

MEMORANDUM

TO: MARIA ECHAVESTE
FROM: IRENE BUENO
RE: MEETING ON SECRET EVIDENCE LEGISLATION – Friday, October 6, 2000 at 9:30 am in Beth Nolan's office

PURPOSE: The purpose of this meeting is to discuss our position on the House compromise Secret Evidence legislation that is pending House consideration. It appears that Congress plans to pass legislation regardless of our position on this legislation. Given that, we should figure out if there is a legislative compromise that we could support. I do not think that DOJ has thought about that since they did not expect this legislation to move but now that it appears to be moving.

BACKGROUND: H.R. 2121, the Secret Evidence Repeal Act, as amended, was passed by the House Judiciary Committee and may be considered by the House under suspension of the rules as early as next week and there appears to be unanimous support in the House. Similar legislation was introduced in the Senate with bipartisan support and is expected to pass easily as well. However, DOJ strongly opposes the amended version for reasons stated in their draft views letter (see attached) and summarized below. I understand that the Attorney General has approved this letter. Expectedly, DOD and CIA agree with the DOJ position.

DOJ's main objections are the following: the bill appears to (1) effectively ban the use of classified evidence altogether in immigration proceedings, (2) effectively eliminate a type of immigration hearing that is intended to expel terrorists from the United States and has been so used in the past, (3) create a new discovery tool for illegal or unadmitted aliens who are deemed risks to national security, and (4) import procedural requirements designed for criminal cases into the much different setting of immigration proceedings, where they will impair the government's ability to withhold immigration benefits from persons who are not eligible to receive them, including some who may be dangerous.

Mark feels strongly that we can not oppose Bonior and the other Democrats. Maureen feel strongly we cannot oppose it because the President's views on this matter and the views of the Arab American community. She thinks that the DOJ letter puts the Administration in the position of being "strongly opposed" but offering no compromise and that the offer to work with Congress is rather disingenuous given that Congress hopes to leave soon. There is no date certain for the long awaited

guidelines and will these regulations address concerns with secret evidence. See DOJ comments in response to Maureen's comment.

Here are some suggested options:

- **Compromise legislation:** At the very least, before DOJ sends a letter to Congress in opposition to legislation that has substantial support and the President would likely sign, we must discuss with DOJ if there is any legislation that they can support. Then, then they should discuss with Congressional staff their proposed changes and their concerns with the legislation. If DOJ says there is no legislation they can support, then they discuss these concerns with Congressional staff. It would also help our negotiation efforts if DOJ could announce the exact timing of the guidelines. Only, then should they send any kind of letter communicating their position. This letter should be toned down to some extent (e.g. serious concerns, etc.). This approach allows DOJ to try to come up with a compromise and to try to work with Congress on legislation rather than sending a letter that expresses opposition to a bill that the President would likely sign.
- **No position/Silence:** Administration not take a position. I think this would be difficult in light of DOJ and other agencies concerns with the legislation.

ATTENDEES:

**You
Beth Nolan
Mary Beth Cahill
Mary De Rosa
Maureen Shea
Mark Magana
Irene**

AG would rethink some of their promises after consultation w/ POTUS.

Need to communicate what OOS is doing.

Bill may go ~~to~~^{two} far.

ADL is reviewing but don't approve it.

- Get guidelines out
- Educate Cyril staff } James/Kobe - get up to ~~the~~ the point
 } AG - back }
 } DSG }

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On September 26, 2000, the Committee on the Judiciary held a mark up of H.R. 2121, the "Secret Evidence Repeal Act" and reported out by voice vote an amendment in the nature of a substitute. The Department of Justice (Department) recognizes that the substitute amendment seeks to respond to legitimate concerns regarding the use of classified information in immigration proceedings. Thus, the amendment ostensibly aims to ensure that meaningful summaries of classified information will be given to the affected alien in every immigration case -- a goal with which the Department generally agrees and already strives, wherever possible, to achieve.

Unfortunately, however, the bill's provisions go far beyond this ostensible purpose. In fact, the bill appears to (1) effectively ban the use of classified evidence altogether in immigration proceedings, (2) effectively eliminate a type of immigration hearing that is intended to expel terrorists from the United States and has been so used in the past, (3) create a new discovery tool for illegal or unadmitted aliens who are deemed risks to national security, and (4) import procedural requirements designed for criminal cases into the much different setting of immigration proceedings, where they will impair the government's ability to withhold immigration benefits from persons who are not eligible to receive them, including some who may be dangerous. The Department believes these features of the amended bill would benefit from the normal process of subcommittee hearings and full committee scrutiny that this legislation, unveiled for the first time on the morning of the mark-up, did not receive. We would look forward to working with the Committee should it decide to reopen the issue in subcommittee or otherwise. On the other hand, if H.R. 2121 is brought to the House floor in its current form, the Department would strongly oppose its passage because of the provisions outlined above, which are described in more detail below.

We turn now to the four aspects of H.R. 2121 identified above as causing us particular concern. First, although H.R. 2121 as amended claims to fall short of repealing the use of classified information in immigration proceedings, repeal is the practical effect. Section 3(a) of H.R. 2121 as amended adds a new Section 295 to the INA. New Section 295(a)(2) states that 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” At the same time, however, Sections 3, 4, 5, and 6 of the bill explicitly eliminate the Alien Terrorist Removal Court, and repeal the use of classified information in bond proceedings, in most Section 235(c) removal proceedings, and in Section 240 removal proceedings. In other words, the bill effectively eliminates most if not all known uses of classified evidence even as it appears in other provisions to preserve them. We have had difficulty construing the provisions of the proposed bill harmoniously with one another, but it appears at a minimum that, if enacted, this legislation would eliminate the ability of immigration adjudicators in any case to review classified information known to the government, while allowing them in certain limited instances to review an unclassified summary produced in a separate process. We do not think that adjudicators should be deprived of pertinent information in deciding cases that may implicate the national security. Moreover, we think that separating the review of the evidence from the immigration adjudication, as this bill does, would only exacerbate the problems posed by the use of classified evidence, as immigration adjudicators struggle in vain to determine what weight and credence to give the summarized material.

Second, Section 6 of H.R. 2121 prohibits the use of removal proceedings under Section 235(c) of the Immigration and Nationality Act (INA) against not only lawful permanent residents but also parolees, including aliens granted advance parole, and asylum seekers. These prohibitions effectively repeal Section 235(c) in its entirety. Section 235(c) has been a part of the INA since 1952 and, although it is used in only a small number of cases, those cases are of the utmost importance to the national security because 235(c) is limited to aliens who are suspected of being inadmissible on security-related grounds described in Section 212(a)(3) of the INA, including terrorist activity. For example, in 1997, the Immigration and Naturalization Service (INS) initiated Section 235(c) proceedings against an alien suspected of being involved in the bombing of the United States Air Force barracks at Khobar Towers in Saudi Arabia in which 19 American servicemen were killed. This alien was successfully removed from the United States pursuant to 235(c) in 1999. H.R. 2121 as amended would have prevented the INS from utilizing Section 235(c) in that case. The Administration believes that Section 235(c) is a necessary law enforcement tool and should be maintained in the law without limitation.

Third, Section 3(d) would confer wide-ranging and unprecedented discovery rights upon aliens who are not only removable from the United States but also believed to be a danger to the national security. Under long-established law, a respondent in immigration proceedings is not entitled to the same procedural protections as a criminal defendant. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation

hearing.”). Moreover, in contrast even to other civil proceedings, “[t]here is no provision for general discovery, and the right to cross-examine is not unlimited.” *Kulle v. INS*, 825 F.2d 1188, 1194 (7th Cir. 1987); *see also Lopez-Mendoza*, 468 U.S. at 1038 (“[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more.”). H.R. 2121 would effect a radical departure from these norms. Under the bill, aliens in certain removal proceedings would be given the same discovery rights as criminal defendants, and would be presumptively entitled to search a broad range of government materials extending well beyond merely “exculpatory” information, to include, among other things, books, papers, documents, photographs, recordings, and even buildings within the government’s possession or control that are deemed “material” to the alien’s case.¹ *See* H.R. 2121 § 3(a); Fed. R. Crim. P. 16.² Moreover, whereas the government’s disclosure obligations in the criminal context relate to information that might show the defendant did not commit the crime charged, an alien in removal proceedings is likely to be aware of any information bearing on his right to remain in the country, and hence has little need or interest in searching the multitude of files of numerous government agencies for such information. Under these provisions an alien might well assert, for example, a right to search the often extensive and highly sensitive government files relating to the designation of foreign terrorist organizations under section 219 of the INA. Such searches will only be costly, dilatory, and perhaps harmful to the national security, with little likelihood of producing evidence likely to establish the alien’s claim under the INA. In combination with the other provisions of section 3, discussed immediately below, these provisions could jeopardize sensitive national security information and undermine the efforts of the United States government to expel and exclude aliens whose presence here poses a threat to the national security.

Fourth, as discussed above, Section 3 of H.R. 2121 applies the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 (1982), which is a part of the criminal code, to immigration proceedings. CIPA operates in the context of criminal procedural rules that require the government to disclose to criminal defendants various types of material that could potentially aid in the defense. In that context, CIPA allows the government, in lieu of providing the classified national security information itself, to provide an unclassified summary of the information -- but only where the summary “will provide the defendant with substantially the

¹ The notion of “exculpation” is wholly out of place in the context of removal proceedings. As explained above, removal proceedings are not criminal in nature.

² *See also* section 4(b) of the bill, which deletes existing statutory protection for classified information from INA Section 240(c)(2).

same ability to make his defense as would disclosure of the specific classified information.” *Id.* at Section 6(c)(1)(B). This standard can, and often does, lead to the abandonment of criminal prosecutions in the interest of preserving national security information. In fact, CIPA requires that the court shall dismiss an indictment (or take certain other corrective actions) whenever a defendant is prevented from disclosing or causing the disclosure of information necessary to his defense. *Id.* at Section 6(e)(2).

We believe that the transfer of the CIPA regime from the criminal context to the very different setting of immigration proceedings is inappropriate and inadvisable. As an initial matter, the Supreme Court has long held that immigration proceedings are not criminal in nature. *See, e.g., Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.”). Consistent with the civil nature of a deportation proceeding, the “various protections that apply in the context of a criminal trial do not apply.” *Lopez-Mendoza*, 468 U.S. at 1038. Furthermore, even within a deportation proceeding, INS has never used classified evidence to prove that an alien is actually deportable.³ Rather, in those rare instances where such evidence has been introduced, it has been used to demonstrate that an alien who is proven deportable by non-classified evidence or who has not been admitted into the country is not entitled to some immigration relief or benefit -- such as cancellation of removal or asylum -- for which he or she has applied. An adjudication of these forms of relief is clearly different from proceedings in which a judge must decide whether to impose criminal penalties. Accordingly, while the balance Congress struck in CIPA may make sense in the criminal context -- if the government cannot provide a sufficient unclassified summary of the classified evidence, it may have to forgo the prosecution -- it does not make sense in the immigration context to allow an individual who is applying for admission to the country or has been proven deportable by open-source evidence to put the government to a similar choice. Although the Department wherever possible gives an alien a meaningful unclassified summary of any classified evidence used against him, it is sometimes not possible to give a detailed account of the evidence without jeopardizing highly sensitive human or technological intelligence sources. And where the summary cannot safely be given in sufficient detail to satisfy the CIPA standard, H.R. 2121 would require the government to forgo not only the removal proceeding, but also its ability to oppose the conferral of immigration benefits -- benefits that can and generally do lead to citizenship -- upon a removable alien who has no right to enter or stay in this country and whose presence is believed to pose a risk to the national security.

³ The Alien Terrorist Removal Court, created in 1996, provides special procedures to allow the use of classified evidence to prove deportability on terrorism-related grounds. Largely owing to limits on the court’s jurisdiction, no cases have yet been brought in that forum.

Finally, we note that H.R. 2121 is premised on a categorical view of constitutional requirements that appears to be inconsistent with legal precedent and with the House Judiciary Committee's pronouncements on this subject four years ago. Thus, whereas the current bill appears predicated on the notion that use of secret evidence always violates the due process rights of aliens, the House Judiciary Committee correctly observed in 1996 that "[t]he Supreme Court and lower federal courts have upheld the authority of the INS to use classified information in the cases of aliens who seek discretionary relief from deportation, without disclosing such information to the applicant." House Report 104-469 at 164 (March 4, 1996) (citing *Jay v. Boyd*, 351 U.S. 348, 358-60 (1956); *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985)); *see also Barbour v. INS*, 491 F.2d 573, 578 (5th Cir. 1974) ("Discretionary relief -- and release on bail is a form of discretionary relief -- may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security."); *Azzouka v. Sava*, 777 F.2d 68, 76 (2d Cir. 1985) (an alien who is a threat to the national security is not entitled to an asylum hearing); *cf. Tefel v. Reno*, 180 F.3d 1286, 1300-01 (11th Cir. 1999) (aliens have no due process liberty interest in suspension of deportation because "expectation does not equate with liberty or property, and a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award") (citing *Jay*). Thus, while Congress may decide that notions of fairness outweigh the risks of alien terrorists being admitted into the United States or relieved of their immigration law violations, it should not assume that the restrictions in H.R. 2121 are mandated by the Constitution.

For these reasons, the Administration strongly opposes H.R. 2121. As always, however, we stand ready to assist the Congress as it considers reforms in this and other areas. The attached letter of September 27 outlines the steps the Department has taken to address the concerns that have been expressed regarding the use of classified information in immigration proceedings. The Administration believes that the Department's guidelines and regulations will address these concerns. If you have any questions concerning this letter, or if we can be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Robert Raben
Assistant Attorney General

Attachment

IDENTICAL LETTER TO BE SENT TO THE RANKING MINORITY MEMBER,
COMMITTEE ON THE JUDICIARY

hr2121rev1004

10/4/00 0915

October 5, 2000

Note for Lisa Macecevic, OMB

From: Greg Jones, DOJ

Re: WH Public Liaison/other comments on our report on the "secret evidence" bill,
H.R. 2121.

