIGRATION PROCEEDING.—In the case of an order or review provided for under paragraph (1), the immigration proceeding may be suspended by the presiding officer pending the disposition of such matter by the district court involved (and any appeals related to such matter).

"(3) SUBMISSION OF SUMMARY.—In the case of a referral under paragraph (1)(A), after the application of subsection (c), the district court shall issue an order to the presiding officer at the proceeding indicating any unclassified summary of classified information, and admissions in lieu of disclosure of classified information, that may be used and the conditions of its use at the proceeding.

The presiding officer shall determine whether any information approved by the order may be offered at the immigration proceeding.

"(c) APPLICATION OF CIPA.—

"(1) IN GENERAL.—Subject to the succeeding provisions of this section, in the cases described in subsection (b)(1) involving review by a Federal district court of the use of classified information in an immigration proceeding, the provisions of the Classified Information Procedures Act (18 U.S.C. Appendix III) (in this section referred to as 'CIPA') shall apply to an alien who is a subject of the immigration proceeding in the same manner as it applies to a defendant in a criminal proceeding subject to CIPA.

"(2) GENERAL RULES OF APPLICATION.—In applying subsection (a), the following general rules apply:

"(A) Any reference in CIPA to—

"(i) a criminal defendant or a trial (or pre-trial) proceeding is deemed to be a reference to the alien who is the subject of the immigration proceeding and to the immigration proceeding;

"(ii) an indictment or information at issue is deemed to be a reference to a notice to appear;

"(iii) a dismissal of an indictment or information is deemed a reference to termination of the immigration proceeding against an alien; and

"(iv) a trial court is deemed a reference (in the case of an administrative immigration proceeding) to the presiding officer in such proceeding.

"(B) The provisions of section 2 of CIPA (other than the last sentence) shall not be applied.

"(C) The Attorney General shall prescribe rules establishing procedures for the protection against unauthorized disclosure of classified information in the custody of the Federal non-judicial officials in immigration proceedings. Such rules shall apply instead of the rules described in section 9 of CIPA.

"(D) Section 12 of CIPA shall not be applied to immigration proceedings.

"(E) In lieu of the reports described in section 13 of CIPA, the Attorney General shall report annually and in writing to the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and the House of Representatives on the implementation of this section. Such reports shall include the following information about each case brought under this section:

"(i) The alien's country of citizenship or, if the alien was stateless, the country in which the alien last habitually resided outside of the United States.

"(ii) The alien's immigration status.

"(iii) The immigration benefit for which the alien applied (if any).

"(iv) Whether the Federal district court approved the summary of classified information and the deletions or admissions proffered by the Attorney General.

"(v) Whether the alien was ultimately ordered removed under section 237(a)(4)(B) or was granted or denied admission or the benefit for which the alien applied.

"(d) DISCLOSURE OF EXCULPATORY EVIDENCE.—In any immigration proceeding under this section, the Attorney General shall disclose to the alien information that it would be required to disclose to a defendant in an analogous criminal proceeding under CIPA.

"(e) CONSTRUCTION CONCERNING DECLASSIFICATION OF INFORMATION.—Nothing in this section shall be construed as preventing an alien in an immigration proceeding from seeking access to classified information under section 552 of title 5, United States Code, or, in the case of information which is not disclosed based on section 552(b)(1) of such title, from initiating an action to seek to declassify some or all of the information involved.

"(f) DEFINITIONS.—For purposes of this section:

"(1) IMMIGRATION PROCEEDING.—The term 'immigration proceeding' means any administrative proceeding under this Act.

"(2) PRESIDING OFFICER.—The term 'presiding officer' means, with respect to an immigration proceeding, the administrative or judicial official who is presiding over the immigration proceeding.".

(b) CONFORMING AMENDMENT.—Title V of the Immigration and Nationality Act (8 U.S.C. 1531–1537) is repealed.

(c) CLERICAL AMENDMENTS.—The table of contents for the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(1) by inserting after the item relating to section 294 the following new item:

"Sec. 295. Application of procedures used under Classified Information Procedures Act to immigration proceedings."; and

(2) by striking the title heading, and the items, relating to title V.

SEC. 4. REPEAL OF USE OF SECRET EVIDENCE IN OTHER IMMIGRATION PROCEEDINGS.

(a) ALIEN'S RIGHTS IN PROCEEDINGS.—Section 240(b)(4)(B) of the Immigration and Nationality Act (8 U.S.C. 1229a(b)(4)(B)) is amended to read as follows:

"(B) subject to section 295, the alien shall have a reasonable opportunity to examine all of the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine all witnesses presented by the Government, and".

(b) BURDEN ON ALIEN.—Section 240(c)(2) of such Act (8 U.S.C. 1229a(c)(2)) is amended by striking the last sentence and inserting the following:

"In meeting the burden of proof under subparagraph (B), subject to section 295, the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents pertaining the alien's admission or presence in the United States.".

SEC. 5. REPEAL OF USE OF SECRET EVIDENCE IN BOND PROCEEDINGS.

Section 236 of the Immigration and Nationality Act (8 U.S.C. 1226) is amended by adding at the end the following:

"(f) ALIENS' RIGHTS IN BOND PROCEEDINGS.—Subject to section 295, in proceedings under this section—

"(1) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings;

"(2) the alien shall have a reasonable opportunity to examine all of the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine all witnesses presented by the Government; and

"(3) a complete record shall be kept of all testimony and evidence produced at the proceeding.".

SEC. 6. REPEAL OF USE OF SECRET EVIDENCE AGAINST LAWFUL PERMANENT RESIDENTS, ASYLUM SEEKERS, AND ALIENS PAROLED INTO THE UNITED STATES.

Section 235(c)(1) of the Immigration and Nationality Act (8 U.S.C. 1225(c)(1)) is amended to read as follows:

"(1) REMOVAL WITHOUT FURTHER HEARING.—

"(A) IN GENERAL.—Except in the case of an alien described in subparagraph (B), if an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

"(i) order the alien removed, subject to review under paragraph (2);

"(ii) report the order of removal to the Attorney General; and

"(iii) not conduct any further inquiry or hearing until ordered by the Attorney General.

"(B) EXCEPTED ALIENS DESCRIBED.—An alien described in this subparagraph is an alien who—

"(i) is a lawful permanent resident;

"(ii) was granted advance parole;

"(iii) was paroled into the United States under section 212(d)(5); or

"(iv) is seeking asylum.".

SEC. 7. TRANSITION.

(a) APPLICATION TO DETAINEES.—Not more than 30 days after the effective date of this Act, the Attorney General shall, with respect to any alien then detained or whose liberty is otherwise restricted by the Attorney General, on the basis in whole or in part of information submitted by the Government ex parte and in camera to an immigration judge, to the Board of Immigration Appeals or to any court—

(1) provide such alien a copy or transcript of such information, and provide the alien with a redetermination of bond (or a reconsideration of the terms of custody, as the case may be) based on evidence disclosed to the alien and the alien's response to such evidence;

(2) withdraw from the record of any proceedings involving such alien any and all evidence, testimony, or other information submitted by the Government ex parte and in camera to the immigration judge, the Board of Immigration Appeals, or to any court, as the case may be, and—

(A) release such alien if such alien is detained; and

(B) cease all restrictions on the liberty of such alien if such restrictions exist,

unless detention is warranted solely on the basis of evidence disclosed to the alien; or

(3) release such alien.

(b) APPLICATION TO ALIENS SEEKING IMMIGRATION BENEFITS.—Not more than 30 days after the effective date of this Act, the Attorney General shall, with respect to any alien physically present in the United States whose application for an immigration benefit is or was opposed by the Government on the basis in whole or in part of information submitted by the Government ex parte and in camera to an immigration judge, to the Board of Immigration Appeals, or to any court—

(1) provide such alien a copy or transcript of such information and a reasonable opportunity to respond to such information, and grant or deny the application or reopen the proceedings and afford the alien de novo reconsideration of the application, as the case may be, based solely on evidence in the public record;

(2) withdraw from the record of any proceedings involving such alien any and all evidence, testimony, or other information submitted by the Government ex parte and in camera to the immigration judge, the Board of Immigration Appeals, or to any court, as the case may be, and grant or deny the application or reopen the proceedings and afford the alien de novo reconsideration of the application, as the case may be, based solely on evidence in the public record; or

(3) grant the application.

(c) TERMINATION OF PROCEEDINGS.—In the case of an alien in immigration proceedings as of the effective date of this Act conducted under title V of the Immigration and Nationality Act—

(1) such proceedings are terminated as of the effective date of this Act without prejudice to the Attorney General or the alien; and

(2) the Attorney General may, in his or her discretion, commence de novo removal proceedings within 10 days thereafter under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a).

SEC. 8. REGULATIONS.

The Attorney General shall promulgate regulations, including regulations governing applications for asylum, withholding of deportation or removal, adjustment of status, naturalization, temporary protected status, and relief from deportation, exclusion, or removal to implement this Act not more than 90 days after the effective date of this Act.

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to all aliens without regard to the date of arrival, admission, entry, or parole into the United States.

PURPOSE AND SUMMARY

The Secret Evidence Repeal Act, H.R. 2121, is intended to apply quasi-criminal procedures to quasi-criminal allegations that arise in the immigration context involving people who are alleged terrorists or threats to national security. Because the allegations are grave, and the procedures used to address those allegations raise substantial due process issues, the committee has ordered reported a bill that would impose, in those few extraordinary cases involving classified information, procedures similar to those used in criminal cases involving classified information.

