



## Support the Secret Evidence Repeal Act

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SUPPORT THE SECRET EVIDENCE REPEAL ACT

*No person should be deprived of liberty on the basis of evidence kept secret from the person.*

This simple statement is a fundamental requisite of any fair legal system. "Star Chamber" proceedings conducted out of sight of the accused and her attorney are a feature of totalitarian governments, not of our own. The Supreme Court has said time and again that deportation is a severe deprivation of liberty - one that can separate a person from home, family, career, and "all that makes life worth living." The Secret Evidence Repeal Act of 1999, H.R. 2121, introduced on June 10, 1999 by Representatives Bonior (D-MI), Campbell (R-CA), Conyers (D-MI) and Barr (R-GA) would restore in immigration proceedings this most basic notion of due process under the Fifth Amendment to the U.S. Constitution. It would put an end to the use of secret evidence against non-citizens in deportation proceedings and promote Supreme Court's promise that non-citizens are protected by the Due Process clause of the Fifth Amendment.

### *How Is Secret Evidence Used Now?*

The 1996 Antiterrorism and Effective Death Penalty Act established a new court 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. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act expanded the secret evidence court so that secret evidence could be more easily used to deport even lawful permanent residents as terrorists. It also included provisions allowing the government to use secret evidence to deny bond to *all* detained non-citizens and to deny various discretionary immigration benefits such as asylum to *all* non-citizens, including those not accused of being terrorists.

Though the secret evidence court has not yet heard a 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, such as asylum. In fact, the INS attempts to use secret evidence to deny *mandatory* relief from deportation, such as withholding of deportation, even though it has no statutory authority to do so.

Virtually every recent secret evidence case that has come to public attention involves a Muslim or an Arab. The ACLU represents one such non-citizen, Nasser Ahmed, a 37-year old Egyptian who was denied bond, asylum and withholding based on secret evidence. The immigration judge who heard the evidence said that he had "no doubt" that Mr. Ahmed would be tortured if returned to Egypt. If the decision in his case had been based only on the evidence in the public record -- evidence that Mr. Ahmed had the chance to challenge -- Mr. Ahmed would be a free man today. Instead, he was held in solitary confinement for over three years, and is still being detained, without being told why and thereby given a chance to refute the accusations against him.

Secret evidence is also being used to detain in Florida without bond Mazen Al-Najjar, a stateless Palestinian. One day at breakfast with his wife as he helped his daughters get ready for school, he answered a knock on the door. This 18-year resident of the United States was immediately detained for alleged violations of the immigration laws. When he asked for release on bond -- which is commonly granted similarly-situated non-citizens who are likely to appear for their immigration hearings because of their strong family and community ties -- his request was denied, based on secret evidence. Two years has elapsed and Mr. Al-Najjar still does not know 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 is denying them political asylum based on secret evidence. A legal team including former Director of Central Intelligence R. James Woolsey represents them. 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.

### *What's Wrong with Using Secret Evidence against Non-Citizens?*

Secret evidence undermines our adversarial system. One cannot defend against the unknown accusation whispered to a judge by a secret accuser. In commenting on secret evidence in another context, Justice Frankfurter once said, "Secrecy is not congenial to truth seeking. ... No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72) (Frankfurter, J., concurring). Fairness demands no less.

Secret evidence in the form of classified information often consists of mere rumor and innuendo. It is often unverified and unverifiable. It has not been, and cannot be, tested for reliability under rigorous cross-examination. Sometimes, it can be something as "secret" as a newspaper clipping the substance of which could be refuted if only it was known.

It is impossible to fight charges without knowing the nature of those charges, and who is making them. 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 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.

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 not also provided the accused. However, the Sixth Amendment does not apply in civil proceedings, such as immigration proceedings. One of the problems with the use of secret evidence in immigration cases is the possibility that use would be expanded to other civil matters, such as civil asset forfeiture proceedings.

### ***What Would the Secret Evidence Repeal Act Do?***

The Secret Evidence Repeal Act of 1999 (H.R. 2121) would put an end to the use of secret evidence in immigration proceedings. In regular removal proceedings where the Government is attempting to prove deportability, this is already the rule. The Secret Evidence Repeal Act would expand this rule to all deportation cases, including those involving aliens accused of being terrorists, and to proceedings involving denial of bond, immigration benefits, and to certain persons seeking admission. It has five simple themes.

First, the Government may not use secret evidence to deport non-citizens. It deletes from current law the secret court established in the 1996 anti-terrorism law. It requires the government to use the same removal proceedings against aliens accused of being terrorists that it uses to remove aliens accused of being deportable for other reasons.

Second, the Government may not deny an immigration benefit to any non-citizen based on secret evidence. This would be the case regardless of whether the alien seeks the benefit in removal proceedings or has affirmatively applied for the benefit. Access to immigration benefits is critical to a non-citizen. Sometimes, it can mean the difference between life and death. Asylum is such a benefit. If it is denied, the non-citizen could be sent back to a place in which he or she could be tortured or killed on account of his or her political opinion, race, religion, national origin, or membership in a particular social group. The Government must either disclose this information to both the decision-maker in the case and to the non-citizen so that it can be challenged, or must keep it secret.

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

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

Fifth, in pending cases, where the Government is holding an alien without bond based on secret evidence, or is denying an application for relief such as political asylum based on secret evidence, it must act fairly. The Secret Evidence Repeal Act directs the Department of Justice to either disclose the evidence to the non-citizen or withdraw it from the record, and in either event, the case would be re-heard on the basis of evidence in the public record, unless the Government decided not to proceed.

### ***Does the Secret Evidence Repeal Act Require the Release of Dangerous Terrorists?***

No. The Secret Evidence Repeal Act merely requires the Government to make a choice. It must either reveal the evidence against a non-citizen whose liberty is in jeopardy, or it must keep that information fully secret and outside of immigration proceedings and determinations. Virtually every day, prosecutors make similar choices in criminal cases where a person's liberty is likewise at stake. Though required to make these choices, prosecutions of truly dangerous terrorists, such as those who bombed the World Trade Center and the federal building in Oklahoma City, have been successful. The fight against terrorism need not involve compromise of our most cherished constitutional rights.

### ***Conclusion.***

The American Civil Liberties Union strongly supports the Secret Evidence Repeal Act (H.R. 2121), compliments Reps. Bonior, Campbell, Conyers and Barr for introducing it, and encourages other members to support this bi-partisan legislation.

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