Legislation: It is impossible to meaningfully assess what Congress' true views on the legislation are and certainly impossible to draw any firm conclusions from the legislation's swift approval by the Committee. The recorded vote of 26-2 was on the motion to adopt the substitute amendment, not to report out of committee. Since nearly everyone thought the substitute was better than a complete ban--because it at least allowed for unclassified summaries of classified evidence--even Members like Lamar Smith voted for it. Had there been a rollcall vote instead of a voice vote on reporting out the bill, however, it's not at all clear what the vote spread would be. Certainly, there would have been more than two members voting against that motion. More fundamentally, it's hard to assess the strength of congressional opinion on a measure that has only been in circulation for a week, has never been subjected to any scrutiny in committee, and on which Members have not heard from the Administration. That is not just our view but the view of organizations like the Anti-Defamation League, as well. When the AG and representatives of the Deputy AG's office met with Congressmen Dixon and Davis (both Democrats) on classified evidence last week, they were very interested in our explanation of what some of the problems might be with the bill and we think were surprised by some of its consequences. People voted for the bill because they thought it would guarantee more access to information to the alien and because it was better than an outright ban. When legislation goes forward in a hasty and ill-considered manner, the responsible thing for the Administration to do is not to wring its hands and say "it's going to pass" but rather to stand up and give its own views.

But give views that will make a diff. + not harm

Inaction: The letter does not propose a compromise piece of legislation, but neither does it propose "inaction." On the contrary, it reaffirms (in fact it attaches once again) our prior views letter that spells out what we intend to have in the guidelines and regulations and the fact that we intend to publish these documents this fall.

Approach: The letter does not address an abstract issue of whether legislation is needed because we think it is hard to assess that before people have seen the guidelines and regulations. On the other hand, the letter is certainly not ambiguous on the undesirability of this particular legislative approach.

Conclusion: The notion that the draft letter does not reflect the President's

*than like
see guy
guidelines
so we can
move*

concerns just seems wrong. The very first paragraph acknowledges the "legitimate concerns" about the use of classified evidence and states that the Department shares the "ostensible" goal of the bill, namely to provide summaries of the evidence to the alien. Our prior letter, which will be attached to the new views letter, further states that we share many of Congress' concerns about use of classified evidence and that is why we are taking all of the steps we have outlined. So, to say that we are ignoring the President's "desire to see changes made in the use of classified evidence," just seems incorrect. What we have not done is gone to point of endorsing a ban on classified evidence, but we have not heard that the President has endorsed that, either.

*If we support
summaries, then we
are deft legislation.*

From: Lisa J. Macecevic on 10/04/2000 12:45:53 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Richard E. Green/OMB/EOP@EOP, James J. Jukes/OMB/EOP@EOP, Brooke B. Livingston/OMB/EOP@EOP

Subject: LRM LJM267 -- JUSTICE Report on HR2121 Secret Evidence Repeal Act of 1999

Following is **LJM267** - a DoJ letter on the amended version of HR2121 that was reported by the House Judiciary Committee on September 26th and the amended bill text. **Please note that the letter strongly opposes the bill.**

Please provide any comments by 5:00 PM TODAY - Wednesday, October 4th - as Justice advises the bill could be brought up under suspension of the rules next week.

Thank you.



Letter ----> hr2121rev10-04.wp



Bill Text ----> HR2121 Amendment

AGENCIES: You will also receive this by fax.

EOP Staff: You will not receive a paper copy.

----- Forwarded by Lisa J. Macecevic/OMB/EOP on 10/04/2000 12:41 PM -----

LRM ID: LJM267

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Wednesday, October 4, 2000

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Richard E. Green (for) Assistant Director for Legislative Reference

OMB CONTACT: Lisa J. Macecevic

PHONE: (202)395-1092 FAX: (202)395-3109

SUBJECT: JUSTICE Report on HR2121 Secret Evidence Repeal Act of 1999

DEADLINE: 5:00 PM Wednesday, October 4, 2000

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: Attached is a DoJ letter on the amended version of HR2121 that was reported by the

AG has signed off

Bonnie / Michelson

① Silent

② meet + try to work out
+ put arguments
before letter

③ See letter

④ Under no circumstances
should I

House Judiciary Committee on September 26th and the amended bill text. **Please note that the letter strongly opposes the bill.**

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Thank you.

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James J. Jukes
Brooke B. Livingston
Elizabeth M. Robinson

SUBJECT: JUSTICE Report on HR2121 Secret Evidence Repeal Act of 1999

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

Please include the LRM number shown above, and the subject shown below.

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

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The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On September 26, 2000, the Committee on the Judiciary held a mark up of H.R. 2121, the "Secret Evidence Repeal Act" and reported out by voice vote an amendment in the nature of a substitute. The Department of Justice (Department) recognizes that the substitute amendment seeks to respond to legitimate concerns regarding the use of classified information in immigration proceedings. Thus, the amendment ostensibly aims to ensure that meaningful summaries of classified information will be given to the affected alien in every immigration case -- a goal with which the Department generally agrees and already strives, wherever possible, to achieve.

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repealing the use of classified information in immigration proceedings, repeal is the practical effect. Section 3(a) of H.R. 2121 as amended adds a new Section 295 to the INA. New Section 295(a)(2) states that 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" At the same time, however, Sections 3, 4, 5, and 6 of the bill explicitly eliminate the Alien Terrorist Removal Court, and repeal the use of classified information in bond proceedings, in most Section 235(c) removal proceedings, and in Section 240 removal proceedings. In other words, the bill effectively eliminates most if not all known uses of classified evidence even as it appears in other provisions to preserve them. We have had difficulty construing the provisions of the proposed bill harmoniously with one another, but it appears at a minimum that, if enacted, this legislation would eliminate the ability of immigration adjudicators in any case to review classified information known to the government, while allowing them in certain limited instances to review an unclassified summary produced in a separate process. We do not think that adjudicators should be deprived of pertinent information in deciding cases that may implicate the national security. Moreover, we think that separating the review of the evidence from the immigration adjudication, as this bill does, would only exacerbate the problems posed by the use of classified evidence, as immigration adjudicators struggle in vain to determine what weight and credence to give the summarized material.

3 uses
in 3 other
uses

How expanded?

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★

OK?

OK?

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Give ↑ of imm. and
etc.

other civil proceedings, "[t]here is no provision for general discovery, and the right to cross-examine is not unlimited." *Kulle v. INS*, 825 F.2d 1188, 1194 (7th Cir. 1987); see also *Lopez-Mendoza*, 468 U.S. at 1038 ("[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more."). H.R. 2121 would effect a radical departure from these norms. Under the bill, aliens in certain removal proceedings would be given the same discovery rights as criminal defendants, and would be presumptively entitled to search a broad range of government materials extending well beyond merely "exculpatory" information, to include, among other things, books, papers, documents, photographs, recordings, and even buildings within the government's possession or control that are deemed "material" to the alien's case.¹ See H.R. 2121 § 3(a); Fed. R. Crim. P. 16.² Moreover, whereas the government's disclosure obligations in the criminal context relate to information that might show the defendant did not commit the crime charged, an alien in removal proceedings is likely to be aware of any information bearing on his right to remain in the country, and hence has little need or interest in searching the multitude of files of numerous government agencies for such information. Under these provisions an alien might well assert, for example, a right to search the often extensive and highly sensitive government files relating to the designation of foreign terrorist organizations under section 219 of the INA. Such searches will only be costly, dilatory, and perhaps harmful to the national security, with little likelihood of producing evidence likely to establish the alien's claim under the INA. In combination with the other provisions of section 3, discussed immediately below, these provisions could jeopardize sensitive national security information and undermine the efforts of the United States government to expel and exclude aliens whose presence here poses a threat to the national security.

Shouldn't we support more info for imm. given large #s, we fight for their rights in work context

limit it

Fourth, as discussed above, Section 3 of H.R. 2121 applies the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 (1982), which is a part of the criminal code, to immigration proceedings. CIPA operates in the context of criminal procedural rules that require the government to disclose to criminal defendants various types of material that could potentially aid in the defense. In that context, CIPA allows the government, in lieu of providing the classified national security information itself, to provide an unclassified summary of the information -- but only where the summary "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Id.* at Section 6(c)(1)(B). This standard can, and often does, lead to the abandonment of criminal prosecutions in the interest of preserving national security information. In fact, CIPA requires that the court shall dismiss an indictment (or take certain other corrective actions) whenever a defendant is prevented from disclosing or causing the disclosure of information necessary to his defense. *Id.* at Section 6(e)(2).

¹ The notion of "exculpation" is wholly out of place in the context of removal proceedings. As explained above, removal proceedings are not criminal in nature.

² See also section 4(b) of the bill, which deletes existing statutory protection for classified information from INA Section 240(c)(2).

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We believe that the transfer of the CIPA regime from the criminal context to the very different setting of immigration proceedings is inappropriate and inadvisable. As an initial matter, the Supreme Court has long held that immigration proceedings are not criminal in nature. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution."). Consistent with the civil nature of a deportation proceeding, the "various protections that apply in the context of a criminal trial do not apply." *Lopez-Mendoza*, 468 U.S. at 1038. Furthermore, even within a deportation proceeding, INS has never used classified evidence to prove that an alien is actually deportable.³ Rather, in those rare instances where such evidence has been introduced, it has been used to demonstrate that an alien who is proven deportable by non-classified evidence or who has not been admitted into the country is not entitled to some immigration relief or benefit -- such as cancellation of removal or asylum -- for which he or she has applied. An adjudication of these forms of relief is clearly different from proceedings in which a judge must decide whether to impose criminal penalties. Accordingly, while the balance Congress struck in CIPA may make sense in the criminal context -- if the government cannot provide a sufficient unclassified summary of the classified evidence, it may have to forgo the prosecution -- it does not make sense in the immigration context to allow an individual who is applying for admission to the country or has been proven deportable by open-source evidence to put the government to a similar choice. Although the Department wherever possible gives an alien a meaningful unclassified summary of any classified evidence used against him, it is sometimes not possible to give a detailed account of the evidence without jeopardizing highly sensitive human or technological intelligence sources. And where the summary cannot safely be given in sufficient detail to satisfy the CIPA standard, H.R. 2121 would require the government to forgo not only the removal proceeding, but also its ability to oppose the conferral of immigration benefits -- benefits that can and generally do lead to citizenship -- upon a removable alien who has no right to enter or stay in this country and whose presence is believed to pose a risk to the national security.

Finally, we note that H.R. 2121 is premised on a categorical view of constitutional requirements that appears to be inconsistent with legal precedent and with the House Judiciary Committee's pronouncements on this subject four years ago. Thus, whereas the current bill appears predicated on the notion that use of secret evidence always violates the due process rights of aliens, the House Judiciary Committee correctly observed in 1996 that "[t]he Supreme Court and lower federal courts have upheld the authority of the INS to use classified information in the cases of

³ The Alien Terrorist Removal Court, created in 1996, provides special procedures to allow the use of classified evidence to prove deportability on terrorism-related grounds. Largely owing to limits on the court's jurisdiction, no cases have yet been brought in that forum.

aliens who seek discretionary relief from deportation, without disclosing such information to the applicant." House Report 104-469 at 164 (March 4, 1996) (citing *Jay v. Boyd*, 351 U.S. 348, 358-60 (1956); *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985)); see also *Barbour v. INS*, 491 F.2d 573, 578 (5th Cir. 1974) ("Discretionary relief -- and release on bail is a form of discretionary relief -- may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security."); *Azzouka v. Sava*, 777 F.2d 68, 76 (2d Cir. 1985) (an alien who is a threat to the national security is not entitled to an asylum hearing); cf. *Tefel v. Reno*, 180 F.3d 1286, 1300-01 (11th Cir. 1999) (aliens have no due process liberty interest in suspension of deportation because "expectation does not equate with liberty or property, and a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award") (citing *Jay*). Thus, while Congress may decide that notions of fairness outweigh the risks of alien terrorists being admitted into the United States or relieved of their immigration law violations, it should not assume that the restrictions in H.R. 2121 are mandated by the Constitution.

For these reasons, the Administration strongly opposes H.R. 2121. As always, however, we stand ready to assist the Congress as it considers reforms in this and other areas. The attached letter of September 27 outlines the steps the Department has taken to address the concerns that have been expressed regarding the use of classified information in immigration proceedings. The Administration believes that the Department's guidelines and regulations will address these concerns. If you have any questions concerning this letter, or if we can be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Robert Raben
Assistant Attorney General

Attachment

IDENTICAL LETTER TO BE SENT TO THE RANKING MINORITY MEMBER,
COMMITTEE ON THE JUDICIARY

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10/4/00 0915

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**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2121
OFFERED BY**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

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

4 SEC. 2. FINDINGS.

5 The Congress makes the following findings:

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

11 (2) Removal from the United States can sepa-
12 rate a person from the person's family, may expose
13 the person to persecution and torture, and amounts
14 to a severe deprivation of liberty.

15 (3) Use of secret evidence in immigration pro-
16 ceedings deprives the alien of due process rights

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1 guaranteed under the United States Constitution
2 and undermines our adversarial system, which relies
3 on cross-examination as an engine of truth-seeking.

4 **SEC. 3. APPLICATION OF PROCEDURES USED UNDER CLAS-**
5 **SIFIED INFORMATION PROCEDURES ACT**
6 **(CIPA) TO IMMIGRATION PROCEEDINGS.**

7 (a) APPLICATION OF PROCEDURES USED UNDER
8 CLASSIFIED INFORMATION PROCEDURES ACT (CIPA) TO
9 IMMIGRATION PROCEEDINGS.—

10 (1) IN GENERAL.—Chapter 9 of title II of such
11 Act is amended by adding at the end the following
12 new section:

13 “APPLICATION OF PROCEDURES USED UNDER CLASSI-
14 FIED INFORMATION PROCEDURES ACT TO IMMIGRA-
15 TION PROCEEDINGS

16 “SEC. 295. (a) NOTICE OF INTENDED USE OF CLAS-
17 SIFIED INFORMATION.—

18 “(1) IN GENERAL.—In any immigration pro-
19 ceeding in which the Attorney General seeks to use
20 classified information, the Attorney General shall in-
21 form the alien and the presiding officer in advance.
22 To the maximum extent practicable, if the Attorney
23 General is initiating such proceeding, the Attorney
24 General shall provide such notice within 15 days
25 after initiating the proceeding.