The use of Classified Information Procedures Act ("CIPA") procedures in the immigration context was raised in debate over 5 years ago and suggested in recent hearings before both the Full Committee and the subcommittee by proponents and opponents of H.R. 2121.[1] The CIPA procedures in H.R. 2121 have been adapted to ensure that where the Government has classified information relating to truly dangerous aliens, it may use the information if it provides

[1] C.I.P.A., 18 U.S.C.A. App. 3. See Infra.

an unclassified summary of the classified information that gives the alien "substantially the same ability to make his defense as would disclosure of the specific classified information." This standard, drawn from CIPA, has successfully and constitutionally balanced national security interests and the rights of the defendant in criminal cases involving classified information.

BACKGROUND AND NEED FOR THE LEGISLATION

I. STATUTES CODIFYING USE OF SECRET EVIDENCE

Since the 1950's, the government has maintained that secret evidence, information not disclosed to a defendant for national security or other reasons, could be used in deportation proceedings. In 1996, Congress passed a series of immigration measures that codified the use of this implied authority by the Immigration and Naturalization Service ("INS") in certain immigration proceedings. These statutes have had the effects of depriving immigrants of the most basic due process rights afforded by the fifth amendment of the Constitution in the immigration context.

In addition, the 1996 Antiterrorism and Effective Death Penalty Act established an "Alien Terrorist Removal Court" that was charged only with hearing cases in which the Government seeks to deport aliens accused of engaging in terrorist activity based on secret evidence submitted in the form of classified information.[2] By effectively prohibiting defendants from confronting the evidence in their deportation proceedings, the procedures of this court are substantially more restrictive than those employed in the criminal context under Classified Information Protection Act.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) expanded the secret evidence court so that secret evidence could be more easily used to deport even lawful permanent residents as terrorists.[3] The statute also included provisions the Government relies upon to use secret evidence to deny a bond to any detained non-citizen (regardless of whether the person is accused of engaging in "terrorist activity") and to deny various discretionary immigration benefits such as asylum to any non-citizen, including those not accused of being terrorists.

While the Alien Terrorist Removal Court has not yet heard its first case, the INS has moved in dozens of other proceedings to use secret evidence against non-citizens to deny them bond and relief from deportation. Persons from the Middle Eastern community have been particularly hard hit by these measures. In some cases, defendants have been denied open hearings and the ability to confront the evidence against them for a term of years.

II. COURTS HAVE HELD THE USE OF SECRET EVIDENCE IN DEPORTATION CASES UNCONSTITUTIONAL

Prior to the passage of the 1996 legislation, the INS relied upon its implied authority to use secret evidence in deportation cases.[4]

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[2] See title V of the Immigration and Nationality Act, 8 U.S.C.A. 1531–1537.

[3] See, e.g., The Immigration and Nationality Act, 8 U.S.C.A. 1225, 1226, 1229.

[4] Secret evidence in the form of classified information often consists of mere rumor and innuendo, inherently unverified and unverifiable. Sometimes, it can be something as "secret" as a newspaper clipping the substance of which could be refuted if only it was known. In U.S. ex rel. *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), secret evidence was used to deny a WWII "war bride" the opportunity to come to the U.S. and join her husband. When eventually she was

In *Jay* v. *Boyd*, the government's principal case, the Supreme Court considered a *statutory* challenge to a decision denying suspension of deportation as a matter of discretion.[5] The court expressly indicated that it was deciding the case on statutory, as opposed to constitutional grounds, and decided that the statute did not preclude the use of secret evidence.[6] The Government, however, relies on dictum in a footnote in the case suggesting that the particular use of secret evidence in the exercise of discretion in that case would not give it "difficulty" as a constitutional matter.[7] Recently, courts have distinguished *Jay* because the Court did not reach the constitutional issue of whether use of secret evidence in an immigration proceeding violated the Due Process Clause of the fifth amendment.

In *Mathews* v. *Diaz*, the Supreme Court noted that "There are literally millions of aliens within the jurisdiction of the United States. The fifth amendment, as well as the 14th amendment, protects every one of these persons from deprivation of life, liberty or property without due process of law. Even one whose presence in this country is unlawful, involuntary or transitory is entitled to constitutional protection."[8] Accordingly, every court to address the constitutional question in the last dozen years has found the use of secret evidence in immigration proceedings against a person admitted to the United States, or seeking admission as a lawful permanent resident returning from a trip abroad, unconstitutional under the Due Process Clause of the fifth amendment.[9]

For example, *In Rafeedie* v. *INS*, the court rejected an attempt by the INS to use secret evidence to exclude a lawful permanent resident from the United States upon his return from a trip abroad.[10] In reaching this decision, the court said, ". . . Rafeedie—like Joseph K. in Kafka's 'The Trial'—can prevail . . . only if he can rebut the undisclosed evidence against him, *i.e.* prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden . . ."[11]

Similarly, in *American-Arab Anti-Discrimination Committee* v. *Reno*, the court rejected an attempt by the INS to deny legalization to two Palestinians it accused of associating with a terrorist organization.[12] In characterizing the INS use of secret evidence in that case, the court said, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations."[13]

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granted a hearing, the secret evidence was found to be worthless because the "confidential source" that offered it turned out to be a jilted former lover of her husband.

[5] 351 U.S. 345 (1945).

[6] 351 U.S. at 358, fn. 21.

[7] *Id.*

[8] 426 U.S. 67, 77 (1976) (emphasis added).

[9] The sixth amendment to the U.S. constitution prohibits the government from using secret evidence in criminal proceedings against both citizens and non-citizens. Instead of using secret evidence, the government relies on the Classified Information Procedures Act, 18 U.S.C. App. 3, to protect classified information in criminal cases. CIPA does not permit the use of evidence that is not also provided the accused and sets out procedures to redact classified information for use in those proceedings. Such procedure are not required by statute in the civil immigration context, but have been implemented to a degree by INS regulation. See, Infra.

[10] 880 F.2d 506 (D.C. Cir. 1989)

[11] *Id.* at 516.

[12] 70 F.3d 1045 (9th Cir. 1995).

[13] *Id.* at 1069 [citations omitted].

Most recently, a Federal district court ordered the release of hearing witness Hany Kiareldeen after he had been detained for 19 months based on secret evidence that is believed to have been offered by his estranged wife, with whom he was having a custody battle. In granting Mr. Kiareldeen's petition for habeas corpus, the court cited the Supreme Court's decision in *Bridges* v. *Wixon* and said, "The court cannot justify the government's attempt to 'allow [persons] to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded." [14]

These cases establish the simple proposition that the use of secret evidence cannot be squared with due process. When the government is free to introduce its evidence behind closed doors, all the requisites of a fair adversarial process have been abandoned. No person should be deprived of liberty on the basis of evidence kept secret from that person. This simple statement is a fundamental requisite of any fair legal system. This legislation would restore the most basic notions of due process to immigration proceedings and promote the Supreme Court's promise that citizens and non-citizens alike are protected by the Due Process clause of the fifth amendment.

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

The INS is currently using secret evidence to detain and/or deny immigration benefits such as political asylum to at least 11 aliens. It has admitted to using secret evidence approximately 50 times from 1992–98. It detained one Egyptian man, Nasser Ahmed, for over 3½ years mostly in solitary confinement—based on secret evidence. He was released last year by an immigration judge who found that the secret evidence was unreliable and that some of it could have been gathered from non-confidential sources and used in open court. Initially, he was given a one-sentence summary of the classified information that the immigration judge deemed "largely useless." Similarly, Dr. Mazen Al-Najjar has been detained in Tampa, Florida for over 3 years based on secret evidence. The only summary of the secret evidence he has received is a single sentence stating that it concerns his alleged association with an organization that has engaged in terrorism.

A. The use of secret evidence is not restricted to individuals posing a threat to national security

As currently applied, INS policy does not limit its use of secret evidence to national security risks. Its regulations permit the use of secret evidence anytime that it deems classified information 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. Most problematically, there is no requirement that the INS limit its use of secret evidence to individuals who truly pose a threat to national security,

[14] *Kiareldeen* v. *Reno*, 71 F.Supp.2d 402, 419 (D.N.J. 1999).

such as, for example, individuals who have committed or were planning to commit criminal conduct threatening national security.

B. The INS often uses improperly classified evidence, and only declassifies it when its actions are challenged

Notwithstanding the question of the validity of secret procedures where evidence is properly classified, there is no justification for using those procedures where evidence does not in fact need to be confidential. However, advocates maintain that the INS and FBI have repeatedly presented evidence *in camera* and *ex parte* that could and should have been disclosed from the outset. While this is more an issue with the FBI, which is generally the classifying agency, than the INS, overclassification 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. One of the Iraqis initially detained on secret evidence, Dr. Ali Yasin Mohammed Karim, has now had an opportunity to respond to the declassified evidence, and on that basis the immigration judge in his case has reversed herself and tentatively ruled that Dr. Karim is not a threat to national security and should be granted asylum and released from custody.

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.

C. The INS uses secret evidence without clear statutory authority

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. While Congress has authorized the INS to use secret evidence

in a variety of settings, 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 those 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 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 the allegation contained therein. In such a situation, it is literally impossible to present a defense.