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

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

11 “(B) The Attorney General has informed
12 the classifying agency of its intent to use the
13 classified information in connection with immi-
14 gration proceedings and has requested such
15 agency to declassify such information as is per-
16 mitted to be declassified under the President’s
17 Executive Order on classification.

18 “(b) REFERRAL OF CLASSIFIED MATTERS TO DIS-
19 TRICT COURT.—

20 “(1) IN GENERAL.—In the case of an immigra-
21 tion proceeding in which Attorney General or alien
22 moves for a referral under this section to consider
23 matters relating to classified information that may
24 arise in connection with the proceeding, the pre-
25 siding officer shall forward the petition for review to

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1 a Federal district court for the district in which the
2 alien resides or the place where the immigration pro-
3 ceedings are pending, of the use of such information
4 in such proceeding under subsection (c). Any evi-
5 dence which is the subject of a petition shall not be
6 considered in the immigration proceeding and shall
7 not be examined by the presiding officer, except as
8 provided in paragraph (3).

9 "(2) SUSPENSION OF IMMIGRATION PRO-
10 CEEDING.—In the case of an order or review pro-
11 vided for under paragraph (1), the immigration pro-
12 ceeding may be suspended by the presiding officer
13 pending the disposition of such matter by the dis-
14 trict court involved (and any appeals related to such
15 matter).

16 "(3) SUBMISSION OF SUMMARY.—In the case of
17 a referral under paragraph (1)(A), after the applica-
18 tion of subsection (c), the district court shall issue
19 an order to the presiding officer at the proceeding
20 indicating any unclassified summary of classified in-
21 formation, and admissions in lieu of disclosure of
22 classified information, that may be used and the
23 conditions of its use at the proceeding. The pre-
24 siding officer shall determine whether any informa-

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1 tion approved by the order may be offered at the im-
2 migration proceeding.

3 "(c) APPLICATION OF CIPA.—

4 "(1) IN GENERAL.—Subject to the succeeding
5 provisions of this section, in the cases described in
6 subsection (b)(1) involving review by a Federal dis-
7 trict court of the use of classified information in an
8 immigration proceeding, the provisions of the Classi-
9 fied Information Procedures Act (18 U.S.C. Appen-
10 dix III) (in this section referred to as 'CIPA') shall
11 apply to an alien who is a subject of the immigration
12 proceeding in the same manner as it applies to a de-
13 fendant in a criminal proceeding subject to such Act.

14 "(2) GENERAL RULES OF APPLICATION.—In
15 applying such Act under subsection (a), the fol-
16 lowing general rules apply:

17 "(A) Any reference in such Act to—

18 "(i) a criminal defendant or a trial (or
19 pre-trial) proceeding is deemed to be a ref-
20 erence to the alien who is the subject of
21 the immigration proceeding and to the im-
22 migration proceeding;

23 "(ii) an indictment or information at
24 issue is deemed to be a reference to a no-
25 tice to appear;

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1 “(iii) a dismissal of an indictment or
2 information is deemed a reference to termi-
3 nation of the immigration proceeding
4 against an alien; and

5 “(iv) a trial court is deemed a ref-
6 erence (in the case of an administrative
7 immigration proceeding) to the presiding
8 officer in such proceeding.

9 “(B) The provisions of section 2 of such
10 Act (other than the last sentence) shall not be
11 applied.

12 “(C) The Attorney General shall prescribe
13 rules establishing procedures for the protection
14 against unauthorized disclosure of classified in-
15 formation in the custody of the Federal non-ju-
16 dicial officials in immigration proceedings. Such
17 rules shall apply instead of the rules described
18 in section 9 of CIPA.

19 “(D) Section 12 of CIPA shall not be ap-
20 plied to immigration proceedings.

21 “(E) In lieu of the reports described in
22 section 13 of CIPA, the Attorney General shall
23 report annually and in writing to the chairmen
24 and ranking minority members of the Commit-
25 tees on the Judiciary of the Senate and the

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1 House of Representatives on the implementa-
2 tion of this section. Such reports shall include
3 the following information about each case,
4 brought under this section:

5 “(i) The alien’s country of citizenship
6 or, if the alien was stateless, the country in
7 which the alien last habitually resided out-
8 side of the United States.

9 “(ii) The alien’s immigration status.

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

12 “(iv) Whether the Federal district
13 court approved the summary of classified
14 information and the deletions or admis-
15 sions proffered by the Attorney General.

16 “(v) Whether the alien was ultimately
17 ordered removed under section
18 237(a)(4)(B) or was granted or denied ad-
19 mission or the benefit for which the alien
20 applied.

21 “(d) DISCLOSURE OF EXCULPATORY EVIDENCE.—In
22 any immigration proceeding under this section, the Attor-
23 ney General shall disclose to the alien information that
24 it would be required to disclose to a defendant in an analo-
25 gous criminal proceeding under CIPA.

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1 “(e) CONSTRUCTION CONCERNING DECLASSIFICA-
2 TION OF INFORMATION.—Nothing in this section shall be
3 construed as preventing an alien in an immigration pro-
4 ceeding from seeking access to classified information
5 under section 552 of title 5, United States Code, or, in
6 the case of information which is not disclosed based on
7 section 552(b)(1) of such title, from initiating an action
8 to seek to declassify some or all of the information in-
9 volved.

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

11 “(1) IMMIGRATION PROCEEDING.—The term
12 ‘immigration proceeding’ means any administrative
13 proceeding under this Act.

14 “(2) PRESIDING OFFICER.—The term ‘pre-
15 siding officer’ means, with respect to an immigration
16 proceeding, the administrative or judicial official who
17 is presiding over the immigration proceeding.”.

18 “(b) CONFORMING AMENDMENT.—Title V of the Im-
19 migration and Nationality Act (8 U.S.C. 1531–1537) is
20 repealed.

21 “(c) CLERICAL AMENDMENTS.—The table of contents
22 for such Act is amended—

23 (1) by inserting after the item relating to sec-
24 tion 294 the following new item:

“Sec. 295. Application of procedures used under classified information proce-
dures act to immigration proceedings.”; and

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

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

5 (a) **ALIEN'S RIGHTS IN PROCEEDINGS.**—Section
6 240(b)(4)(B) of the Immigration and Nationality Act (8
7 U.S.C. 1229a(b)(4)(B)) is amended to read as follows:

8 “(B) the alien shall have a reasonable op-
9 portunity to examine all of the evidence against
10 the alien, to present evidence on the alien's own
11 behalf, and to cross-examine all witnesses pre-
12 sented by the Government, and”.

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

16 “In meeting the burden of proof under subpara-
17 graph (B), the alien shall have access to the alien's
18 visa or other entry document, if any, and any other
19 records and documents pertaining the alien's admis-
20 sion or presence in the United States.”.

21 **SEC. 5. REPEAL OF USE OF SECRET EVIDENCE IN BOND**
22 **PROCEEDINGS.**

23 Section 236 of the Immigration and Nationality Act
24 (8 U.S.C. 1226) is amended by adding at the end the fol-
25 lowing:

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1 “(f) ALIENS’ RIGHTS IN BOND PROCEEDINGS.—In
2 proceedings under this section—

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

7 “(2) the alien shall have a reasonable oppor-
8 tunity to examine all of the evidence against the
9 alien, to present evidence on the alien’s own behalf,
10 and to cross-examine all witnesses presented by the
11 Government; and

12 “(3) a complete record shall be kept of all testi-
13 mony and evidence produced at the proceeding.”.

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

18 Section 235(c)(1) of the Immigration and Nationality
19 Act (8 U.S.C. 1225(c)(1)) is amended by striking “If” and
20 inserting: “Except in the case of an alien who (i) is a law-
21 ful permanent resident; (ii) was granted advance parole;
22 (iii) was paroled into the United States under section
23 212(d)(5); or (iv) is seeking asylum, if”.

1 SEC. 7. TRANSITION:

2 (a) APPLICATION TO DETAINEES.—Not more than
3 30 days after the effective date of this Act, the Attorney
4 General shall, with respect to any alien then detained or
5 whose liberty is otherwise restricted by the Attorney Gen-
6 eral, on the basis in whole or in part of information sub-
7 mitted by the Government ex parte and in camera to an
8 immigration judge, to the Board of Immigration Appeals
9 or to any court—

10 (1) provide such alien a copy or transcript of
11 such information, and provide the alien with a rede-
12 termination of bond (or a reconsideration of the
13 terms of custody, as the case may be) based on evi-
14 dence disclosed to the alien and the alien's response
15 to such evidence; or

16 (2) withdraw from the record of any pro-
17 ceedings involving such alien any and all evidence,
18 testimony, or other information submitted by the
19 Government ex parte and in camera to the immigra-
20 tion judge, the Board of Immigration Appeals, or to
21 any court, as the case may be, and—

22 (A) release such alien if such alien is de-
23 tained; and

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

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1 the application or reopen the proceedings and afford
2 the alien de novo reconsideration of the application,
3 as the case may be, based solely on evidence in the
4 public record; or

5 (3) grant the application.

6 (c) TERMINATION OF PROCEEDINGS.—In the case of
7 an alien in immigration proceedings as of the effective
8 date of this Act conducted under title V of the Immigra-
9 tion and Nationality Act—

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

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

17 SEC. 8. REGULATIONS.

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

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1 SEC. 9. EFFECTIVE DATE.

2 The amendments made by this Act shall take effect
3 on the date of the enactment of this Act and shall apply
4 to all aliens without regard to the date of arrival, admis-
5 sion, entry, or parole into the United States.



The Honorable Bob Barr
Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

September 25, 2000

The Honorable John Conyers
Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Representative Bob Barr, Representative John Conyers and
Representative Jerrold Nadler:

I am specifically writing to you concerning the proposed Classified Information Procedures Act (CIPA) Amendment to the Secret Evidence Repeal Act, H.R. 2121.

My name is Juliette Kayyem and I recently served as one of Minority Leader Richard Gephardt's appointments to the National Commission on Terrorism. Before my appointment, I was a legal counsel at the Department of Justice where I worked on civil rights issues, including cases involving classified information. I presently serve as an Associate for the Executive Session on Domestic Preparedness at the Belfer Center for Science and International Affairs, John F. Kennedy School of Government, where I teach on America's counter-terrorism policy. I have testified before several Senate and House hearings on terrorism.

The secret evidence cases have engendered a great amount of controversy. The fact that people are being held in America based on evidence they can not see runs counter to our notions of basic fairness and the right to confrontation. Furthermore, through an aggressive litigation campaign, flaws within the classification process regarding the quality and reliability of the information have been exposed, making the entire process appear suspect. The vast majority of aliens in these cases are Muslims or Arabs.

I applaud the effort presently being considered to provide for a CIPA amendment to H.R. 2121. As a former Commissioner on the National Commission on Terrorism, which recommended providing for increased protections for those being detained based on secret evidence, these proposed changes are a welcome compromise that will not undermine the nation's security. On a more personal note, as an Arab-American, the impact that these three or four cases have had on the Arab and Muslim community can not be quantified. With a more sound, open and justifiable process, communities that have long felt alienated from our law enforcement efforts may begin to have more faith that America's war on terrorism does not target persons based on their nationality or ethnicity.

Based on concerns over how classified information is presently being utilized, H.R. 2121 would prohibit the Government from using any classified information in immigration proceeding. A CIPA Amendment to the Secret Evidence Repeal Act is an appropriate and sound compromise to the present debate regarding the use of classified information in immigration proceedings.

A properly constructed CIPA Amendment provides the government with an important tool when it believes that classified information is the only means to detain a suspected national security threat. In the event that classified information absolutely had to be utilized to detain an immigrant, the government would still be able to do so. Yet, instead of keeping the proceedings within the exclusive province of the immigration courts, a CIPA change would permit a federal district court to oversee the creation of an unclassified summary of the classified information. With such an unclassified summary, the government's interest in protecting sources and procedures would be maintained without fully compromising an alien's interest in being able to wage a defense.

In many ways, this amendment might be desirable for the INS and the Department of Justice. The Department of Justice has only a few secret evidence cases still pending. While that may suggest that the Department only brings these cases in the most important matters, such a small number can hardly justify the litigation expenses, political debates and constitutional challenges involved in every single secret evidence case. Since the CIPA amendment would apply to only a handful of cases, and be both legally and politically acceptable, it would provide the Department with a means to protect the national interest without resort to constant, and often unsuccessful, litigation. Because the Alien Terrorism Removal Court (ATRC) has never been utilized, then there is no tangible loss to the Department's national security prosecutions if they went directly to district court. Indeed, from the immigration judge's perspective, the CIPA amendment would provide him or her with a legally defensible means to detain an alien without consistent threat that federal district courts would reevaluate classified files upon habeas review. It would, in other words, provide immigration judges -- who have no ability to declassify information or rule on constitutional challenges -- some assurance that the information before them is sound and legitimate.

The proposed CIPA Amendment would not unduly advantage aliens suspected of terrorism or national security violations relative to other aliens. The early access to federal court review is appropriate in light of the qualitatively different nature (from both the government's and alien's perspective) of these national security cases, a difference recognized by this Congress in the 1996 AEDPA legislation. In particular, aliens subject to these charges -- unlike other aliens -- will not have knowledge of the evidence against

them unless they are given access to the CIPA envisioned judicial review. In this respect, the CIPA Amendment simply ensures that aliens charged with national security violations have the same opportunity to defend themselves against allegations as any other alien would. There are, after all, less than half a dozen secret evidence cases pending; most terrorism cases are successfully brought in open, federal courts without resort to our immigration laws. Thus, federal review will hardly have an impact in either our immigration or federal district courts.