IV. SECRET EVIDENCE PROVISIONS HAVE HAD A DISPARATE IMPACT ON THE ARAB COMMUNITY

The case of Nasser Ahmed, a 37-year old Egyptian who was denied bond, asylum and withholding based on secret evidence, is typical. If the decision in his case had been based on the evidence in the public record—evidence that Mr. Ahmed had the chance to challenge—he could have had a fair chance at a timely hearing. Instead, Mr. Ahmed spent 3 years in detention, mostly in solitary confinement, while fighting secret evidence. On granting his release and political asylum, an immigration judge found the secret evidence to be unreliable because it consisted of double or triple hearsay. The immigration judge also was troubled by the fact that a lot of the evidence appeared to originate from the Egyptian government, the alleged persecutor.

Secret evidence is also being used to detain in Florida, without bond, Mazen Al-Najjar, a stateless Palestinian and 18-year resident of the United States. Despite his long residence and community contacts, his request for bond was denied on te basis of secret evidence. The full committee hearing marked his 1,000th day in detention, without disclosure of the allegations that form the basis for his detention.

The INS is also using secret evidence in cases involving seven Iraqis airlifted by the U.S. from Northern Iraq because they were part of a failed CIA plot to destabilize the regime in Iraq headed by Saddam Hussein. The INS the Iraqis political asylum based on secret evidence. A legal team including former Director of Central Intelligence R. James Woolsey represents this group. Mr. Woolsey, who was himself denied the opportunity to see the evidence against his clients, commented that secret evidence is what "one would expect to find in Iraq, not the U.S." Five of the seven recently agreed to be deported in exchange for release from custody with certain limitations on their liberty while they search for a foreign country that will accept them.

As a general matter, the use of secret evidence has undermined the confidence of the Middle Eastern community in law enforcement. Cases around the country have highlighted how current secret evidence procedures have led investigators to focus on the wrong people and sow further community mistrust. If investigators believe that arab communities really contain serious numbers of terrorists (and there is no evidence to support this conclusion), the last thing we should do is adopt tactics that make an entire community view law enforcement as the enemy.

V. ANALYSIS OF PROCEDURES ESTABLISHED IN H.R. 2121

The use of procedures similar to those set out in the Classified Information Procedures Act in the immigration context was suggested in hearings before both the Full Committee and the subcommittee by proponents and opponents of H.R. 2121. In fact, the committee heard testimony as many as 5 years ago about how CIPA procedures might be adapted to immigration proceedings involving classified information. The committee was spurred to action by the failure of the Department of Justice to utilize similar procedures, even when required to do so by a Federal court and even after promising for nearly 2 years to issue regulations that would ensure fairness when it uses classified information.

This legislation is narrowly tailored and designed to ensure that where the Government has classified information relating to truly dangerous aliens, it may use the information if it provides an unclassified form of the classified information that gives the alien "substantially the same ability to make his defense as would disclosure of the specific classified information." This legal standard is familiar to the government and is drawn from CIPA, a set of Congressionally mandated procedures with a proven track record for constitutionally balancing national security interests and the rights of the defendant in criminal cases involving classified information.

A. H.R. 2121 is focused on a narrow class of immigration cases

Currently, the Immigration and Nationality Act authorizes the INS to use classified information to deny admission, to deny immigration benefits such as political asylum, and, at the Alien Terrorist Removal Court established under title V of the INA, to affirmatively remove a person under INA section 237(a)(4)(B) who is alleged to have engaged in terrorist activities. The Secret Evidence Repeal Act is crafted to limit the use of classified information to these situations, and no others. The legislation gives the Government the option to keep classified information fully secret and outside of the proceedings altogether, to disclose it to the alien so he can defend against it, to continue to investigate until it develops information from other sources that can be used publicly, or, to employ new procedures set out here in Federal district court.

Under this H.R. 2121, when the Attorney General is authorized to use classified information, the Department of Justice is empowered to ask that the immigration proceedings be suspended so that the classified information can be handled by a Federal district court. The court would, as it does in a pre-trial hearing under CIPA, oversee the creation of an unclassified summary of the classified information that meets the standard set forth in section 6(c)

of CIPA.[15] The judge could also order certain deletions of classified information. The substituted summary—which would be given to the immigration judge and the alien—must provide the alien with substantially the same opportunity to make his defense and rebut the allegations against him as would disclosure of the specific classified information. It is the committee's intent that this strict standard drawn from CIPA and explained in its legislative history apply in proceedings brought under the new section 295 in the same manner CIPA applies to defendants in criminal proceedings.

The Federal district court is expected to address any constitutional questions in these proceedings, including questions as to whether the substituted evidence adequately protects the due process rights of the alien. If the Attorney General believes that the judge's decision about the summary is incorrect, she can take an interlocutory appeal to the appellate court with jurisdiction. However, the alien would appeal any such findings only in connection with review of any final order of deportation.

The Federal district court judge would provide the unclassified summary and any other documents (with classified information deleted) to the immigration judge *and to the alien* so that the proceedings could continue, in the open. There would be no "secret evidence" as such in the immigration proceeding because the immigration judge would base his decision on the same information that is shared with the alien and made part of the public record. This procedure ensures that the immigration judge will not be prejudiced by information kept secret from the alien, just as a jury in a CIPA case is not prejudiced by information kept secret from the defendant. The Secret Evidence Repeal Act also repeals title V of the INA, which established the Alien Terrorist Removal Court. The court, which has never been invoked by the INS, is unnecessary because all immigration matters in which classified information is authorized to be used will be handled as indicated in this legislation.

Section 3 adds a new section 295(a) to the INA that limits the circumstances in which classified information can be considered to those in which the INA currently permits consideration of classified information. It also requires the Attorney General to certify that use of the information is necessary because substantially the same information cannot be reasonably developed from open sources. It also requires the Attorney General to seek declassification of the classified information. This section does not require declassification, but is instead intended to trigger an expedited process wherein the classified information is evaluated for declassification. It is the committee's intent that the certification required by this section be made by the Deputy Attorney General or the Attorney General, or a person acting in such position, and that authority to make the certification may not be delegated to another person.

Section 3 also adds a new section 295(b) that establishes procedures for referral of classified matters to the Federal district court. The matter can be referred either to the court in which the alien resides, or the place where the proceedings are pending, but not to both. While the district court considers the classified information, the presiding officer may suspend the proceedings, or allow them

[15] 18 U.S.C.A. App. 3.

to continue while matters that do not relate to the classified information are addressed.

The Secret Evidence Repeal Act does not require the presiding officer to accept into evidence all of the information approved for disclosure by the Federal district court. The presiding officer retains discretion as to what evidence will be admitted. For example, a confession made abroad and approved by the district court with certain classified information deleted may be excluded from evidence if the presiding officer believes the confession is unreliable because the confessant was tortured.

The committee intends that the Federal district court conduct its review of the classified information expeditiously and in the same manner it would review classified information in a CIPA case, subject to the rules of application in section 3. New section 295(d) is intended to give an alien in the Federal district court proceedings authorized under this act access to the same information against him that would be required to be disclosed in analogous proceedings under CIPA. This provision requires the disclosure of no more information than would be disclosed to a defendant in a criminal proceeding. It is intended, among other things, to ensure that the alien has the information he or she would need to contest the adequacy (under the strict CIPA standard) of the substituted information that is to be provided the presiding officer.

Section 4 of the bill amends section 240 of the INA to make it clear that subject to section 295, the alien shall have access to all of the evidence against the alien and an opportunity to cross-examine all witnesses presented by the Government. Likewise, section 5 of the bill is intended to make it clear that in bond proceedings, the alien shall have access to all of the evidence against him and to cross-examine all of the Government's witnesses. It also requires the keeping of a complete record of the testimony and evidence produced at the proceeding.

Section 6 excepts from the procedures in section 235(c) returning lawful permanent residents, aliens granted advance parole, parole under section 212(d)(5) and aliens seeking asylum. Section 7 establishes rules for pending cases.

H.R. 2121 effects only a small percentage of all immigration cases and leaves the Government's ability to use confidential information largely intact. For example, section 235(c) provides that if an immigration officer or immigration judge suspects that an arriving alien may be inadmissible on certain national security grounds, the person may be ordered removed without further review, except by the Attorney General, who is empowered to base her decision on "confidential information" that need not even be classified. Section 6 of H.R. 2121 does not prohibit the use of secret evidence in removal proceedings under section 235(c).

In fact, it preserves the use section 235(c) against the vast majority of aliens seeking admission. It excepts asylum seekers, parolees, and returning lawful permanent residents from section 235(c). They represent only a tiny proportion of the 29 million people the INS admits each year. In the rare case when an asylum seeker, parolee, or returning lawful permanent resident is believed inadmissible based on secret evidence alleged to show that the person is a threat to national security, the procedures in section 295 would be available to the Attorney General. They would both protect the

national security and preserve the rights of the person seeking admission.

B. H.R. 2121 does not ban the use of classified information

Arguments that H.R. 2121 would effectively ban the use of classified information in immigration proceedings misread the legislation. Rather than banning the use of classified evidence in immigration proceedings, the legislation establishes a procedure under a new section 295 of the INA for handling classified information. Section 3 of the bill eliminates the Alien Terrorist Removal Court because the class of cases that would have gone to the ATRC would now go to Federal district court under section 295.

The establishment of the procedures in H.R. 2121 are consistent with Congress's duty to protect due process and a recognition of the liberty interests at stake in immigration proceedings. For example, under section 237(a)(4), an alien can be deported as a "terrorist" if he has "engaged in terrorist activity" by preparing, planning or otherwise assisting in activity such as hijacking, assassination, kidnapping and using bombs and guns with intent to endanger the safety of the person or damage property. In 1996, the committee recognized the extraordinary nature of such proceedings, and the need for additional procedural protections, when it created the Alien Terrorist Removal Court, ensured that it was composed of independent article III judges, and gave indigent aliens appearing before the ATRC a right to counsel at taxpayer expense. The limitation language in section 3(a) of H.R. 2121 reflects the current circumstances in which the government is empowered by statute, in title V, section 240(b)(4)(B) and section 235(c), to use classified information in the immigration context. This legislation neither expands nor contracts these circumstances.