The Department of Justice is making a good faith effort to ensure the legitimacy and accuracy of the secret evidence cases. The review of the cases, and proposed regulations to the process now within the Department of Justice, may go a long way to provide that past abuses do not recur. Nothing in that review, however, is inconsistent with the CIPA Amendment. Indeed, the Department has long defended and supported the legitimacy and fairness of CIPA in criminal cases. Given the serious deprivations that can occur when an alien is denied knowledge concerning the basis for his detention, this compromise properly balances the legitimate and competing interests of both the government and the alien.

The National Commission on Terrorism also confronted the difficult issue regarding secret evidence cases. The Commission Report was an aggressive review of where our government needed to reassess its counter-terrorism strategy. While our specific proposal on secret evidence involved the potential use of cleared defense counsel in any future secret evidence cases, what is important to recognize is that the Commission understood that, when it came to the secret evidence cases, *the status quo could not hold*.¹ The CIPA compromise is an important step towards coming to resolution about these difficult and challenging cases.

¹ The specific recommendation reads:

The Attorney General should direct the Department of Justice to pursue vigorously the criminal prosecution of terrorists in an open court whenever possible; [and]

The Attorney General should further direct that where national security requires the use of secret evidence in administrative immigration cases, procedures for cleared counsel and unclassified summaries, such as those provided in the ATRC, should be used.

Countering the Changing Threat of International Terrorism: Report from the National Commission on Terrorism, at 32.

I continue to believe that the most sound counter-terrorism policies are those that have broad support of the American public. Using this test, the present use of secret evidence has failed. The CIPA compromise is an important contribution to ensuring that our counter-terrorism efforts are not only effective, but also legitimate.²

Respectfully,

A handwritten signature in black ink, appearing to read "Juliette Kayyem", with a long, sweeping horizontal stroke extending to the right.

Juliette Kayyem

Commissioner, Nov. 1999-June 2000
National Commission on Terrorism

² If you, or your staff, have any additional questions, I can be contacted at (617)495-9962.

Calendar No. 825

106th CONGRESS

2d Session

S. 3095

To amend the Immigration and Nationality Act to remove certain limitations on the eligibility of aliens residing in the United States to obtain lawful permanent resident status.

IN THE SENATE OF THE UNITED STATES

September 21, 2000

Mr. KENNEDY (for himself, Mr. REID, Mr. DURBIN, Mr. REED, Mr. DASCHLE, Mr. GRAHAM, Mr. LEAHY, Mr. KERRY, and Mr. WELLSTONE) introduced the following bill; which was read the first time

September 22, 2000

Read the second time and placed on the calendar

A BILL

To amend the Immigration and Nationality Act to remove certain limitations on the eligibility of aliens residing in the United States to obtain lawful permanent resident status.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Latino and Immigrant Fairness Act of 2000'.

TITLE I--CENTRAL AMERICAN AND HAITIAN PARITY

SEC. 101. SHORT TITLE.

This title may be cited as the 'Central American and Haitian Parity Act of 2000'.

SEC. 102. ADJUSTMENT OF STATUS FOR CERTAIN NATIONALS FROM EL SALVADOR, GUATEMALA, HONDURAS, AND HAITI.

Section 202 of the Nicaraguan Adjustment and Central American Relief Act is amended--

(1) in the section heading, by striking 'NICARAGUANS AND CUBANS' and inserting

'NICARAGUANS, CUBANS, SALVADORANS, GUATEMALANS, HONDURANS, AND HAITIANS';

(2) in subsection (a)(1)(A), by striking '2000' and inserting '2004';

(3) in subsection (b)(1), by striking 'Nicaragua or Cuba' and inserting 'Nicaragua, Cuba, El Salvador, Guatemala, Honduras, or Haiti'; and

(4) in subsection (d)--

(A) in subparagraph (A), by striking 'Nicaragua or Cuba' and inserting 'Nicaragua, Cuba, El Salvador, Guatemala, Honduras, or Haiti; and

(B) in subparagraph (E), by striking '2000' and inserting '2004'.

SEC. 103. APPLICATIONS PENDING UNDER AMENDMENTS MADE BY SECTION 203 OF THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT.

An application for relief properly filed by a national of Guatemala or El Salvador under the amendments made by section 203 of the Nicaraguan Adjustment and Central American Relief Act which was filed on or before the date of enactment of this Act, and on which a final administrative determination has not been made, shall, at the election of the applicant, be considered to be an application for adjustment of status under the provisions of section 202 of the Nicaraguan Adjustment and Central American Relief Act, as amended by sections 102 and 105 of this Act, upon the payment of any fees, and in accordance with procedures, that the Attorney General shall prescribe by

regulation. The Attorney General may not refund any fees paid in connection with an application filed by a national of Guatemala or El Salvador under the amendments made by section 203 of that Act.

SEC. 104. APPLICATIONS PENDING UNDER THE HAITIAN REFUGEE IMMIGRATION FAIRNESS ACT OF 1998.

An application for adjustment of status properly filed by a national of Haiti under the Haitian Refugee Immigration

Fairness Act of 1998 which was filed on or before the date of enactment of this Act, and on which a final

administrative determination has not been made, may be considered by the Attorney General to also constitute an

application for adjustment of status under the provisions of section 202 of the Nicaraguan Adjustment and Central

American Relief Act, as amended by sections 102 and 105 of this Act.

SEC. 105. TECHNICAL AMENDMENTS TO THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT.

(a) IN GENERAL- Section 202 of the Nicaraguan Adjustment and Central American Relief Act is amended--

(1) in subsection (a)--

(A) by inserting before the period at the end of paragraph (1)(B) the following: `, and the Attorney

General may waive the grounds of inadmissibility specified in section 212(a)(1) (A)(i) and (6)(C) of

such Act for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest';

(B) by redesignating paragraph (2) as paragraph (3);

(C) by inserting after paragraph (1) the following:

“(2) INAPPLICABILITY OF CERTAIN PROVISIONS- In determining the eligibility of an alien

described in subsection (b) or (d) for either adjustment of status under this section or other relief necessary

to establish eligibility for such adjustment, the provisions of section 241(a)(5) of the Immigration and

Nationality Act shall not apply. In addition, an alien who would otherwise be inadmissible pursuant to section

212(a)(9) (A) or (C) of such Act may apply for the Attorney General's consent to reapply for admission

without regard to the requirement that the consent be granted prior to the date of the alien's reembarkation at

a place outside the United States or attempt to be admitted from foreign contiguous territory, in order to

qualify for the exception to those grounds of inadmissibility set forth in section 212(a)(9) (A)(iii) and (C)(ii)

of such Act.'; and

(D) by amending paragraph (3) (as redesignated by subparagraph (B)) to read as follows:

`(3) RELATIONSHIP OF APPLICATION TO CERTAIN ORDERS- An alien present in the United

States who has been ordered excluded, deported, or removed, or ordered to depart voluntarily from the

United States under any provision of the Immigration and Nationality Act may, notwithstanding such order,

apply for adjustment of status under paragraph (1). Such an alien may not be required, as a condition of

submitting or granting such application, to file a separate motion to reopen, reconsider, or vacate such order.

Such an alien may be required to seek a stay of such an order in accordance with subsection (c) to prevent

the execution of that order pending the adjudication of the application for adjustment of status. If the

Attorney General denies a stay of a final order of exclusion, deportation, or removal, or if the Attorney

General renders a final administrative determination to deny the application for adjustment of status, the

order shall be effective and enforceable to the same extent as if the application had not been made. If the

Attorney General grants the application for adjustment of status, the Attorney General shall cancel the

order.';

(2) in subsection (b)(1), by adding at the end the following: `Subsection (a) shall not apply to an alien

lawfully admitted for permanent residence, unless the alien is applying for relief under that subsection in

deportation or removal proceedings.';

(3) in subsection (c)(1), by adding at the end the following: 'Nothing in this Act requires the Attorney

General to stay the removal of an alien who is ineligible for adjustment of status under this Act.';

(4) in subsection (d)–

(A) by amending the subsection heading to read as follows: 'SPOUSES,
CHILDREN, AND
UNMARRIED SONS AND DAUGHTERS- ';

(B) by amending the heading of paragraph (1) to read as follows:
'ADJUSTMENT OF STATUS- ';

(C) by amending paragraph (1)(A) to read as follows:

'(A) the alien entered the United States on or before the date of enactment of the
Central American
and Haitian Parity Act of 2000;';

(D) in paragraph (1)(B), by striking 'except that in the case of' and inserting the
following: 'except
that--

'(i) in the case of such a spouse, stepchild, or unmarried stepson or
stepdaughter, the qualifying
marriage was entered into before the date of enactment of the Central American
and Haitian
Parity Act of 2000; and

'(ii) in the case of'; and

(E) by adding at the end the following new paragraph:

'(3) ELIGIBILITY OF CERTAIN SPOUSES AND CHILDREN FOR ISSUANCE
OF IMMIGRANT
VISAS-

'(A) IN GENERAL- In accordance with regulations to be promulgated by the
Attorney General and
the Secretary of State, upon approval of an application for adjustment of status to
that of an alien
lawfully admitted for permanent residence under subsection (a), an alien who is
the spouse or child of
the alien being granted such status may be issued a visa for admission to the
United States as an

immigrant following to join the principal applicant, if the spouse or child--

`(i) meets the requirements in paragraphs (1)(B) and (1)(D); and

`(ii) applies for such a visa within a time period to be established by such regulations.

`(B) RETENTION OF FEES FOR PROCESSING APPLICATIONS- The Secretary of State may retain fees to recover the cost of immigrant visa application processing and issuance for certain spouses and children of aliens whose applications for adjustment of status under subsection (a) have been approved. Such fees--

`(i) shall be deposited as an offsetting collection to any Department of State appropriation to recover the cost of such processing and issuance; and

`(ii) shall be available until expended for the same purposes of such appropriation to support consular activities.';

(5) in subsection (g), by inserting `, or an immigrant classification,' after `for permanent residence'; and

(6) by adding at the end the following new subsection:

`(i) STATUTORY CONSTRUCTION- Nothing in this section authorizes any alien to apply for admission to, be admitted to, be paroled into, or otherwise lawfully return to the United States, to apply for, or to pursue an application for adjustment of status under this section without the express authorization of the Attorney General.'.

(b) EFFECTIVE DATE- The amendments made by paragraphs (1)(D), (2), and (6) shall be effective as if included in the enactment of the Nicaraguan and Central American Relief Act. The amendments made by paragraphs (1) (A)-(C), (3), (4), and (5) shall take effect on the date of enactment of this Act.

SEC. 106. TECHNICAL AMENDMENTS TO THE HAITIAN REFUGEE IMMIGRATION FAIRNESS ACT OF 1998.

(a) IN GENERAL- Section 902 of the Haitian Refugee Immigration Fairness Act of 1998 is amended--

(1) in subsection (a)--

(A) by inserting before the period at the end of paragraph (1)(B) the following: ', and the Attorney

General may waive the grounds of inadmissibility specified in section 212(a)(1)(A)(i) and (6)(C) of such Act for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest';

(B) by redesignating paragraph (2) as paragraph (3);

(C) by inserting after paragraph (1) the following:

'(2) INAPPLICABILITY OF CERTAIN PROVISIONS- In determining the eligibility of an alien described in subsection (b) or (d) for either adjustment of status under this section or other relief necessary to establish eligibility for such adjustment, or for permission to reapply for admission to the United States for the purpose of adjustment of status under this section, the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply. In addition, an alien who would otherwise be inadmissible pursuant to section 212(a)(9) (A) or (C) of such Act may apply for the Attorney General's consent to reapply for admission without regard to the requirement that the consent be granted prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, in order to qualify for the exception to those grounds of inadmissibility set forth in section 212(a)(9) (A)(iii) and (C)(ii) of such Act.'; and

(D) by amending paragraph (3) (as redesignated by subparagraph (B)) to read as follows:

'(3) RELATIONSHIP OF APPLICATION TO CERTAIN ORDERS- An alien present in the United

States who has been ordered excluded, deported, removed, or ordered to depart voluntarily from the

United States under any provision of the Immigration and Nationality Act may, notwithstanding such order,

apply for adjustment of status under paragraph (1). Such an alien may not be required, as a condition of

submitting or granting such application, to file a separate motion to reopen, reconsider, or vacate such order.

Such an alien may be required to seek a stay of such an order in accordance with subsection (c) to prevent

the execution of that order pending the adjudication of the application for adjustment of status. If the

Attorney General denies a stay of a final order of exclusion, deportation, or removal, or if the Attorney

General renders a final administrative determination to deny the application for adjustment of status, the

order shall be effective and enforceable to the same extent as if the application had not been made. If the

Attorney General grants the application for adjustment of status, the Attorney General shall cancel the order.';

(2) in subsection (b)(1), by adding at the end the following: 'Subsection (a) shall not apply to an alien

lawfully admitted for permanent residence, unless the alien is applying for such relief under that subsection in deportation or removal proceedings.';

(3) in subsection (c)(1), by adding at the end the following: 'Nothing in this Act shall require the Attorney

General to stay the removal of an alien who is ineligible for adjustment of status under this Act.';

(4) in subsection (d)--

(A) by amending the subsection heading to read as follows: 'SPOUSES, CHILDREN, AND

UNMARRIED SONS AND DAUGHTERS- ';

(B) by amending the heading of paragraph (1) to read as follows: 'ADJUSTMENT OF STATUS- ';

(C) by amending paragraph (1)(A), to read as follows:

'(A) the alien entered the United States on or before the date of enactment of the Central American and Haitian Parity Act of 2000;';

(D) in paragraph (1)(B), by striking 'except that in the case of' and inserting the following: 'except

that--

`(i) in the case of such a spouse, stepchild, or unmarried stepson or stepdaughter, the qualifying marriage was entered into before the date of enactment of the Central American and Haitian Parity Act of 2000; and

`(ii) in the case of;

(E) by adding at the end of paragraph (1) the following new subparagraph:

`(E) the alien applies for such adjustment before April 3, 2004.'; and

(F) by adding at the end the following new paragraph:

`(3) ELIGIBILITY OF CERTAIN SPOUSES AND CHILDREN FOR ISSUANCE OF IMMIGRANT VISAS-

`(A) IN GENERAL- In accordance with regulations to be promulgated by the Attorney General and the Secretary of State, upon approval of an application for adjustment of status to that of an alien lawfully admitted for permanent residence under subsection (a), an alien who is the spouse or child of the alien being granted such status may be issued a visa for admission to the United States as an immigrant following to join the principal applicant, if the spouse or child--

`(i) meets the requirements in paragraphs (1)(B) and (1)(D); and

`(ii) applies for such a visa within a time period to be established by such regulations.

`(B) RETENTION OF FEES FOR PROCESSING APPLICATIONS- The Secretary of State may retain fees to recover the cost of immigrant visa application processing and issuance for certain spouses and children of aliens whose applications for adjustment of status under subsection (a) have been approved. Such fees--

`(i) shall be deposited as an offsetting collection to any Department of State appropriation to recover the cost of such processing and issuance; and

`(ii) shall be available until expended for the same purposes of such appropriation to support consular activities.';

(5) in subsection (g), by inserting `, or an immigrant classification,' after `for permanent residence';

(6) by redesignating subsections (i), (j), and (k) as subsections (j), (k), and (l), respectively; and

(7) by inserting after subsection (h) the following new subsection:

`(i) STATUTORY CONSTRUCTION- Nothing in this section authorizes any alien to apply for admission to, be admitted to, be paroled into, or otherwise lawfully return to the United States, to apply for, or to pursue an application for adjustment of status under this section without the express authorization of the Attorney General.'

(b) EFFECTIVE DATE- The amendments made by paragraphs (1)(D), (2), and (6) shall be effective as if included in the enactment of the Haitian Refugee Immigration Fairness Act of 1998. The amendments made by paragraphs (1) (A)-(C), (3), (4), and (5) shall take effect on the date of enactment of this Act.

SEC. 107. MOTIONS TO REOPEN.

(a) NATIONALS OF HAITI- Notwithstanding any time and number limitations imposed by law on motions to reopen, a national of Haiti who, on the date of enactment of this Act, has a final administrative denial of an application for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998, and is made eligible for adjustment of status under that Act by the amendments made by this Act, may file one motion to reopen an exclusion, deportation, or removal proceeding to have the application reconsidered. Any such motion shall be filed within 180 days of the date of enactment of this Act. The scope of any proceeding reopened on this basis shall be limited to a determination of the alien's eligibility for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998.

(b) NATIONALS OF CUBA- Notwithstanding any time and number limitations imposed by law on motions to reopen, a national of Cuba or Nicaragua who, on the date of enactment of the Act, has a final administrative denial of an application for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act, and who is made eligible for adjustment of status under that Act by the amendments made by this Act, may file one motion to reopen an exclusion, deportation, or removal proceeding to have the application reconsidered. Any such motion shall be filed within 180 days of the date of enactment of this Act. The scope of any proceeding reopened on this basis shall be limited to a determination of the alien's eligibility for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act.

TITLE II--ADJUSTMENT OF STATUS OF OTHER ALIENS

SEC. 201. ADJUSTMENT OF STATUS.

(a) GENERAL AUTHORITY- Notwithstanding any other provision of law, an alien described in subsection (b) and subsection (c) shall be eligible for adjustment of status by the Attorney General under the same procedures and under the same grounds of eligibility as are applicable to the adjustment of status of aliens under section 202 of the Nicaraguan Adjustment and Central American Relief Act.

(b) COVERED ALIENS- An alien described in this subsection is any alien who was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and who has been physically present in the United States for a continuous period, beginning not later than December 1, 1995, and ending not earlier than the date the application for adjustment under subsection (a) is filed, except an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence, or absences, from the United States for any periods in the aggregate not exceeding 180 days; and

(c) any alien who is a national of Liberia and who has been physically present in the United States for a continuous

period, beginning not later than December 31, 1996, and ending not earlier than the date the application for adjustment under subsection (a) is filed, except an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence, or absences, from the United States for any periods in the aggregate not exceeding 180 days.

TITLE III--RESTORATION OF SECTION 245(i) ADJUSTMENT OF STATUS BENEFITS

SEC. 301. REMOVAL OF CERTAIN LIMITATIONS ON ELIGIBILITY FOR ADJUSTMENT OF STATUS UNDER SECTION 245(i).

(a) IN GENERAL- Section 245(i)(1) of the Immigration and Nationality Act (8 U.S.C. 1255(i)(1)) is amended by striking '(i)(1)' through 'The Attorney General' and inserting the following:

'(i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States who--

'(A) entered the United States without inspection; or

'(B) is within one of the classes enumerated in subsection (c) of this section;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General'.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall be effective as if included in the enactment of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Public Law 105-119; 111 Stat. 2440).

SEC. 302. USE OF SECTION 245(i) FEES.

Section 245(i)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1255(i)(3)(B)) is amended to read as follows:

'(B) One-half of any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 286(m), and one-half

of any remaining portion of such fees shall be deposited by the Attorney General into the Breached Bond/Detention

Fund established under section 286(r).'

TITLE IV--EXTENSION OF REGISTRY BENEFITS

SEC. 401. SHORT TITLE.

This title may be cited as the 'Date of Registry Act of 2000'.

SEC. 402. RECORD OF ADMISSION FOR PERMANENT RESIDENCE IN THE CASE OF CERTAIN ALIENS.

(a) IN GENERAL- Section 249 of the Immigration and Nationality Act (8 U.S.C. 1259) is amended--

(1) in subsection (a), by striking 'January 1, 1972' and inserting 'January 1, 1986'; and

(2) by striking 'JANUARY 1, 1972' in the heading and inserting 'JANUARY 1, 1986'.

(b) EFFECTIVE DATES-

(1) GENERAL RULE- The amendments made by subsection (a) shall take effect on the date of enactment of this Act.

(2) EXTENSION OF DATE OF REGISTRY-

(A) PERIOD BEGINNING JANUARY 1, 2002- Beginning on January 1, 2002, section 249 of the

Immigration and Nationality Act (8 U.S.C. 1259) is amended by striking 'January 1, 1986' each place it appears and inserting 'January 1, 1987'.

(B) PERIOD BEGINNING JANUARY 1, 2003- Beginning on January 1, 2003, section 249 of

such Act is amended by striking 'January 1, 1987' each place it appears and inserting 'January 1, 1988'.

(C) PERIOD BEGINNING JANUARY 1, 2004- Beginning on January 1, 2004, section 249 of

such Act is amended by striking 'January 1, 1988' each place it appears and inserting 'January 1, 1989'.

(D) PERIOD BEGINNING JANUARY 1, 2005- Beginning on January 1, 2005, section 249 of

such Act is amended by striking 'January 1, 1989' each place it appears and inserting 'January 1, 1990'.

(E) PERIOD BEGINNING JANUARY 1, 2006- Beginning on January 1, 2006, section 249 of

such Act is amended by striking 'January 1, 1990' each place it appears and inserting 'January 1, 1991'.

(3) TABLE OF CONTENTS- The table of contents of the Immigration and Nationality Act is amended by amending the item relating to section 249 to read as follows:

'Sec. 249. Record of admission for permanent residence in the case of certain aliens who entered the United States prior to July 1, 1924 or January 1, 1986.'

(c) EFFECTIVE DATE- The amendments made by this section shall take effect on January 1, 2001, and the amendment made by subsection (a) shall apply to applications to record lawful admission for permanent residence that are filed on or after January 1, 2001.

Calendar No. 825

106th CONGRESS

2d Session

S. 3095

A BILL

To amend the Immigration and Nationality Act to remove certain limitations on the eligibility of aliens residing in the United States to obtain lawful permanent resident status.

Eastern Europe

- change the date 1990 - 1995
- more automatic adjustment

~~the bill is now obligatory~~

E.E. / Senate

- We already have something in our bill - ~~more later~~

What's our objections

- support Parity b/c of foreign policy. ~~the~~ H.R. is focused on party in immigration.
- E.E. -
- what about the other countries in the world?
- Discriminatory

#s of people



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2000

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

It is my understanding that on September 26, 2000, the Committee on the Judiciary intends to mark up H.R. 2121, the "Secret Evidence Repeal Act." By way of background, the INS has been using classified information in certain immigration cases for a long time. Indeed, some use of classified information in the immigration context has been expressly permitted by regulation since 1917 and was sanctioned by statute in 1952 and again four years ago. See, e.g., 8 U.S.C. §1229a(b)(4)(B) (Supp. IV 1994). The Supreme Court, moreover, has upheld the use of classified evidence in certain settings, see, e.g., Jay v. Boyd, 351 U.S. 345 (1956); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

I would like to outline the steps the Department of Justice (Department) has taken to address the concerns that have been expressed regarding the use of classified information in immigration proceedings. The Department has for several months been working to draft regulations and guidelines related to the use of classified evidence; we intend to make these documents public this fall. These documents would establish an internal review process that would limit the use of classified evidence by: a) imposing standards for classified evidence that must be met by any component of the Department advocating the use of classified evidence in a particular case; b) establishing a review process within the Department involving people outside the originating component that would evaluate the evidence, pursuant to specified standards, before recommending its use in a particular case; c) requiring approval by the Attorney General or the Deputy Attorney General before any classified evidence is submitted in a particular case; and d) establishing mechanisms to expedite the adjudication of cases in which classified evidence is used to detain an alien.

We want to emphasize that the Department understands and acknowledges the serious concerns about the *ex parte*, *in camera* use of classified information in immigration proceedings. We take these matters seriously, and we do not casually resort to the use of classified

information. For that reason, the Department has put into place an interim internal process for review of classified cases that incorporates some of these principles and which appears to have already had some impact in reducing the use of classified evidence in immigration proceedings. I am told that no new classified evidence cases have been brought this calendar year, and that the total number of pending classified evidence cases has been reduced to nine (of which only three are detained) from a high of about 24 two years ago. The Executive Office for Immigration Review hears more than 200,000 cases each year.

With the steps that the Department has taken to date and the future implementation of new procedures that will mandate careful scrutiny before classified evidence is filed in immigration proceedings, the Department believes that the ability of the INS to introduce classified information in immigration proceedings should be maintained in the current law. Congress recognized the need for the use of classified information in a limited category of cases in 1996, when it codified previously existing INS regulations and federal court precedent.

Thank you for the opportunity to comment on this important matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



Robert Raben
Assistant Attorney General

IDENTICAL LETTER TO BE SENT TO THE CHAIRMAN,
COMMITTEE ON THE JUDICIARY



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2000

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

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I would like to outline the steps the Department of Justice (Department) has taken to address the concerns that have been expressed regarding the use of classified information in immigration proceedings. The Department has for several months been working to draft regulations and guidelines related to the use of classified evidence; we intend to make these documents public this fall. These documents would establish an internal review process that would limit the use of classified evidence by: a) imposing standards for classified evidence that must be met by any component of the Department advocating the use of classified evidence in a particular case; b) establishing a review process within the Department involving people outside the originating component that would evaluate the evidence, pursuant to specified standards, before recommending its use in a particular case; c) requiring approval by the Attorney General or the Deputy Attorney General before any classified evidence is submitted in a particular case; and d) establishing mechanisms to expedite the adjudication of cases in which classified evidence is used to detain an alien.

We want to emphasize that the Department understands and acknowledges the serious concerns about the *ex parte, in camera* use of classified information in immigration proceedings. We take these matters seriously, and we do not casually resort to the use of classified

information. For that reason, the Department has put into place an interim internal process for review of classified cases that incorporates some of these principles and which appears to have already had some impact in reducing the use of classified evidence in immigration proceedings. I am told that no new classified evidence cases have been brought this calendar year, and that the total number of pending classified evidence cases has been reduced to nine (of which only three are detained) from a high of about 24 two years ago. The Executive Office for Immigration Review hears more than 200,000 cases each year.

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Thank you for the opportunity to comment on this important matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



Robert Raben

Assistant Attorney General

IDENTICAL LETTER TO BE SENT TO THE CHAIRMAN,
COMMITTEE ON THE JUDICIARY

Secret Evidence - 8/7/00

Arab Am suggestions

(1) too ~~na~~ narrow

DOT guidance ^{indemn steps - Deputy A.G. must approve} _{proposed by}

(1) OLC

(2) OLC

(3) ^{available elsewhere} Too similar

(4) ~~too similar~~ summary whenever possible.

(5) ~~too similar~~ credible evidence

} DOT has alot of discretion

- How can you ~~to~~ make sure that it's not be overused.

- #s have gone down - shld explain.

- Give DOT a deadline on ~~the~~ the page ~~that~~ ^{final take} he and

- May call Brad by other both will call AG

↳ what's metric

- ME will mention this to re AG at Cal. Mtg.

MEMORANDUM

TO: MARIA ECHAVESTE
FROM: IRENE BUENO
RE: SECRET EVIDENCE
Monday, August 7, 2000 at 6 PM in your office

PURPOSE: We are meeting to discuss the Secret Evidence memorandum prepared by DOJ in response to a letter from Arab American leaders who met with the President earlier this year (see attached memo & letter). I think the question is do we want to push back on DOJ or wait to review their draft guidance/regulations to limit the use of secret evidence in immigration proceedings.

BACKGROUND: In a letter to the President, the Arab American community suggested that secret evidence only be used under two circumstances: (1) when the government has reliable and credible evidence that the individual has engaged in or is planning to engage in specific criminal activity that threatens national security; and (2) the government can give the affected individual a summary that affords him or her substantially the same opportunity to defend himself or herself as would the classified evidence itself.

DOJ opposes these proposals and believes that its proposed guidance/regulations will address these concerns. The aim of the new draft procedures would be to ensure that secret evidence is only very limited circumstances: (1) the evidence is important to the case in which it is being used; (2) the evidence is properly classified; (3) there is no unclassified source from which the very same evidence could be obtained; (4) the individual is provided an unclassified summary of the information whenever possible and with as much detail possible; and (5) they are confident about the reliability of the evidence.