In the extraordinary case that would be brought under section 295, immigration adjudicators would be given access only to the same evidence that is in the public record and made available to the alien. This would include the summary of classified information and any other material provided by the Federal district court, with classified information deleted. The immigration adjudicator as the trier of fact would thus be put in a position analogous to a jury in a CIPA case, when it acts as a trier of fact. To suggest that the immigration adjudicator ought to have access to as well to national security information that is kept secret from the alien is to condone the use of secret evidence and denigrate due process—exactly what the bill is designed to prevent.

C. H.R. 2121 does not endanger national security by expanding the rights of aliens

Some have claimed that limitation on the use of secret evidence would allow dangerous aliens to go free. These claims, however, lack merit. For example, it is difficult to understand why the INS would seek to remove from the United States an alien suspected of being involved in the Khobar Towers bombing that claimed the lives of 19 American servicemen where such a bombing is a crime under our laws, as some have argued. It seems that the better course of action would be to charge the person and try them here. To remove such a person runs the risk that they will escape prosecution abroad, and attempt more murderous activity against

Americans. Nonetheless, under H.R. 2121, the Attorney General would not be required to bring criminal charges. Under H.R. 2121, such a suspect seeking admission would be removed under section 235(c) or under section 295, depending on whether the suspect arrived seeking asylum.

Similarly, claims that H.R. 2121 expands the discovery rights of aliens in immigration proceedings is exaggerated. Under section 240(b)(4)(B), an alien in removal proceedings is guaranteed a reasonable opportunity to examine the evidence against the alien, present evidence on the alien's own behalf and cross-examine witnesses presented by the Government. The section includes an exception for "national security" information in some circumstances. This right is similarly guaranteed under H.R. 2121 in new INA section 295.

Further, under rule 16 of the Federal Rules of Criminal Procedure, a person accused of a crime is entitled to information relevant to his or her defense. This rule governs access to information in criminal proceedings involving classified information brought under the Classified Information Procedures Act. H.R. 2121 gives an alien in proceedings under section 295 the same discovery rights as a person accused of a crime in a CIPA case to ensure that the alien will have the information necessary to contest the adequacy of the summary of classified information prepared by the Government for approval by the judge. This provision will not give aliens accused of being terrorists "free reign" to rummage through classified information and discover sources and methods.[16] Moreover, section 3(d) does not confer discovery rights on any person who is not in section 295 proceedings.

CONCLUSION

The defects of legal proceedings conducted in secret have been recognized for centuries. In the Bible, under Roman law, a man charged with criminal conduct should "have the accuser face to face, and have license to answer for himself concerning the crime laid against him."[17] 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."[18] 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. 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.

HEARINGS

The committee's Subcommittee on Immigration and Claims held a hearing on H.R. 2121 on February 10, 2000. Testimony was re-

[16] See, e.g., *U.S.* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989) (defendant's access to information in a CIPA case is limited by governmental privilege similar to informant's privilege identified in *Rovario* v. *U.S.*, 353 U.S. 53 (1957)).

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

[18] 5 *Wigmore on Evidence* 1367 (3d ed. 1940) (quoted in *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959)).

ceived from Rep. Bonior of Michigan; Rep. Campbell of California; Professor David Cole of Georgetown University Law Center; Ms. Nahla Al-Arian; and Mr. Larry Parkinson, General Counsel for the Federal Bureau of Investigation, with additional material submitted by six individuals and organizations. The committee held a hearing on H.R. 2121 on May 23, 2000. Testimony was received from Reps. Bonior and Campbell; Mr. Parkinson; Mr. Bo Cooper, General Counsel of the Immigration and Naturalization Service; Mr. Gregory Nojeim of the American Civil Liberties Union; Professor Cole; Mr. Hany Kiareldeen; Ms. Al-Arian; Mr. Bruce Ramer of the American Jewish Committee; Mr. Thomas Homburger of the Anti-Defamation League; Mr. Steven Emerson; and Mr. Stephen Flatow.

COMMITTEE CONSIDERATION

On Tuesday, September 26, the committee met in open session and ordered favorably reported the bill H.R. 2121 with an amendment in the nature of a substitute by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There was one recorded vote on an amendment in the nature of a substitute offered by Rep. Barr of Georgia. The amendment made three changes to the bill as introduced: 1) modifying section 3 to allow an unclassified summary of classified evidence prepared in accordance with the Classified Information Procedures Act to be used in some immigration proceedings; 2) deleting section 5, which would have prohibited any immigration benefit from being adjudicated on the basis of any evidence not shared with the applicant; and 3) deleting section 6(a), which would have provided an additional habeas corpus appeal to any alien held in detention or released on bond or parole. Adopted 26–2.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson		X	
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham	X		
Ms. Bono			
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	26	2	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 2121, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 12, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2121, the Secret Evidence Repeal Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 2121—Secret Evidence Repeal Act of 2000.

H.R. 2121 would prohibit the use of classified evidence against aliens in immigration proceedings. Because there are only about 10 proceedings involving such evidence in any year, CBO estimates that enacting the bill would have no significant impact on federal spending. H.R. 2121 would not affect direct spending or receipts, so pay-as-you-go procedures would not apply.

Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act legislative provisions that enforce constitutional rights of individuals. CBO has determined that the provisions of H.R. 2121 deal with the due process rights of aliens in immigration proceedings and thus would fall within that exclusion.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in article I, section 8, clause 4 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title. The short title for H.R. 2121 is the "Secret Evidence Repeal Act of 2000."

Sec. 2. Findings. No person physically present in the United States should be deprived of liberty based on evidence kept secret from that person, including information classified for national security reasons. Removal from the United States can separate a person from the person's family, may expose the person to persecution and torture, and amounts to a severe deprivation of liberty. The use of secret evidence in immigration proceedings deprives an alien of due process rights guaranteed under the United States constitution and undermines our adversarial system, which relies on cross-examination as an engine of truth seeking.

Sec. 3(a). Application of Procedures Used Under Classified information Procedures Act ("CIPA") to Immigration Proceedings. Requires the Attorney General to notify the alien and the presiding officer in advance if she intends to use classified information in immigration proceedings. Limits the use of classified information to cases in which the Attorney General currently has statutory authority to do so, i.e., where the alien is alleged to be deportable under section 237(a)(4)(B) and in cases where the Attorney General opposes an application for admission or an application for discretionary relief from removal. Prior to initiating section 295 pro-

ceedings, the Attorney General must certify that the use of classified information is necessary. The certificate must state that: (A) The information could not have been developed from open sources, and (B) she has informed the classifying agency of the intention to use the information and asked the agency to declassify such information as is permitted to be declassified under the President's Executive Order on Classification. Nothing in this section requires the classifying agency or the Attorney General to declassify information..

Sec. 3(b). Referral of Classified Matters to District Court. Upon request from the Attorney General or the alien, the presiding officer shall forward the classified evidence to a Federal district court for review. This section requires the Federal district court judge to review the classified information, in lieu of review by the presiding officer in the immigration proceeding. The presiding officer may continue with the rest of the proceedings when it is appropriate to do so. The district court will issue an order indicating any unclassified summary of the classified information that may be used in the proceedings and dictate the conditions of its use.

Sec. 3(c). Application of CIPA. For example, the unclassified summary of classified information must provide the alien with substantially the same ability to make his defense as would the specific classified information. In lieu of the reports described in section 13 of CIPA, the Attorney General shall report annually to the chairman and ranking minority members of the Committees on the Judiciary of the Senate and the House of Representatives on the implementation of this section.

Sec. 3(d). Disclosure of Exculpatory Evidence. To ensure that the alien can contest the adequacy of the summary of classified information to the same extent as would a defendant in a criminal case, this section requires the Attorney General to disclose to the alien the information, and only that information, that would have to be disclosed to a defendant in an analogous criminal proceeding under CIPA.

Sec. 3(e). Construction Concerning Declassification of Information. This section reflects current law and clarifies that the Secret Evidence Repeal Act does not bar an alien under the Freedom of Information Act ("FOIA") from obtaining information that relates to his case. Nothing in this section requires the declassification of any information that would not otherwise be made available to the public under FOIA.

Sec. (f). Definitions. The term "immigration proceeding" means any administrative proceeding under this act. The term "presiding officer" means the administrative or judicial official who is presiding over the immigration proceeding.

Sec. 4. Repeal of Use of Secret Evidence in Other Immigration Proceedings. Subject to the limitations of section 295 relating to procedures for handling classified information, an alien shall have access to the evidence that is used against him or her in removal proceedings.

Sec. 5. Repeal of Use of Secret Evidence in Bond Proceedings. Subject to the limitations of section 295 relating to procedures for handling classified information, an alien shall have access to the evidence that is used against him or her in bond proceedings.

Sec. 6. Repeal of Use of Secret Evidence Against Lawful Permanent Residents, Asylum Seekers, and Aliens Paroled into the United States. The provision of the act which permits the Attorney General to exclude an arriving alien on the basis of confidential information showing that the alien is a spy, saboteur, criminal, terrorist, or foreign policy threat does not apply to lawful permanent residents, aliens paroled into the United States, or aliens who are seeking asylum.