DOJ believes that the Arab American proposals would undermine national security if DOJ only use secret evidence in these very limited circumstances and would reward with immigrant benefits (e.g. asylum, withholding of removal) those who may be unworthy of these benefits. For example, if there is secret evidence that an individual seeking immigration relief helped to raise funding for terrorist organizations, this evidence could not be used in immigration proceeding because it is not illegal. In addition, DOJ thinks that making public a summary of secret

evidence could threaten national security or jeopardize highly human or technological sources rather they proposes to make summaries available only as required under Classified Information Procedures Act (CIPA).

ATTENDEES:

You
Beth Nolan – by phone
Irene Bueno
Mary De Rosa
Wendy Patten



U. S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

June 9, 2000

TO: Beth Nolan
Counsel to the President

THROUGH: THE ATTORNEY GENERAL *[Signature]* July 10, 2000

THROUGH: THE DEPUTY ATTORNEY GENERAL *[Signature]* 6-9-00

FROM: James E. Castello *J.E.C.*
Associate Deputy Attorney General

RE: Classified Evidence in Immigration Proceedings

As you know, there has been increasing public attention focused on the use of classified evidence in immigration proceedings. In particular, certain members of Congress have proposed legislation to bar such use of this evidence. In addition, leaders of Arab-American groups have met with both the Deputy Attorney General and the Attorney General, as well as more recently with the President, to express their concern about the INS's classified evidence cases, many of which involve aliens from predominantly Arab or Muslim countries. At their meeting with the President earlier this year, these Arab-American leaders said they wanted to propose an approach to using classified evidence that would substantially limit what is already a very limited use of such evidence in immigration proceedings. That proposal was subsequently submitted to the President in a letter from Azizah Y. al-Hibri, and you have asked us to comment on it.¹

¹ This memo addresses only the use of classified evidence in conventional removal proceedings under Title II of the Immigration and Nationality Act (INA) and does not discuss the possible use of such evidence to prove deportability in the Alien Terrorist Removal Court (ATRC), under INA Title V. No ATRC cases have yet been initiated. The ATRC can only be used if, among other requirements, the Attorney General certifies to the removal court that she has classified evidence indicating that the particular alien is a terrorist *and* that his "removal under Title II would pose a risk to the national security of the United States." 8 U.S.C.

The Department of Justice shares some of the concerns expressed by members of Congress and community leaders. In 1998, the Attorney General asked the Deputy to oversee a review of pending INS cases in which classified evidence was being used, to determine whether the evidence was properly classified and whether its substance was appropriate to the case. That review, which has been carried out with the help of senior lawyers from the Civil Division's Office of Immigration Litigation, the Office of Intelligence Policy and Review, the INS's General Counsel's office, the FBI's National Security Law Unit and the Deputy Attorney General's office, led to a determination that some of the evidence in certain cases was improperly classified by the classifying agency. This evidence, chiefly found in the cases of the so-called "Iraqi Six," was thereafter declassified. The review also led to the development of a new process for approving any proposed use of classified evidence in INS cases. That process has required review of proposed classified evidence by the components listed above and approval by either the Deputy Attorney General or the Attorney General. In addition, the Department has taken steps to accelerate the adjudication of immigration cases in which aliens are detained; the Board of Immigration Appeals has, for example, set a firm goal--which has been met in the vast majority of cases--of disposing of each appeal involving a detained alien within six months. Thus, detained cases, including those involving classified information, should now be adjudicated more expeditiously than in the past. Finally, at the Attorney General's direction, a working group led by the Deputy's office has been drafting new guidelines and regulations that are intended to govern future use of classified evidence and will embody the reforms that have already been put in place as well as possibly others. The aim of the new draft procedures, as they are presently envisioned, would be to ensure that classified evidence is only used where five crucial criteria are met: (1) the evidence is important to the case in which it is being used; (2) the evidence is properly classified; (3) there is no unclassified source from which the very same evidence could be obtained; (4) the alien is provided an unclassified summary of the information wherever possible and with as much detail as possible, and (5) we are as confident as we can be about the reliability of the evidence. The Department is continuing to discuss the draft regulations and whether there are additional ways in which we may need to protect the interests of aliens in proceedings while still seeking to protect national security.

Some community leaders and congressional members have sought to go beyond the reforms already implemented or being considered by the Department. They advocate either an outright prohibition against, or an extreme restriction of, the use of classified evidence in

§1533(a)(1)(D)(iii) (Supp. IV 1994). The National Commission on Terrorism seems to have overlooked this statutory requirement when (in the Commission's recent report, released June 5) it implicitly criticizes the Department of Justice for bringing classified evidence cases before immigration judges rather than in the ATRC. The Commission's report also appears to criticize the Department for not extending to Title II proceedings the ATRC provision that permits (in some circumstances) cleared counsel for the alien to review the classified evidence. This criticism again seems misplaced since, as the Commission itself acknowledges, the relevant ATRC provision applies only to counsel for legal permanent residents (LPRs). None of the aliens in the INS's current classified evidence cases is an LPR.

immigration cases. The letter to the President from Mr. al-Hibri typifies the latter approach, and in fact it closely resembles a proposal espoused by Professor David Cole, a lawyer who has represented many of the aliens in INS's classified evidence cases. The al-Hibri letter recommends that the President direct that classified evidence not be used except where (1) the Department can demonstrate that the alien "has engaged in or is planning to engage in specific criminal activity that threatens the national security," and (2) the alien is given a summary of the classified evidence that "affords him or her substantially the same opportunity to defend himself as would the classified evidence itself." The Department does not support adoption of these restrictions on classified evidence use. Rather, it believes there will continue to be a limited but important number of immigration cases in which classified evidence should be placed before the immigration judge or other adjudicator (so that he can determine whether the alien should be admitted to the United States, granted relief from removal, or released from detention) but in which cases it will either be difficult to prove that the alien has committed a crime or impossible to provide a summary of the classified evidence that satisfies the proposed standard without significantly jeopardizing intelligence sources or methods or other national security interests.

In evaluating the proposed reforms, it is important to remember that the use of classified evidence in immigration cases is extremely rare. At this moment, there are more than 180,000 alien removal cases in various stages of adjudication nationwide, and in only 11 of those cases is classified evidence being used by the INS (and only four involve detained aliens). Moreover, that number suggests a recent decline. When the Deputy's office began its review of these cases two years ago, there were about 24 cases; we have reviewed a total of 29 cases in the past two years. Many of those cases have either reached an end in the adjudication process or been settled, and there have been only two cases initiated in the past year. (In one of those cases, the evidence was never used because the alien voluntarily left the country before the hearing.) This decline may reflect the increased scrutiny to which classified evidence is subjected within the INS and the Department before its use is authorized.

Secondly, the purposes for which classified evidence has been used in the immigration cases we have reviewed are quite limited. For example, the evidence has never been used to prove that an alien is deportable. These aliens typically concede either that they are in the United States illegally or that they have no legal right to be admitted. Accordingly, all of the classified evidence cases reviewed to date have involved aliens who either (1) are in the country illegally (for example, having overstayed their visa), or (2) are not admitted into the country and are seeking admission (including those who were previously paroled temporarily into the country and whose parole has been revoked). In these circumstances, the classified evidence is introduced to show either (1) that an alien should not receive immigration relief from removal (or release from detention pending removal), which is within the Attorney General's discretion to grant or deny, or (2) to prevent the alien's admission into the United States. Consider, as an example of an immigration benefit, that an alien who is out of status may seek asylum to avoid removal from the country. Asylum can be denied for several specified reasons, including that "there are reasonable grounds for regarding the alien as a danger to the security of the United States," 8 U.S.C. §1158(b)(2)(A)(iv) (Supp. IV 1994), and it also can be denied as a general

exercise of discretion by the Attorney General or her delegates.² Other types of discretionary decisions on immigration relief that the INS has made, at least in part, on the basis of classified evidence include decisions about cancellation of removal, and release from detention pending removal. We believe it is appropriate to inform immigration judges or other adjudicators of risks posed by the aliens who are seeking such a discretionary benefit.

(There is one nondiscretionary context in which classified evidence has been used. INS automatically considers an application for asylum to be, as well, an application for withholding of removal. Accordingly, classified evidence that INS introduces to show that a particular alien is ineligible for asylum is also used to establish ineligibility for withholding. An alien who is granted withholding is protected against being removed to a particular country where he or she would be persecuted. This is not a discretionary form of relief, since the government has a statutory obligation not to remove an alien to such a country once the alien's eligibility for withholding has been established. However, as with asylum, an alien is statutorily ineligible for the relief of withholding if "there are reasonable grounds for regarding the alien as a danger to the security of the United States," 8 U.S.C. §1231(b)(3)(B)(iv) (Supp. IV 1994), and it is in that context that the INS has used classified evidence. The use of classified information in adjudicating withholding claims is expressly permitted by DOJ regulation, see 8 C.F.R. §240.33(c)(4), and it has been upheld by two appellate courts and a district court (noted below). Nevertheless, such use of classified evidence has never been evaluated in any detail by the courts, and the practice is being examined internally by the Department.)

The final point is that INS has been using classified information in the types of immigration cases just indicated for a long time. Indeed, some use of classified information in the immigration context has been expressly permitted by regulation since 1917 and sanctioned by statute since 1952, and its current uses were largely codified by Congress four years ago. See, e.g., 8 U.S.C. §1229a(b)(4)(B) (Supp. IV 1994) (in removal proceedings, alien is "not entitle[d] ... 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"). The Supreme Court, moreover, has upheld the use of classified evidence in certain settings, see, e.g., Jay v. Boyd, 351 U.S. 345 (1956) (upholding, on statutory grounds, the use of confidential information to deny suspension of deportation and stating in dictum that the statute's "constitutionality ... as herein interpreted gives us no difficulty"); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (finding that reliance on confidential information to deny admission to alien whose immigration status was equivalent to an initial

² Although INS has nearly always offered classified evidence to show that a particular alien is a threat to national security or public safety, occasionally INS has been required to use classified evidence in a case where it has raised no such objection to the alien. Typically, in the latter kind of case, an alien seeking asylum (or other benefit) claims that he had a relationship with a U.S. intelligence agency that led to a promise of, or otherwise entitled him to, immigration relief. It is often not possible to respond to such a claim without using some classified information.

entrant did not deprive him of due process), and has observed that, because deportation is not a criminal proceeding and is not a punishment, aliens are not entitled to the same constitutional protections as criminal defendants. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

Aliens subjected to the use of classified information and their supporters often cite two fairly recent appellate court decisions disapproving particular uses of classified evidence. However, neither decision involved the kind of circumstances at issue in the current INS cases or that were at issue in the Supreme Court rulings upholding classified evidence use. See American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995) (enjoining use of classified information to deny an alien legalization under IRCA's 1986 amnesty provision, which the court characterized as a "mandatory statutory provision" requiring "that 'the Attorney General shall adjust' the alien's status if the statutory eligibility requirements are satisfied"); Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (finding that the procedural minimum of INA section 235(c)'s summary exclusion proceedings, which included the use of classified evidence, was insufficient when applied to a lawful permanent resident returning to the United States from abroad after a brief three week absence).

It should be noted that several other appellate court rulings have upheld the use of such evidence. See, e.g., Azzouka v. Meese, 820 F.2d 585 (2d Cir. 1987)(per curiam) (upholding use of classified evidence to deny withholding--which the court persisted in calling "asylum"--on national security grounds); Suciu v. INS, 755 F.2d 127 (8th Cir. 1985) (per curiam) (upholding use of classified evidence "with national security implications" to deny adjustment of status, suspension and withholding); United States ex rel. Barbour v. INS, 491 F.2d 573 (5th Cir.), cert. denied, 419 U.S. 873 (1974) (upholding the use of classified evidence to deny a bond redetermination during deportation proceedings and expressly rejecting due process claim). The district court decisions on classified evidence have also been mixed. Compare El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982) (upholding use of classified evidence to exclude returning alien with student visa in summary proceedings pursuant to INA §235(c)); Avila v. Rivkind, 724 F. Supp. 945 (S.D. Fla. 1989) (upholding use of classified evidence to exclude alien under §235(c) and deny his applications for asylum and withholding); Kiarelddeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999) (finding statute that appears to permit use of classified evidence to detain deportable aliens was unconstitutional as applied in particular case); Al Najjar v. Reno, ___ F. Supp. 2d ___, 2000 WL 726358 (S.D. Fla. 2000) (holding that use of classified evidence in a bond proceeding violated due process because the Attorney General's discretion to grant bond "was not 'unfettered' or 'purely an act of grace'" and therefore due process protections were required and procedure applied in particular case was not sufficient).

The Supreme Court has not spoken further on the issue of classified evidence in immigration proceedings since it issued Jay v. Boyd and Mezei, more than forty years ago. Notwithstanding the passage of time, we do not doubt the continued vitality of the holdings in

those cases.³ We recognize, however, that the Court has elaborated its due process jurisprudence in the intervening decades, *see, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1974), and that there is a considerable range of variables in classified evidence cases (e.g., the procedural posture of a case, the immigration status and history of an alien, the particular determination that classified evidence is used to support) that may--depending upon their configuration in a particular case--implicate liberty interests in ways not yet resolved by the Supreme Court. Neither *Jay v. Boyd* nor *Mezei* addresses how to evaluate the use of confidential information where an alien does have an interest protected by the Due Process Clause. Thus, the Department continues to assess whether additional protections need to be incorporated in its proposed procedures for handling these cases.

Nothing in the Department's ongoing analysis, however, has suggested that the reforms proposed by Mr. al-Hibri must be adopted. First, barring the use of classified evidence unless it demonstrates the commission or the planning of a crime that directly threatens national security would essentially force the government to grant immigration benefits to aliens who do not merit such benefits and may even be statutorily barred from receiving them. Classified evidence can demonstrate many bases for withholding an immigration benefit short of proving the commission of a specific crime that threatens national security. Consider, for example, evidence that an alien personally committed terrorist acts abroad; or raised money for a hostile foreign terrorist group at a time when U.S. criminal law did not comprehensively prohibit fundraising for designated foreign terrorist organizations; or helped a nondesignated foreign terrorist group purchase arms abroad. Such an alien's actions may or may not have violated a specific U.S. criminal statute in effect at the time of his activities, depending on various factors. But even if these actions (or other forms of support for a terrorist organization) may not lead to a criminal prosecution, the alien's conduct may, for example, amount to "engaging in terrorist activity" under the INA, *see* 8 U.S.C. §1182(a)(3)(B)(iii) (Supp. IV 1994) (bar to admissibility); constitute "reasonable grounds for regarding the alien as a danger to the security of the United States," 8 U.S.C. §1158(b)(2)(A)(iv) (Supp. IV 1994) (bar to asylum); or otherwise support the discretionary

³ A recent Court decision, while not dealing with classified evidence, does suggest that the Court continues to evaluate constitutional challenges to the deportation process with a special awareness of Executive Branch authority in this area. In *Reno v. Arab-American Anti-Discrimination Committee*, 525 U.S. 471 (1999), several deportable aliens who were members of an alleged terrorist organization claimed violation of their First Amendment rights on the basis of selective deportation. The Court held they had no constitutional right to assert such claims and, in that context, offered these views about the extent to which the government had to explain its motives in deporting an alien: "What will be involved in deportation cases is not merely the disclosure of normal domestic law-enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (*as in this case*) *foreign-intelligence products and techniques*. The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat ...and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*, at 491 (emphasis added).

denial of relief. Thus, an adjudicator who is considering granting an immigration benefit to an alien who has engaged in this kind of conduct should be made aware of such evidence and make his or her assessment of whether it warrants a denial of that benefit. Public disclosure of that information, however, would harm national security. In these rare cases, the Department believes that an alien who is here illegally or who has no right to be admitted, and as to whom there are reasonable grounds to believe he or she is a risk to national security or public safety, should not be awarded an immigration benefit simply because we are unwilling to harm our national security by revealing the classified information that shows him or her to be undeserving of that benefit.

Similarly, the proposal that classified evidence be withheld from the adjudicator unless, in every case, it can be shared with the alien in enough detail that it "affords him or her substantially the same opportunity to defend himself or herself as would the classified evidence itself," will, in certain cases, put the government to the Hobson's choice of either jeopardizing intelligence sources or granting an alien who is a threat to national security an immigration status to which he is not entitled. While the Department gives a meaningful unclassified summary of the classified evidence wherever possible, it is sometimes not possible to give a detailed account of it without jeopardizing highly sensitive human or technological sources. In our view, it is inappropriate to mandate that, in all such cases, the government's weighty interests must yield to those of the alien. Moreover, this proposed standard is derived from the standard found in the Classified Information Procedures Act ("CIPA"), where it applies to classified information obtained by a criminal defendant pursuant to discovery. See 18 U.S.C. App. 3 (1982). Whether to import such a standard from the criminal context into immigration proceedings was fully considered and rejected by this Administration and by the Congress during the 1996 immigration reform deliberations. Instead of this standard, the Department is considering what other procedures or standards may be feasible to guide the production of unclassified summaries in immigration proceedings, particularly in any contexts in which protected liberty interests may be implicated by the use of such evidence.

The Department's views about the use of classified evidence in immigration proceedings have been presented to Congressional Committees four times within the past two years—most recently by INS General Counsel Bo Cooper and FBI General Counsel Larry Parkinson at a hearing on May 23, 2000, before the House Judiciary Committee. I have attached copies of these testimonies because they address additional points not covered in this memo.

March 13, 2000

President William Jefferson Clinton
The White House
Washington, D.C.

Dear Mr. President:

During a recent meeting at the White House, you asked me to propose language that would eliminate the improper use of secret evidence, thus alleviating the suffering of many immigrants to our country.

After extensive consultation with constitutional law scholars, the consensus is that speed is of the essence. For this reason, we have now concluded that the most efficient way of handling this constitutional matter, short of prohibiting all use of secret evidence (the better constitutional alternative in our view), is for you to issue a Presidential letter to Ms. Janet Reno, the Attorney General. Such a letter, which would limit the use of secret evidence, would also give immediate succor to long suffering victims.

We propose that the letter include the following language:

In view of the substantial fairness concerns that arise when classified evidence is considered in camera and ex parte in immigration proceedings, I hereby order that the INS may use secret evidence, as specifically authorized by statute, against aliens living in the United States only if:

(1) the government has reliable and credible evidence that the individual has engaged in or is planning to engage in specific criminal activity that threatens national security, which it must articulate in detail to the adjudicating body and which the adjudicating body must explicitly accept or reject, and

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2) the government can give the affected individual a summary that affords him or her substantially the same opportunity to defend himself or herself as would the classified evidence itself. CIPA standards (Classified Information Procedures Act, 18 U.S.C., App. III) govern this evaluation, to be made by the adjudicating body.

These requirements are designed, first, to ensure that reliance on this procedure is reserved for aliens who truly pose a threat to national security, and second, to ensure that reliance on this procedure will not be permitted unless the alien can be afforded a meaningful opportunity to confront and rebut the charges against him or her. Only where both requirements are met should the extraordinary procedure of relying on secret evidence be invoked against aliens living here.

It is our view that such language would improve due process for aliens and reduce the possibility of misusing secret evidence against them. I hope that you find this language acceptable for inclusion in a Presidential letter.

Further, I continue to urge you, Mr. President, to lend your valuable support to the Secret Evidence Repeal Act pending now in Congress. Given your deep commitment to civil rights, and your excellent legacy in that area, we have high hopes that you will indeed go out of your way to right these wrongs before your term ends.

Respectfully,

Azizah Y. al-Hibri

TESTIMONY

OF

LARRY R. PARKINSON

GENERAL COUNSEL

FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

HOUSE JUDICIARY COMMITTEE

CONCERNING

H.R. 2121, THE "SECRET EVIDENCE REPEAL ACT"

I am pleased to have the opportunity to discuss with you, on behalf of the Justice Department, H.R. 2121, and more specifically, the use of classified information in immigration proceedings. I cannot address specific cases because of ongoing litigation and the need to protect sensitive law enforcement information, but I will try to illustrate the value to the United States of preserving the ability to use classified information in ex parte, in camera immigration proceedings.

At the outset, I want to emphasize that the Justice Department understands and acknowledges the serious concerns that some members of the Committee and other persons and organizations have expressed about the ex parte, in camera use of classified information in immigration proceedings. We recognize that the use of such information can profoundly affect the people involved. We take these matters seriously, and we do not casually resort to the use of classified information. We have found, however, that in a small number of cases the use of such information is necessary to adequately protect the national security, and we believe that the laws currently in place, which allow for the use of such information in appropriate cases, strike the best balance between the various interests affected in these cases.

Moreover, I want to emphasize that the Justice Department, recognizing all of the serious concerns implicated by this issue, has instituted practices and procedures to ensure that classified evidence is used only when necessary to adequately serve the national interest. Before any final decision is made to use classified information in immigration proceedings, the information and the case are subjected to rigorous review at high levels of all affected Justice

Department components to ensure that it is necessary and appropriate to use the information. When the decision is made to use classified information in court, the alien is given an unclassified summary of the classified information when one can be produced, to use in the preparation and presentation of his or her case. Moreover, the Department is currently in the process of an ongoing review of all pending cases involving the use of classified information, to ensure that the information was properly used. The Department, under the Deputy Attorney General's Office, is also working on guidelines and regulations to regularize and improve these processes. The Attorney General and the Deputy Attorney General are both personally involved in these efforts. The Department believes that all of these practices will help ensure that the letter and the spirit of current law will be honored, by requiring that classified information is used only when necessary in the interests of the United States.

Congress has considered this issue in the past and, for good reason, authorized the Immigration and Naturalization Service (INS) to use and consider classified information in ex parte, in camera proceedings. In fact, the 1996 Congress thoroughly debated the competing interests involved during a review of the Immigration and Nationality Act, and on a bi-partisan vote of wide margins, determined that the United States should not be put to the choice of either admitting or suffering the continued presence of a terrorist alien, or compromising the national security information regarding that alien. INS has testified in the past as to its authority, and I will leave it to INS to respond to questions regarding the details of the immigration laws and regulations under which it operates. What I am here to emphasize is the value to the United States of preserving the INS's ability to present appropriately classified evidence in ex parte, in

camera proceedings. This typically occurs when, in the considered opinion of executive branch officials, it is necessary to introduce such information in opposition to an alien's admission to the United States, or in opposition to an alien's application for discretionary relief such as the granting of asylum, adjustment of status, granting of bond, or cancellation of removal.

It is important to note that under current procedures classified information is not used to prove deportability in conventional immigration proceedings. In general, when the INS presents classified evidence ex parte and in camera, it does so only to demonstrate the alien's inadmissibility into the United States; to demonstrate that the immigration court should deny bond to an alien, or to demonstrate that the alien is ineligible for some type of relief he or she is seeking. In other words, classified evidence is used only against aliens who are either seeking admission to the United States or, having been determined to be removable from the United States, are applying for relief from that removal. When an alien who has been determined to be removable, for overstaying a visa or on other grounds, seeks relief from removal -- asylum, withholding of removal, suspension, or adjustment of status -- and other agencies have provided substantive, credible, and relevant classified information which indicates that the alien is ineligible for such relief or does not merit the exercise of discretion, the INS should bring such information to the attention of the immigration court in the interest of the national security.

There are times when the government has highly relevant classified information that should be considered in determining an alien's immigration status, but the information cannot be made public or disclosed to the alien without harming the national security by compromising

intelligence-gathering operations and sources. In such cases the FBI, or whatever other agency has the information, shares it with the INS, and the information is subjected to a clearance process within the Justice Department by all concerned components, at a high level. Once consensus is reached that the alien poses a risk to the national security, or that the classified information is otherwise material to national security issues in the case, the INS presents the information to the immigration judge. The immigration judge then determines how much weight he or she will give to the information. It is important to note that while the ex parte, in camera use of classified information has garnered much media attention, it is in fact quite rare.

Classified evidence is involved in only 12 pending cases out of a total of 300,000 cases pending overall.

The ability to use classified information in this manner is vitally important to the protection of our national security, because it allows us to proceed appropriately against the very small number of aliens who pose national security threats. Although the United States has always welcomed immigrants, it has also always been the policy of the United States to exclude those aliens who pose a threat to national security, such as terrorists and foreign intelligence operatives, and those who would impose undue burdens on society, such as convicted felons. In recent years we have found that direct and continuous liaison with INS, and the ability to use classified information in appropriate cases, are essential to the effort to protect the national security by making proper decisions about aliens with ties to terrorism or other activities that threaten our national security.

I firmly believe that the FBI must be able to share classified information with the INS, and the INS must be able to use the information in ex parte, in camera proceedings, when necessary in order to adequately protect the national security. That means the INS must be able to use the information in a manner which protects the confidentiality of the information, and the methods and sources used to obtain the information. Disclosing such information to the public, or to the alien, would put the sources and methods at risk, and we could no longer count on being able to use those sources and methods to learn important information about critical national security matters.

It should also be remembered that immigration proceedings are administrative and not criminal proceedings. As the Supreme Court has noted, the purpose of immigration proceedings is to "provide a streamlined determination of eligibility to remain in this country, nothing more." United States v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). Thus, the full range of rights guaranteed a criminal defendant, including the Sixth Amendment's right to confrontation of evidence, are not applicable in immigration proceedings. Recognizing the interests involved, and the rights and duties of all parties, courts, including the United States Supreme Court, have concluded that INS use of classified information in ex parte, in camera proceedings to deny discretionary relief from deportation or to deny release on bond is appropriate.

In short, if the INS could not use classified information in ex parte and in camera proceedings, and was instead required to share all evidence with the alien, the United States would be faced with two equally unacceptable scenarios in the small number of cases involving

national security threats. Using a terrorism example, if we withhold the classified information in order to protect our important sources and methods, we let a dangerous alien obtain an immigration benefit which threatens national security, requires the release of the alien to move freely within the United States, and confers permanent status that may then aid the alien in obtaining United States citizenship. But if we reveal the classified information in an effort to obtain an appropriate ruling in the immigration court, we will jeopardize, and in most cases effectively eliminate, our ability to use those sources and methods in important national security investigations. Both scenarios pose unacceptable risks to the national security. We believe Congress properly considered all these factors, and struck the proper balance in favor of protecting the national security, when it came up with the current laws that allow for the ex parte, in camera use of classified information in appropriate cases. Again, the Department is taking appropriate steps to ensure the reliability of any classified evidence used in immigration proceedings.

I am providing two brief examples to illustrate how damaging it would be to national security to take away the ability to use classified information in immigration proceedings. The aliens in both of these examples are in the United States unlawfully.

CASE # 1:

We receive information from four separate foreign governments linking Subject #1 to terrorist groups and activities. Subsequent FBI investigation confirms Subject #1's dedication to

a terrorist organization, and his commitment to violence. The FBI investigation indicates that Subject #1 participates in procuring weapons for terrorist violence, and has a desire to participate in violent activities himself. Additionally, the FBI investigation confirms that Subject #1 raises money to send to the terrorist organization, helps transmit communications for it, and engages in immigration fraud on behalf of members of the organization. Subject #1 wants to obtain lawful status so he can more easily leave and re-enter the country. He was the subject of an intelligence investigation for some time but has been referred to INS for evaluation of his right to be in the United States. Subject #1 was found to be excludable, but filed for asylum. We will want to use classified information to show that he should be denied asylum.

All of the foreign governments who provided information on Subject #1 did so on a classified basis only. The subsequent FBI investigation relied on classified means of acquiring information. Disclosure of either the foreign or FBI-acquired information would reveal the precise means and timing of the acquisition. In turn, that would disclose the scope of the investigation, the identities of other targets of the investigation, and the information that would have been provided to other nations to assist in prevention of terrorist acts. Disclosure of even the FBI-acquired information would reveal that specific individuals both abroad and in the United States were subjects of terrorism investigations by certain governments. That, in turn, would lead to the frustration of efforts by friendly foreign governments to prevent terrorist acts.