Sec. 7(a). Application to Detainees. Not more than 30 days after the effective date of this act, the Attorney General shall provide a bond redetermination, with the rights provided by this section, for any alien who is detained on the basis of classified information that was considered *ex parte.*

Sec. 7(b). Application to Aliens Seeking Immigration Benefits. Not more than 30 days after the effective date of this act, the Attorney General shall provide an opportunity for any alien physically present in the United States who had an application for an immigration benefit denied on the basis of classified information considered *ex parte* to seek reopening and consideration *de novo* of his or her benefits application.

Sec. 7(c). Termination of Proceedings. Requires termination in the case of any alien who is in Alien Terrorist Removal Court proceedings as of the effective date of this act.

Sec. 8. Regulations. Requires the Attorney General to promulgate implementing regulations within 90 days of the effective date of this act.

Sec. 9. Effective Date. Amendments made by this act shall take effect on the date of enactment and shall apply to all aliens without regard to their date of arrival, admission, entry, or parole into the United States.

AGENCY VIEWS

The views of the FBI and the INS are contained in their testimony in opposition to H.R. 2121 at the committee's hearings. These views do not address H.R. 2121 as ordered reported and the administration has taken no position on the legislation in its current form.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles, chapters, and sections according to the following table of contents, may be cited as the "Immigration and Nationality Act".

TABLE OF CONTENTS

TITLE I—GENERAL

Sec. 101. Definitions.

* * * * * * *

TITLE II—IMMIGRATION

CHAPTER 9—MISCELLANEOUS

Sec. 281. Nonimmigrant visa fees.

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Sec. 295. Application of procedures used under Classified Information Procedures Act to immigration proceedings.

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[TITLE V—ALIEN TERRORIST REMOVAL PROCEDURES

[Sec. 501. Definitions.
[Sec. 502. Establishment of removal court.
[Sec. 503. Removal court procedure.
[Sec. 504. Removal hearing.
[Sec. 505. Appeals.
[Sec. 506. Custody and release pending removal hearing.
[Sec. 507. Custody and release after removal hearing.]

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TITLE II—IMMIGRATION

* * * * * * *

CHAPTER 4—INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

* * * * * * *

INSPECTION BY IMMIGRATION OFFICERS; EXPEDITED REMOVAL OF INADMISSIBLE ARRIVING ALIENS; REFERRAL FOR HEARING

SEC. 235. (a) * * *

* * * * * * *

(c) REMOVAL OF ALIENS INADMISSIBLE ON SECURITY AND RELATED GROUNDS.—

[(1) REMOVAL WITHOUT FURTHER HEARING.—If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

[(A) order the alien removed, subject to review under paragraph (2);

[(B) report the order of removal to the Attorney General; and

[(C) not conduct any further inquiry or hearing until ordered by the Attorney General.]

(1) REMOVAL WITHOUT FURTHER HEARING.—

(A) IN GENERAL.—Except in the case of an alien described in subparagraph (B), if an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

(i) order the alien removed, subject to review under paragraph (2);

(ii) report the order of removal to the Attorney General; and

(iii) not conduct any further inquiry or hearing until ordered by the Attorney General.

(B) EXCEPTED ALIENS DESCRIBED.—An alien described in this subparagraph is an alien who—

(i) is a lawful permanent resident;

(ii) was granted advance parole;

(iii) was paroled into the United States under section 212(d)(5); or

(iv) is seeking asylum.

* * * * * * *

APPREHENSION AND DETENTION OF ALIENS

SEC. 236. (a) * * *

* * * * * * *

(f) ALIENS' RIGHTS IN BOND PROCEEDINGS.—Subject to section 295, in proceedings under this section—

(1) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings;

(2) the alien shall have a reasonable opportunity to examine all of the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine all witnesses presented by the Government; and

(3) a complete record shall be kept of all testimony and evidence produced at the proceeding.

* * * * * * *

REMOVAL PROCEEDINGS

SEC. 240. (a) * * *

(b) CONDUCT OF PROCEEDING.—

(1) * * *

* * * * * * *

(4) ALIENS RIGHTS IN PROCEEDING.—In proceedings under this section, under regulations of the Attorney General—

(A) * * *

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

(B) subject to section 295, the alien shall have a reasonable opportunity to examine all of the evidence against the alien, to present evidence on the alien's own behalf, and

to cross-examine all witnesses presented by the Government, and

* * * * * * *

(c) DECISION AND BURDEN OF PROOF.—

(1) * * *

(2) BURDEN ON ALIEN.—In the proceeding the alien has the burden of establishing—

(A) * * *

* * * * * * *

[In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.] *In meeting the burden of proof under subparagraph (B), subject to section 295, the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents pertaining the alien's admission or presence in the United States.*

* * * * * * *

CHAPTER 9—MISCELLANEOUS

* * * * * * *

APPLICATION OF PROCEDURES USED UNDER CLASSIFIED INFORMATION PROCEDURES ACT TO IMMIGRATION PROCEEDINGS

SEC. 295. (a) NOTICE OF INTENDED USE OF CLASSIFIED INFORMATION.—

(1) IN GENERAL.—In any immigration proceeding in which the Attorney General seeks to use classified information, the Attorney General shall inform the alien and the presiding officer in advance. To the maximum extent practicable, if the Attorney General is initiating such proceeding, the Attorney General shall provide such notice within 15 days after initiating the proceeding.

(2) LIMITATION.—The Attorney General may seek to use classified information only in an immigration proceeding in which the alien is alleged to be deportable under section 237(a)(4)(B) or to oppose an application for admission or an application for discretionary relief from removal and only after issuing the following certification:

(A) Substantially the same information could not reasonably be developed from open sources.

(B) The Attorney General has informed the classifying agency of its intent to use the classified information in connection with immigration proceedings and has requested such agency to declassify such information as is permitted to be declassified under the President's Executive Order on classification.

(b) REFERRAL OF CLASSIFIED MATTERS TO DISTRICT COURT.—

(1) IN GENERAL.—In the case of an immigration proceeding in which the Attorney General or the alien moves for a referral under this section to consider matters relating to classified in-

formation that may arise in connection with the proceeding, the presiding officer shall forward the petition for review to a Federal district court for the district in which the alien resides or the place where the immigration proceedings are pending, of the use of such information in such proceeding under subsection (c). Any evidence which is the subject of a petition shall not be considered in the immigration proceeding and shall not be examined by the presiding officer, except as provided in paragraph (3).

(2) SUSPENSION OF IMMIGRATION PROCEEDING.—In the case of an order or review provided for under paragraph (1), the immigration proceeding may be suspended by the presiding officer pending the disposition of such matter by the district court involved (and any appeals related to such matter).

(3) SUBMISSION OF SUMMARY.—In the case of a referral under paragraph (1)(A), after the application of subsection (c), the district court shall issue an order to the presiding officer at the proceeding indicating any unclassified summary of classified information, and admissions in lieu of disclosure of classified information, that may be used and the conditions of its use at the proceeding. The presiding officer shall determine whether any information approved by the order may be offered at the immigration proceeding.

(c) APPLICATION OF CIPA.—

(1) IN GENERAL.—Subject to the succeeding provisions of this section, in the cases described in subsection (b)(1) involving review by a Federal district court of the use of classified information in an immigration proceeding, the provisions of the Classified Information Procedures Act (18 U.S.C. Appendix III) (in this section referred to as "CIPA") shall apply to an alien who is a subject of the immigration proceeding in the same manner as it applies to a defendant in a criminal proceeding subject to CIPA.

(2) GENERAL RULES OF APPLICATION.—In applying subsection (a), the following general rules apply:

(A) Any reference in CIPA to—

(i) a criminal defendant or a trial (or pre-trial) proceeding is deemed to be a reference to the alien who is the subject of the immigration proceeding and to the immigration proceeding;

(ii) an indictment or information at issue is deemed to be a reference to a notice to appear;

(iii) a dismissal of an indictment or information is deemed a reference to termination of the immigration proceeding against an alien; and

(iv) a trial court is deemed a reference (in the case of an administrative immigration proceeding) to the presiding officer in such proceeding.

(B) The provisions of section 2 of CIPA (other than the last sentence) shall not be applied.

(C) The Attorney General shall prescribe rules establishing procedures for the protection against unauthorized disclosure of classified information in the custody of the Federal non-judicial officials in immigration proceedings.

Such rules shall apply instead of the rules described in section 9 of CIPA.

(D) Section 12 of CIPA shall not be applied to immigration proceedings.

(E) In lieu of the reports described in section 13 of CIPA, the Attorney General shall report annually and in writing to the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and the House of Representatives on the implementation of this section. Such reports shall include the following information about each case brought under this section:

(i) The alien's country of citizenship or, if the alien was stateless, the country in which the alien last habitually resided outside of the United States.

(ii) The alien's immigration status.

(iii) The immigration benefit for which the alien applied (if any).

(iv) Whether the Federal district court approved the summary of classified information and the deletions or admissions proffered by the Attorney General.

(v) Whether the alien was ultimately ordered removed under section 237(a)(4)(B) or was granted or denied admission or the benefit for which the alien applied.

(d) DISCLOSURE OF EXCULPATORY EVIDENCE.—In any immigration proceeding under this section, the Attorney General shall disclose to the alien information that it would be required to disclose to a defendant in an analogous criminal proceeding under CIPA.

(e) CONSTRUCTION CONCERNING DECLASSIFICATION OF INFORMATION.—Nothing in this section shall be construed as preventing an alien in an immigration proceeding from seeking access to classified information under section 552 of title 5, United States Code, or, in the case of information which is not disclosed based on section 552(b)(1) of such title, from initiating an action to seek to declassify some or all of the information involved.

(f) DEFINITIONS.—For purposes of this section:

(1) IMMIGRATION PROCEEDING.—The term "immigration proceeding" means any administrative proceeding under this Act.

(2) PRESIDING OFFICER.—The term "presiding officer" means, with respect to an immigration proceeding, the administrative or judicial official who is presiding over the immigration proceeding.

* * * * * * *

[TITLE V—ALIEN TERRORIST REMOVAL PROCEDURES

[SEC. 501. DEFINITIONS.

[As used in this title—

[(1) the term "alien terrorist" means any alien described in section 241(a)(4)(B);

[(2) the term "classified information" has the same meaning as in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

[(3) the term "national security" has the same meaning as in section 1(b) of the Classified Information Procedures Act (18 U.S.C. App.);

[(4) the term "removal court" means the court described in section 502;

[(5) the term "removal hearing" means the hearing described in section 504;

[(6) the term "removal proceeding" means a proceeding under this title; and

[(7) the term "special attorney" means an attorney who is on the panel established under section 502(e).

[SEC. 502. ESTABLISHMENT OF REMOVAL COURT.

[(a) DESIGNATION OF JUDGES.—The Chief Justice of the United States shall publicly designate 5 district court judges from 5 of the United States judicial circuits who shall constitute a court that shall have jurisdiction to conduct all removal proceedings. The Chief Justice may, in the Chief Justice's discretion, designate the same judges under this section as are designated pursuant to section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)).

[(b) TERMS.—Each judge designated under subsection (a) shall serve for a term of 5 years and shall be eligible for redesignation, except that of the members first designated—

[(1) 1 member shall serve for a term of 1 year;

[(2) 1 member shall serve for a term of 2 years;

[(3) 1 member shall serve for a term of 3 years; and

[(4) 1 member shall serve for a term of 4 years.

[(c) CHIEF JUDGE.—

[(1) DESIGNATION.—The Chief Justice shall publicly designate one of the judges of the removal court to be the chief judge of the removal court.

[(2) RESPONSIBILITIES.—The chief judge shall—

[(A) promulgate rules to facilitate the functioning of the removal court; and

[(B) assign the consideration of cases to the various judges on the removal court.

[(d) EXPEDITIOUS AND CONFIDENTIAL NATURE OF PROCEEDINGS.—The provisions of section 103(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(c)) shall apply to removal proceedings in the same manner as they apply to proceedings under that Act.

[(e) ESTABLISHMENT OF PANEL OF SPECIAL ATTORNEYS.—The removal court shall provide for the designation of a panel of attorneys each of whom—

[(1) has a security clearance which affords the attorney access to classified information, and

[(2) has agreed to represent permanent resident aliens with respect to classified information under section 504(e)(3) in accordance with (and subject to the penalties under) this title.

[SEC. 503. REMOVAL COURT PROCEDURE.

[(a) APPLICATION.—

[(1) IN GENERAL.—In any case in which the Attorney General has classified information that an alien is an alien terrorist, the Attorney General may seek removal of the alien under this title by filing an application with the removal court that contains—

[(A) the identity of the attorney in the Department of Justice making the application;

[(B) a certification by the Attorney General or the Deputy Attorney General that the application satisfies the criteria and requirements of this section;

[(C) the identity of the alien for whom authorization for the removal proceeding is sought; and

[(D) a statement of the facts and circumstances relied on by the Department of Justice to establish probable cause that—

[(i) the alien is an alien terrorist;

[(ii) the alien is physically present in the United States; and

[(iii) with respect to such alien, removal under title II would pose a risk to the national security of the United States.

[(2) FILING.—An application under this section shall be submitted ex parte and in camera, and shall be filed under seal with the removal court.

[(b) RIGHT TO DISMISS.—The Attorney General may dismiss a removal action under this title at any stage of the proceeding.

[(c) CONSIDERATION OF APPLICATION.—

[(1) BASIS FOR DECISION.—In determining whether to grant an application under this section, a single judge of the removal court may consider, ex parte and in camera, in addition to the information contained in the application—

[(A) other information, including classified information, presented under oath or affirmation; and

[(B) testimony received in any hearing on the application, of which a verbatim record shall be kept.

[(2) APPROVAL OF ORDER.—The judge shall issue an order granting the application, if the judge finds that there is probable cause to believe that—

[(A) the alien who is the subject of the application has been correctly identified and is an alien terrorist present in the United States; and

[(B) removal under title II would pose a risk to the national security of the United States.

[(3) DENIAL OF ORDER.—If the judge denies the order requested in the application, the judge shall prepare a written statement of the reasons for the denial, taking all necessary precautions not to disclose any classified information contained in the Government's application.

[(d) EXCLUSIVE PROVISIONS.—If an order is issued under this section granting an application, the rights of the alien regarding removal and expulsion shall be governed solely by this title, and except as they are specifically referenced in this title, no other provisions of this Act shall be applicable.

[SEC. 504. REMOVAL HEARING.

[(a) IN GENERAL.—

[(1) EXPEDITIOUS HEARING.—In any case in which an application for an order is approved under section 503(c)(2), a removal hearing shall be conducted under this section as expeditiously as practicable for the purpose of determining whether the alien to whom the order pertains should be removed from the United States on the grounds that the alien is an alien terrorist.

[(2) PUBLIC HEARING.—The removal hearing shall be open to the public.

[(b) NOTICE.—An alien who is the subject of a removal hearing under this title shall be given reasonable notice of—

[(1) the nature of the charges against the alien, including a general account of the basis for the charges; and

[(2) the time and place at which the hearing will be held.

[(c) RIGHTS IN HEARING.—

[(1) RIGHT OF COUNSEL.—The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien. Such counsel shall be appointed by the judge pursuant to the plan for furnishing representation for any person financially unable to obtain adequate representation for the district in which the hearing is conducted, as provided for in section 3006A of title 18, United States Code. All provisions of that section shall apply and, for purposes of determining the maximum amount of compensation, the matter shall be treated as if a felony was charged.

[(2) INTRODUCTION OF EVIDENCE.—Subject to the limitations in subsection (e), the alien shall have a reasonable opportunity to introduce evidence on the alien's own behalf.

[(3) EXAMINATION OF WITNESSES.—Subject to the limitations in subsection (e), the alien shall have a reasonable opportunity to examine the evidence against the alien and to cross-examine any witness.

[(4) RECORD.—A verbatim record of the proceedings and of all testimony and evidence offered or produced at such a hearing shall be kept.

[(5) REMOVAL DECISION BASED ON EVIDENCE AT HEARING.—The decision of the judge regarding removal shall be based only on that evidence introduced at the removal hearing.

[(d) SUBPOENAS.—

[(1) REQUEST.—At any time prior to the conclusion of the removal hearing, either the alien or the Department of Justice may request the judge to issue a subpoena for the presence of a named witness (which subpoena may also command the person to whom it is directed to produce books, papers, documents, or other objects designated therein) upon a satisfactory showing that the presence of the witness is necessary for the determination of any material matter. Such a request may be made ex parte except that the judge shall inform the Department of Justice of any request for a subpoena by the alien for a witness or material if compliance with such a subpoena would reveal classified evidence or the source of that evidence. The Department of Justice shall be given a reasonable opportunity to oppose the issuance of such a subpoena.

[(2) PAYMENT FOR ATTENDANCE.—If an application for a subpoena by the alien also makes a showing that the alien is financially unable to pay for the attendance of a witness so requested, the court may order the costs incurred by the process and the fees of the witness so subpoenaed to be paid from funds appropriated for the enforcement of title II.

[(3) NATIONWIDE SERVICE.—A subpoena under this subsection may be served anywhere in the United States.

[(4) WITNESS FEES.—A witness subpoenaed under this subsection shall receive the same fees and expenses as a witness subpoenaed in connection with a civil proceeding in a court of the United States.

[(5) NO ACCESS TO CLASSIFIED INFORMATION.—Nothing in this subsection is intended to allow an alien to have access to classified information.

[(e) DISCOVERY.—

[(1) IN GENERAL.—For purposes of this title—

[(A) the Government is authorized to use in a removal proceedings the fruits of electronic surveillance and unconsented physical searches authorized under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) without regard to subsections (c), (e), (f), (g), and (h) of section 106 of that Act and discovery of information derived pursuant to such Act, or otherwise collected for national security purposes, shall not be authorized if disclosure would present a risk to the national security of the United States;

[(B) an alien subject to removal under this title shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained; and

[(C) section 3504 of title 18, United States Code, and section 1806(c) of title 50, United States Code, shall not apply if the Attorney General determines that public disclosure would pose a risk to the national security of the United States because it would disclose classified information or otherwise threaten the integrity of a pending investigation.

[(2) PROTECTIVE ORDERS.—Nothing in this title shall prevent the United States from seeking protective orders and from asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privileges.

[(3) TREATMENT OF CLASSIFIED INFORMATION.—

[(A) USE.—The judge shall examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to this paragraph. Notwithstanding the previous sentence, the Department of Justice may, in its discretion and, in the case of classified information, after coordination with the origi-

nating agency, elect to introduce such evidence in open session.

[(B) SUBMISSION.—With respect to such information, the Government shall submit to the removal court an unclassified summary of the specific evidence that does not pose that risk.

[(C) APPROVAL.—Not later than 15 days after submission, the judge shall approve the summary if the judge finds that it is sufficient to enable the alien to prepare a defense. The Government shall deliver to the alien a copy of the unclassified summary approved under this subparagraph.