CASE #2:

Subject #2 applies for immigration relief. He comes to FBI attention as a result of reporting from a very singular and highly reliable source. Information from that source and further FBI investigation demonstrate that Subject #2 is in a leadership position of an organization that assumes responsibilities for gathering intelligence on behalf of a foreign power. Additionally, the FBI investigation shows that the foreign power directly contacts and tasks the individual and provides him with funds. Through the investigation, focusing on Subject #2's contacts, the FBI learns of intelligence activities being conducted by a number of individuals, as well as the methods of operation of both the organization and the individuals. Through a court-authorized electronic intercept targeting a person other than Subject #2, the FBI learns of significant activities by Subject #2 to circumvent United States laws for the benefit of the foreign power.

Disclosure of the classified information in this scenario would reveal the source of the information and, in all likelihood, would preclude further receipt of information from the source. It would reveal, as well, knowledge of the United States concerning the activities of the organization and the individuals supporting it. It would reveal our knowledge of a foreign power's efforts to circumvent United States law, and thereby alert the foreign power to the need to switch to new tactics. Disclosure of the electronic intercept would reveal the investigation and targeting of the other person. In short, the inability to use classified information in this case would do serious damage to the national security.

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For all these reasons, the Justice Department is opposed to HR 2121.

Mr. Chairman, this concludes my statement, and I would be happy to answer the Committee's questions.

TESTIMONY
OF
BO COOPER
INS GENERAL COUNSEL
BEFORE THE
COMMITTEE ON THE JUDICIARY
OF THE U.S.HOUSE OF REPRESENTATIVES
CONCERNING
H.R. 2121, THE "SECRET EVIDENCE REPEAL ACT"

I am pleased to have the opportunity to discuss with you, on behalf of the Department of Justice, H.R. 2121, and more specifically, the use of classified information in immigration proceedings.

At the outset, I want to emphasize that the INS understands and acknowledges the serious concerns about the *ex parte, in camera* use of classified information in immigration proceedings. We take these matters seriously, and we do not casually resort to the use of classified information. The INS prosecutes and the Executive Office for Immigration Review hears nearly 300,000 cases each year. There are currently 11 pending cases involving classified information.

As Members of this Committee know, the Department's pending matter policy, as well as its rules regarding the individual privacy of aliens, substantially constrain my ability to discuss individual immigration cases. Nor can the Department discuss sensitive national security information that is classified.

Having noted the constraints that govern my appearance today, I do want to address the policies and procedures that are at issue in the INS's use of classified evidence and that serve as the focus of this hearing this morning. I will try to illustrate the value to the United States of preserving the ability to use classified information in *ex parte, in camera* immigration proceedings.

Role of the Department of Justice

The Attorney General also recognizes the serious concerns implicated by this issue. As a result, she has instituted practices and procedures to ensure that classified evidence is used only when necessary to adequately serve the national interest. Before any final decision is made to use classified information in immigration proceedings, the information is subjected to rigorous review at high levels of all affected Justice Department components to ensure that it is necessary and appropriate to use the information.

Either the Attorney General or the Deputy Attorney General must currently approve any use of classified information in immigration proceedings. The aim of this review is to ensure that classified evidence is used only when it is necessary, and when it cannot be declassified.

Hypothetical Example

The issue of using classified information implicates two very important objectives that the Department of Justice strives to achieve: (1) adjudicating immigration claims in a manner that is as transparent and fair as possible; and (2) protecting the national security and the safety of all Americans.

There is a tension between these two goals in classified evidence cases. To make the problem more concrete, consider the following hypothetical example. Assume that the INS encounters an alien who has been in this country illegally for several years. The alien concedes that he is here illegally and that he is deportable. But then he asks the immigration judge to exercise discretion and to grant him asylum so he will not be returned home. The law says that an alien who is a threat to the national security cannot be granted asylum. The law also says that someone who is granted asylum can seek adjustment of status to become a permanent resident after one year. Now, suppose that the INS receives classified information that this alien is actually a dangerous person – perhaps an activist in a terrorist organization. And suppose that the classified information comes from a very reliable source, such as an official of that organization. And, suppose that we cannot reveal that information publicly without thereby revealing the source and compromising the entire intelligence-gathering operation.

Here is the dilemma. To protect the national security, the immigration judge must be allowed to see the classified information before she decides whether the alien should be given asylum. But neither the INS nor the immigration judge can show the information to the alien without risking the national security.

The INS believes that the judge should be allowed to see the evidence. That is what the law now says, that what the Supreme Court and most federal courts have said is constitutionally permissible, and that is what is appropriate to protect the national security.

H.R. 2121

H.R. 2121 would repeal most of the INS's statutory authority to present classified information *in camera* and *ex parte* in any type of removal proceeding. Specifically, H.R. 2121 would amend the Immigration and Nationality Act (INA or Act) by:

- (1) repealing Title V of the Act, which governs proceedings before the Alien Terrorist Removal Court;
- (2) amending section 240(b)(4)(B) of the INA, by removing language that currently provides that aliens in removal proceedings are not entitled to examine national security information presented by the INS to oppose the alien's admission to the United States or an application by the alien for discretionary relief under Act;
- (3) providing aliens in removal proceedings access to all documents pertaining to the alien's admission or presence in the United States, including records and documents considered by the Attorney General to be confidential;
- (4) prohibiting any decision on any application for a benefit, including custody on the basis of evidence not shared with the alien;
- (5) prohibiting the use of expedited removal for national security cases under Section 235(c) in cases of lawful permanent residents, aliens granted parole or advance parole, and aliens seeking asylum; and
- (6) allowing most detained aliens to seek review of custody determinations through petitions for writs of habeas corpus.

Relevant Immigration Law

The INS is charged with the difficult task of determining when to admit an alien to the United States, when to grant an alien's application for an immigration benefit, and when to place an alien in removal proceedings. The INS undertakes these tasks with vigilance in an effort to ensure the protection of our national security.

Congress has considered this issue in the past and, for good reason, has authorized the Attorney General to use and consider classified information in *ex parte*, *in camera* proceedings. The Attorney General has delegated much of her authority under the immigration laws to the INS.

Congress has authorized the Attorney General to consider classified evidence in several provisions of the Immigration Nationality Act (Act).

First, Section 105 of the Act authorizes the INS to maintain direct and continuous liaison with the federal intelligence and law enforcement entities for the purpose of enforcing the immigration laws in the interest of the internal security of the United States. To further this end, the INS has established a National Security Unit to coordinate counterterrorism efforts within INS and between INS and other law enforcement and intelligence agencies.

The second statutory basis for the use of classified information is Section 235(c) of the Act. Under Section 235(c), if an immigration officer or immigration judge "suspects that an arriving alien may be inadmissible" under INA §212(a)(3)(A) (other than clause (ii)), (B), or (C), the immigration judge or immigration officer shall order the alien removed without further inquiry. Pursuant to regulation, the case is referred to the appropriate INS regional director, who reviews the order, reviews any relevant "confidential information," and consults with "appropriate security agencies of the United States Government" over whether the "disclosure of the confidential information would be prejudicial to the public interest or security." If the regional director concludes that the alien is inadmissible on the specified security related grounds based on the confidential information that cannot be disclosed, the regional director may issue the final order of removal, or order any other action the regional director deems appropriate. Section 235(c) has been part of the immigration law since 1952.

The third way in which Congress has authorized the Attorney General to consider classified information is in the context of conventional removal proceedings under Section 240 of the Act. If an alien is removable from the U.S. on a charge based on unclassified evidence, such as overstaying a visa, but the alien applies for discretionary relief from removal, the INS may introduce classified national security information to oppose the application for relief. Discretionary applications for relief from removal include asylum, cancellation of removal, suspension, or adjustment of status. The INS presents classified information to oppose applications only when other agencies have provided substantive, credible, and relevant classified information which indicates that the alien is ineligible for such relief or does not merit the exercise of discretion.

This express statutory authority was added to the law as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. However, it is important to note that in 1996, Congress simply sanctioned by statute an authority to introduce classified evidence that had been a part of the Attorney General's regulations since at least 1961. Furthermore, the Supreme Court and other federal courts have upheld these regulations and this practice over the last four decades.

The fourth way that the Attorney General may use classified information is in immigration proceedings before the Alien Terrorist Removal Court (ATRC). The Antiterrorism and Effective Death Penalty Act of 1996 added a new Title V to the Act which established the ATRC. In proceedings before the ATRC, the Department of Justice may present classified evidence *in camera* and *ex parte* to prove that the alien has "engaged in terrorist activity." In fact, to initiate a case under Title V, the Attorney

General must determine that "removal under Title II would pose a risk to the national security of the United States." INA § 503(a)(D)(iii).

Taken as a whole, these provisions clarify the expectation of Congress that the INS must play a larger and increasingly critical role in counterterrorism activities. The laws have substantially strengthened INS' authority to remove aliens who support or are directly involved in terrorist activities. Incidents such as the December 1999 arrest at the United States – Canadian border, the 1998 embassy bombings, and the 1993 World Trade Center bombing have shown that the United States is a target for international terrorists. Interagency cooperation on terrorism is vital to protecting the security and the interests of the United States.

Removal Proceedings

An alien in conventional removal proceedings has certain statutory rights. The alien has the right: to be represented by an attorney at no expense to the government; to notice of whether the alien will be maintained in custody and, in some cases, to seek a bond redetermination hearing before an immigration judge; to a reasonable opportunity to examine the unclassified evidence against the alien; to present evidence on the alien's behalf; to cross examine witnesses presented by the INS; and to a complete record of the proceeding. However, Section 240(b)(4)(B) specifically states that "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."

The Supreme Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application for admission because the power to admit or exclude aliens is a sovereign prerogative. The Court, however, has held that once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

Based on this distinction, the burden of proof in a conventional removal proceeding depends on the type of charge. An applicant for admission bears the burden of proving that he or she is "clearly and beyond a doubt entitled to be admitted and is not inadmissible" to the United States or by clear and convincing evidence that the alien is lawfully present in the U.S. pursuant to prior admission. If the alien has been admitted to the United States, then the INS bears the burden of establishing by clear and convincing evidence that the alien is deportable.

It should also be remembered that immigration proceedings are administrative and not criminal proceedings. As the Supreme Court has noted, the purpose of immigration proceedings is to "provide a streamlined determination of eligibility to remain in this country, nothing more." *United States v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Thus, the full range of rights guaranteed a criminal defendant, including the Sixth

Amendment's right to confrontation of witnesses, are not applicable in immigration proceedings. Recognizing the interests involved, and the rights and duties of all parties, courts, including the United States Supreme Court, have concluded that INS use of classified information in *ex parte*, *in camera* proceedings to deny discretionary relief from deportation or to deny release on bond is appropriate.

Process for Using Classified Information

The INS learns that classified information relating to an alien may exist in two ways: from another agency or from the alien. In some cases, the INS requests that other agencies search their records to determine whether any information exists on the alien. In these cases, the INS usually has some indication that the alien may be involved in terrorist activity or human rights abuses. In other cases, the other agency contacts the INS to report that it possesses relevant information.

In still other cases, an alien may claim an affiliation with a United States agency. This claim is usually made in the asylum context. When such a claim is made, the INS goes to the specified agency and requests that the agency check its records and report whether it has any information on the alien.

In each of these scenarios, most, if not all, of the information is classified. I will leave it to Mr. Parkinson to explain the requirements under the relevant Executive Orders for classification of documents. However, I want to emphasize that the INS does not make the classification decision.

The decision to submit classified evidence is made on a case-by-case basis without regard to a person's religion, nationality or ethnic origin. The INS and the Department of Justice have developed standard procedures for dealing with each case that involves the potential use of classified information. In such cases the FBI, or whatever other agency has the information, shares it with the INS. The INS has established a National Security Law Division in the Office of the General Counsel to ensure that all national security cases are legally sufficient and are handled in a consistent manner. The INS carefully scrutinizes the information and meets with representatives of the originating agency to examine the information.

If the INS believes the information is relevant and necessary in the case, the case is referred to the Department of Justice for intra-departmental review and discussion with other components. In order for the classified information to be used, this review process must result in the determination that the information is properly classified and either that the alien poses a risk to the national security, or that the classified information is otherwise material to issues in the case. In addition, the Attorney General or the Deputy Attorney General must thereafter approve use of the evidence.

Once this process is completed, the INS presents the information to the immigration judge *in camera* and *ex parte*. The immigration judge then determines how much

weight he or she will give to the information. If the immigration judge grants the application for relief, the INS may seek further review before the Board of Immigration Appeals (BIA), and if the immigration judge denies the application, the alien may appeal to the BIA.

It is important to note that while the *ex parte, in camera* use of classified information has garnered much media attention, it is in fact quite rare. As noted at the outset, in any given year, nearly 300,000 cases are processed by the INS and decided by the Executive Office for Immigration Review. The INS has presented classified evidence in only 11 pending cases, four of them involving detained aliens.

H.R. 2121's Amendments to Judicial Review

The INS opposes the bill's amendment to the judicial review provisions of the Act because the legislation is written so broadly it creates room for two parallel tracks of review, at both the district court and court of appeals levels. This will create confusion in the federal court system if the same case is pending at both levels at one time. The INS prefers the current law contained in Section 242(a) of the Act, which provides for judicial review of claims arising from removal proceedings through a timely-filed petition for review in the court of appeals.

Conclusion

For all these reasons, the INS opposes HR 2121. The INS believes that if H.R. 2121 were enacted, one result would be that aliens who have been involved in terrorist activity or human rights abuses in other countries would likely be able to obtain immigration benefits, in the absence of derogatory information that is unclassified. Once an alien becomes a lawful permanent resident, it is only a matter of time before that individual becomes a United States citizen. H.R. 2121 will put the INS in a position of extending the privilege of United States citizenship to those who are undeserving because they are dangers to the national security.

Mr. Chairman, this concludes my statement, and I would be happy to answer the Committee's questions.