[(D) DISAPPROVAL.—

[(i) IN GENERAL.—If an unclassified summary is not approved by the removal court under subparagraph (C), the Government shall be afforded 15 days to correct the deficiencies identified by the court and submit a revised unclassified summary.

[(ii) REVISED SUMMARY.—If the revised unclassified summary is not approved by the court within 15 days of its submission pursuant to subparagraph (C), the removal hearing shall be terminated unless the judge makes the findings under clause (iii).

[(iii) FINDINGS.—The findings described in this clause are, with respect to an alien, that—

[(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and

[(II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.

[(E) CONTINUATION OF HEARING WITHOUT SUMMARY.—If a judge makes the findings described in subparagraph (D)(iii)—

[(i) if the alien involved is an alien lawfully admitted for permanent residence, the procedures described in subparagraph (F) shall apply; and

[(ii) in all cases the special removal hearing shall continue, the Department of Justice shall cause to be delivered to the alien a statement that no summary is possible, and the classified information submitted in camera and ex parte may be used pursuant to this paragraph.

[(F) SPECIAL PROCEDURES FOR ACCESS AND CHALLENGES TO CLASSIFIED INFORMATION BY SPECIAL ATTORNEYS IN CASE OF LAWFUL PERMANENT ALIENS.—

[(i) IN GENERAL.—The procedures described in this subparagraph are that the judge (under rules of the removal court) shall designate a special attorney to assist the alien—

[(I) by reviewing in camera the classified information on behalf of the alien, and

[(II) by challenging through an in camera proceeding the veracity of the evidence contained in the classified information.

[(ii) RESTRICTIONS ON DISCLOSURE.—A special attorney receiving classified information under clause (i)—

[(I) shall not disclose the information to the alien or to any other attorney representing the alien, and

[(II) who discloses such information in violation of subclause (I) shall be subject to a fine under title 18, United States Code, imprisoned for not less than 10 years nor more than 25 years, or both.

[(f) ARGUMENTS.—Following the receipt of evidence, the Government and the alien shall be given fair opportunity to present argument as to whether the evidence is sufficient to justify the removal of the alien. The Government shall open the argument. The alien shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The judge may allow any part of the argument that refers to evidence received in camera and ex parte to be heard in camera and ex parte.

[(g) BURDEN OF PROOF.—In the hearing, it is the Government's burden to prove, by the preponderance of the evidence, that the alien is subject to removal because the alien is an alien terrorist.

[(h) RULES OF EVIDENCE.—The Federal Rules of Evidence shall not apply in a removal hearing.

[(i) DETERMINATION OF DEPORTATION.—If the judge, after considering the evidence on the record as a whole, finds that the Government has met its burden, the judge shall order the alien removed and detained pending removal from the United States. If the alien was released pending the removal hearing, the judge shall order the Attorney General to take the alien into custody.

[(j) WRITTEN ORDER.—At the time of issuing a decision as to whether the alien shall be removed, the judge shall prepare a written order containing a statement of facts found and conclusions of law. Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to subsection (e) shall not be made available to the alien or the public.

[(k) NO RIGHT TO ANCILLARY RELIEF.—At no time shall the judge consider or provide for relief from removal based on—

[(1) asylum under section 208;

[(2) by withholding of removal under section 241(b)(3);

[(3) cancellation of removal under section 240A; [1]

[(4) voluntary departure under section 244(e);

[(5) adjustment of status under section 245; or

[(6) registry under section 249.

[SEC. 505. APPEALS.

[(a) APPEAL OF DENIAL OF APPLICATION FOR REMOVAL PROCEEDINGS.—

[(1) IN GENERAL.—The Attorney General may seek a review of the denial of an order sought in an application filed pursuant to section 503. The appeal shall be filed in the United States Court of Appeals for the District of Columbia Circuit by

notice of appeal filed not later than 20 days after the date of such denial.

[(2) RECORD ON APPEAL.—The entire record of the proceeding shall be transmitted to the Court of Appeals under seal, and the Court of Appeals shall hear the matter ex parte.

[(3) STANDARD OF REVIEW.—The Court of Appeals shall—

[(A) review questions of law de novo; and

[(B) set aside a finding of fact only if such finding was clearly erroneous.

[(b) APPEAL OF DETERMINATION REGARDING SUMMARY OF CLASSIFIED INFORMATION.—

[(1) IN GENERAL.—The United States may take an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit of—

[(A) any determination by the judge pursuant to section 504(e)(3); or

[(B) the refusal of the court to make the findings permitted by section 504(e)(3).

[(2) RECORD.—In any interlocutory appeal taken pursuant to this subsection, the entire record, including any proposed order of the judge, any classified information and the summary of evidence, shall be transmitted to the Court of Appeals. The classified information shall be transmitted under seal. A verbatim record of such appeal shall be kept under seal in the event of any other judicial review.

[(c) APPEAL OF DECISION IN HEARING.—

[(1) IN GENERAL.—Subject to paragraph (2), the decision of the judge after a removal hearing may be appealed by either the alien or the Attorney General to the United States Court of Appeals for the District of Columbia Circuit by notice of appeal filed not later than 20 days after the date on which the order is issued. The order shall not be enforced during the pendency of an appeal under this subsection.

[(2) AUTOMATIC APPEALS IN CASES OF PERMANENT RESIDENT ALIENS IN WHICH NO SUMMARY PROVIDED.—

[(A) IN GENERAL.—Unless the alien waives the right to a review under this paragraph, in any case involving an alien lawfully admitted for permanent residence who is denied a written summary of classified information under section 504(e)(3) and with respect to which the procedures described in section 504(e)(3)(F) apply, any order issued by the judge shall be reviewed by the Court of Appeals for the District of Columbia Circuit.

[(B) USE OF SPECIAL ATTORNEY.—With respect to any issue relating to classified information that arises in such review, the alien shall be represented only by the special attorney designated under section 504(e)(3)(F)(i) on behalf of the alien.

[(3) TRANSMITTAL OF RECORD.—In an appeal or review to the Court of Appeals pursuant to this subsection—

[(A) the entire record shall be transmitted to the Court of Appeals; and

[(B) information received in camera and ex parte, and any portion of the order that would reveal the substance

or source of such information, shall be transmitted under seal.

[(4) EXPEDITED APPELLATE PROCEEDING.—In an appeal or review to the Court of Appeals under this subsection—

[(A) the appeal or review shall be heard as expeditiously as practicable and the court may dispense with full briefing and hear the matter solely on the record of the judge of the removal court and on such briefs or motions as the court may require to be filed by the parties;

[(B) the Court of Appeals shall issue an opinion not later than 60 days after the date of the issuance of the final order of the district court;

[(C) the court shall review all questions of law de novo; and

[(D) a finding of fact shall be accorded deference by the reviewing court and shall not be set aside unless such finding was clearly erroneous, except that in the case of a review under paragraph (2) in which an alien lawfully admitted for permanent residence was denied a written summary of classified information under section 504(c)(3), the Court of Appeals shall review questions of fact de novo.

[(d) CERTIORARI.—Following a decision by the Court of Appeals pursuant to subsection (c), the alien or the Attorney General may petition the Supreme Court for a writ of certiorari. In any such case, any information transmitted to the Court of Appeals under seal shall, if such information is also submitted to the Supreme Court, be transmitted under seal. Any order of removal shall not be stayed pending disposition of a writ of certiorari, except as provided by the Court of Appeals or a Justice of the Supreme Court.

[(e) APPEAL OF DETENTION ORDER.—

[(1) IN GENERAL.—Sections 3145 through 3148 of title 18, United States Code, pertaining to review and appeal of a release or detention order, penalties for failure to appear, penalties for an offense committed while on release, and sanctions for violation of a release condition shall apply to an alien to whom section 507(b)(1) applies. In applying the previous sentence—

[(A) for purposes of section 3145 of such title an appeal shall be taken to the United States Court of Appeals for the District of Columbia Circuit; and

[(B) for purposes of section 3146 of such title the alien shall be considered released in connection with a charge of an offense punishable by life imprisonment.

[(2) NO REVIEW OF CONTINUED DETENTION.—The determinations and actions of the Attorney General pursuant to section 507(b)(2)(C) shall not be subject to judicial review, including application for a writ of habeas corpus, except for a claim by the alien that continued detention violates the alien's rights under the Constitution. Jurisdiction over any such challenge shall lie exclusively in the United States Court of Appeals for the District of Columbia Circuit.

[SEC. 506. CUSTODY AND RELEASE PENDING REMOVAL HEARING.

[(a) UPON FILING APPLICATION.—

[(1) IN GENERAL.—Subject to paragraphs (2) and (3), the Attorney General may—

[(A) take into custody any alien with respect to whom an application under section 503 has been filed; and

[(B) retain such an alien in custody in accordance with the procedures authorized by this title.

[(2) SPECIAL RULES FOR PERMANENT RESIDENT ALIENS.—

[(A) RELEASE HEARING.—An alien lawfully admitted for permanent residence shall be entitled to a release hearing before the judge assigned to hear the removal hearing. Such an alien shall be detained pending the removal hearing, unless the alien demonstrates to the court that the alien—

[(i) is a person lawfully admitted for permanent residence in the United States;

[(ii) if released upon such terms and conditions as the court may prescribe (including the posting of any monetary amount), is not likely to flee; and

[(iii) will not endanger national security, or the safety of any person or the community, if released.

[(B) INFORMATION CONSIDERED.—The judge may consider classified information submitted in camera and ex parte in making a determination whether to release an alien pending the removal hearing.

[(3) RELEASE IF ORDER DENIED AND NO REVIEW SOUGHT.—

[(A) IN GENERAL.—Subject to subparagraph (B), if a judge of the removal court denies the order sought in an application filed pursuant to section 503, and the Attorney General does not seek review of such denial, the alien shall be released from custody.

[(B) APPLICATION OF REGULAR PROCEDURES.—Subparagraph (A) shall not prevent the arrest and detention of the alien pursuant to title II.

[(b) CONDITIONAL RELEASE IF ORDER DENIED AND REVIEW SOUGHT.—

[(1) IN GENERAL.—If a judge of the removal court denies the order sought in an application filed pursuant to section 503 and the Attorney General seeks review of such denial, the judge shall release the alien from custody subject to the least restrictive condition, or combination of conditions, of release described in section 3142(b) and clauses (i) through (xiv) of section 3142(c)(1)(B) of title 18, United States Code, that—

[(A) will reasonably assure the appearance of the alien at any future proceeding pursuant to this title; and

[(B) will not endanger the safety of any other person or the community.

[(2) NO RELEASE FOR CERTAIN ALIENS.—If the judge finds no such condition or combination of conditions, as described in paragraph (1), the alien shall remain in custody until the completion of any appeal authorized by this title.

SEC. 507. CUSTODY AND RELEASE AFTER REMOVAL HEARING.

[(a) RELEASE.—

[(1) IN GENERAL.—Subject to paragraph (2), if the judge decides that an alien should not be removed, the alien shall be released from custody.

[(2) CUSTODY PENDING APPEAL.—If the Attorney General takes an appeal from such decision, the alien shall remain in

custody, subject to the provisions of section 3142 of title 18, United States Code.

[(b) CUSTODY AND REMOVAL.—

[(1) CUSTODY.—If the judge decides that an alien shall be removed, the alien shall be detained pending the outcome of any appeal. After the conclusion of any judicial review thereof which affirms the removal order, the Attorney General shall retain the alien in custody and remove the alien to a country specified under paragraph (2).

[(2) REMOVAL.—

[(A) IN GENERAL.—The removal of an alien shall be to any country which the alien shall designate if such designation does not, in the judgment of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.

[(B) ALTERNATE COUNTRIES.—If the alien refuses to designate a country to which the alien wishes to be removed or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be removed to any country willing to receive such alien.

[(C) CONTINUED DETENTION.—If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General, in coordination with the Secretary of State, shall make periodic efforts to reach agreement with other countries to accept such an alien and at least every 6 months shall provide to the attorney representing the alien at the removal hearing a written report on the Attorney General's efforts. Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate.

[(D) FINGERPRINTING.—Before an alien is removed from the United States pursuant to this subsection, or pursuant to an order of removal because such alien is inadmissible under section 212(a)(3)(B), the alien shall be photographed and fingerprinted, and shall be advised of the provisions of section 276(b).

[(c) CONTINUED DETENTION PENDING TRIAL.—

[(1) DELAY IN REMOVAL.—The Attorney General may hold in abeyance the removal of an alien who has been ordered removed, pursuant to this title, to allow the trial of such alien on any Federal or State criminal charge and the service of any sentence of confinement resulting from such a trial.

[(2) MAINTENANCE OF CUSTODY.—Pending the commencement of any service of a sentence of confinement by an alien described in paragraph (1), such an alien shall remain in the custody of the Attorney General, unless the Attorney General determines that temporary release of the alien to the custody

of State authorities for confinement in a State facility is appropriate and would not endanger national security or public safety.

[(3) SUBSEQUENT REMOVAL.—Following the completion of a sentence of confinement by an alien described in paragraph (1), or following the completion of State criminal proceedings which do not result in a sentence of confinement of an alien released to the custody of State authorities pursuant to paragraph (2), such an alien shall be returned to the custody of the Attorney General who shall proceed to the removal of the alien under this title.

[(d) APPLICATION OF CERTAIN PROVISIONS RELATING TO ESCAPE OF PRISONERS.—For purposes of sections 751 and 752 of title 18, United States Code, an alien in the custody of the Attorney General pursuant to this title shall be subject to the penalties provided by those sections in relation to a person committed to the custody of the Attorney General by virtue of an arrest on a charge of a felony.

[(e) RIGHTS OF ALIENS IN CUSTODY.—

[(1) FAMILY AND ATTORNEY VISITS.—An alien in the custody of the Attorney General pursuant to this title shall be given reasonable opportunity, as determined by the Attorney General, to communicate with and receive visits from members of the alien's family, and to contact, retain, and communicate with an attorney.

[(2) DIPLOMATIC CONTACT.—An alien in the custody of the Attorney General pursuant to this title shall have the right to contact an appropriate diplomatic or consular official of the alien's country of citizenship or nationality or of any country providing representation services therefore. The Attorney General shall notify the appropriate embassy, mission, or consular office of the alien's detention.]

DISSENTING VIEWS

While the amendment in the nature of a substitute reported by the committee is an improvement in some respects over the original bill[1], the reported bill still raises a number of national-security-related concerns regarding its scope and application.

Scope of the Reported Bill

In testimony and public statements made during the 106th Congress, the authors and proponents of H.R. 2121 focused attention on aliens in removal proceedings who were detained for extended periods. However, the scope of the reported bill is significantly broader than necessary to address those concrete concerns. The reported bill would prohibit the INS from using classified or confidential evidence in all immigration proceedings, including those unrelated to removal or long-term detention.

Three such areas should be noted. First, Section 235(c) of the Immigration and Nationality Act allows an INS airport inspector to exclude an arriving alien if confidential evidence indicates that the alien is a security threat. This provision has been used by INS to exclude dangerous aliens from the United States, and the proponents of H.R. 2121 have not demonstrated that this power has been abused. Nonetheless, section 6 of the reported bill would prohibit the INS from using confidential evidence to exclude permanent residents, parolees, or aliens who claim asylum in the United States. Terrorists, including those implicated in the World Trade Center bombings, have in the past used fraudulent asylum claims to remain and operate in the United States. Such abuse should not be facilitated.

Second, section 7(b) of the reported bill would prohibit the INS' use of confidential evidence to deny immigration benefits—including refugee status, asylum, permanent residence, or citizenship—although, again, the proponents of H.R. 2121 have not demonstrated that this power has been abused. Permanent immigration status, if granted, would allow terrorists to remain in the United States indefinitely while raising funds, recruiting personnel, providing logistical support, or planning operations on behalf of their organizations.

Third, section 3(b) of the reported bill would eliminate the Alien Terrorist Removal Court created by the Anti-terrorist and Effective Death Penalty Act of 1996. The ATRC is composed of five district court judges specially designated by the Chief Justice of the United States to preside over terrorist removal proceedings where removal under normal immigration proceedings would pose a risk to national security through disclosure of classified information. The

[1] The amendment deleted sections 5 and 6 of H.R. 2121, two provisions which if enacted would probably have delayed adjudication of immigration benefits and impaired effective detention of criminal aliens.

threshold for convening the ATRC is high, and it has not yet been used. Thus, it cannot be claimed that the ATRC has abused the rights of aliens, and eliminating the ATRC is not reasonable or necessary.

Use of Unclassified Summaries

H.R. 2121 as reported would permit the Justice Department to request an unclassified summary of classified information for use in the adjudication of three types of immigration proceedings: removal of an alien who is a threat to national security, opposition to an application for admission, or opposition to an application for discretionary relief from removal. However, before requesting the summary, the Department would first have to request that the evidence be declassified; in other words, if the Department took the position that the evidence should not be declassified, it could not request an unclassified summary. This exception would probably swallow the rule. It stands to reason that in most cases the Department would believe that sensitive classified information about international terrorists should remain classified. The Department would then be unable to request preparation of an unclassified summary.

In addition, in the rare instance where an unclassified summary was requested and provided, its usefulness would be limited at best. Proponents of H.R. 2121 like Professor David Cole of Georgetown University Law Center and Mr. Gregory Nojeim of the American Civil Liberties Union testified to the committee that unclassified summaries provided to aliens in immigration proceedings are generally insufficient to inform the aliens of the charges against them.[2] Yet H.R. 2121 would require immigration judges to rely on unclassified summaries in their adjudications; the judges would not be allowed to see the classified information itself. The unclassified summaries would most likely not identify sources of classified information for fear of endangering those sources, making it difficult or impossible to judge their credibility. Anticipating this result, many judges would probably refuse to prepare or utilize unclassified summaries in the first place.

While the reported bill appears to allow some limited use of unclassified summaries of classified evidence, in practice it is likely to eliminate the use of classified evidence in immigration proceedings as completely and effectively as the original bill would have done. This is an absolutist approach that is likely to endanger national security. The government would be forced to choose between allowing terrorists to enter and remain in the United States or disclosing classified information that would endanger U.S. intelligence agents and operations.

For the aforementioned reasons, H.R. 2121 should be re-examined and modified to incorporate a more balanced approach.

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[2] Legislative hearing on H.R. 2121, the "Secret Evidence Repeal Act of 1999," House Judiciary Committee, 106th Congress, 2nd Session (May 23, 2000).

ADDITIONAL VIEWS

We join with our colleagues in the dissenting views expressed above. However, it is our further belief that legislation creating a time limitation on the period in which an alien may be detained on the basis of classified evidence would create an appropriate balance between the need to protect the national security and the due process rights that should be afforded to aliens in immigration proceedings. While we have concerns with the scope of H.R. 2121, we agree with the authors of the bill that a time limitation is necessary.

MARY BONO.
BOB GOODLATTE.

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