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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

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SUBJECT - THE USE OF SECRET EVIDENCE IN IMMIGRATION PROCEEDINGS AND THE SECRET EVIDENCE REPEAL ACT, H.R. 2121

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Body

Chairman Hyde, Ranking Member Conyers, members of the Committee:

I am pleased to testify today before the House Judiciary Committee on behalf of the American Civil Liberties Union in support of the ***Secret Evidence*** Repeal Act, H.R. 2121. The ACLU is a nation-wide, non-profit, non-partisan organization consisting of over 275,000 members dedicated to protecting the principles of freedom set forth in the Bill of Rights. The ACLU receives no funding from the federal government. We support the H.R. 2121 because it would end a civil liberties crisis: people are being detained, for years, without a realistic opportunity to rebut the allegations that are the basis for their detention.

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

This simple statement is a fundamental requisite of any fair legal system. ***Secret*** proceedings conducted out of sight of the accused and her attorney are a feature of totalitarian governments, not of our own. The Supreme Court has said time and again that deportation is a severe deprivation of liberty - one that can separate a person from home, family, career, and "all that makes life worth living."

The ***Secret Evidence*** Repeal Act, H.R. 2121, introduced on June 10, 1999 by Representatives Bonior (D-MI), Campbell (R-CA), Conyers (D-MI) and Barr (R-GA) would restore in immigration proceedings this most basic notion of due process under the Fifth Amendment to the U.S. Constitution. It would put an end to the use of ***secret evidence*** -- usually submitted in the form of classified information -- against non-citizens in deportation proceedings and promote the principle that non-citizens are protected by the Due Process clause of the Fifth Amendment. The bill has 90 co-sponsors.

Today I will explain how the Immigration and Naturalization Service uses ***secret evidence*** in immigration cases, and how the use of ***secret evidence*** violates the Constitution. Then, I will discuss how the ***Secret Evidence*** Repeal Act and proposed alternatives to that legislation would effect the use of classified information in deportation cases.

Use of ***Secret Evidence*** Now

The 1996 Antiterrorism and Effective Death Penalty Act established a new court charged only with hearing cases in which the Government seeks to deport aliens accused of engaging in terrorist activity based ***on secret evidence*** submitted in the form of classified information. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) expanded the ***secret evidence*** court so that ***secret evidence*** could be more easily used to deport even lawful permanent residents as terrorists. It also included provisions the Government relies upon to use ***secret evidence*** to deny bond to any detained non-citizen (regardless of whether the person is accused of engaging in "terrorist activity") and to deny various discretionary immigration benefits such as asylum to any non-citizen, including those not accused of being terrorists.

Though the ***secret evidence*** court has not yet heard a case, the INS has moved in dozens of other proceedings to use ***secret evidence*** against non-citizens to deny them bond and relief from deportation, such as asylum. In fact, the INS attempts to use ***secret evidence*** to deny mandatory relief from deportation, such as withholding of deportation, even though it has no statutory authority to do so. Withholding of deportation is available to non-citizens who demonstrate that their life or freedom would be threatened in the country to which they are to be deported on account of their race, religion, nationality, membership in a particular social group, or political opinion.

Virtually every recent ***secret evidence*** case that has come to public attention involves a Muslim or an Arab. The ACLU represents two such non-citizens. One of them, Nasser Ahmed, is a 37-year old Egyptian who was initially denied bond, asylum and withholding based ***on secret evidence***. The immigration judge who heard the ***evidence*** said that he had "no doubt" that Mr. Ahmed would be tortured if returned to Egypt. Mr. Ahmed was held in solitary confinement for over three years, but was recently released from custody on bond. The immigration judge who ordered his release criticized the INS for using ***secret evidence*** -- often in the form of double or even triple hearsay -- when public material showing the same thing could have been used instead, and provided to Mr. Ahmed. In re Nasser Ahmed, No. A90 674 238 (6/24/99).

Secret evidence is also being used to detain in Florida without bond Mazen Al-Najjar, a stateless Palestinian also represented by the ACLU. His sister, Nahla Al-Alrian, is testifying before the Committee today. One day at breakfast with his wife as he helped his daughters get ready for school, he answered a knock on the door. This 18-year resident of the United States was immediately detained for alleged violations of the immigration laws. When he asked for release on bond which is commonly granted similarly-situated non-citizens who are likely to appear for their immigration hearings because of their strong family and community ties -- his request was denied, based ***on secret evidence***. Earlier this week, Mr. Al-Najjar marked the third anniversary of his detention based ***on secret evidence***.

The INS is also using ***secret evidence*** in cases involving seven Iraqis airlifted by the U.S. from northern Iraq because they were part of a failed CIA plot to destabilize the regime in Iraq headed by Saddam Hussein. The INS is denying them political asylum based ***on secret evidence***. A legal team including former Director of Central Intelligence R. James Woolsey represents them. Mr. Woolsey, who was himself denied the opportunity to see the ***evidence*** against his clients, commented that ***secret evidence*** is what "one would expect to find in Iraq, not the U.S." Last year, five of the seven agreed to be deported in exchange for release from custody with certain limitations on their liberty while they search for a foreign country that will accept them. Two weeks ago, an immigration judge preliminarily ruled that one of the Iraqis who rejected the deal is not a risk to national security, though the Government had alleged that he is.

Problems Arising from the Use of ***Secret Evidence***

Secret evidence presents both practical and constitutional problems. The INS abuses its authority to use ***secret evidence***. It uses ***secret evidence*** when there is no need for the ***evidence*** to be ***secret***, when it has no statutory authority to do so, and when other ***evidence*** in the public record and open to cross-examination would tend to show the same thing. It uses ***secret evidence*** that amounts to no more than triple hearsay, and it does not even preserve a record of the ***evidence*** it presents so that its actions can be evaluated on appeal. It claims the authority to use ***secret evidence*** against people it does not even allege are "terrorists" or pose some vague threat to national

security. Should Elian Gonzalez be granted an asylum hearing, under the Government's reading of the law, it could present ***secret evidence*** against even him to show, for example, that he would not be persecuted if returned to Cuba.

Secret evidence undermines our adversarial system. One cannot defend against the unknown accusation whispered to a judge by a ***secret*** accuser.

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

Secret evidence in the form of classified information often consists of mere rumor and innuendo. It is often unverified and unverifiable. It has not been, and cannot be, tested for reliability under rigorous cross-examination. Sometimes, it can be something as "***secret***" as a newspaper clipping the substance of which could be refuted if only it was known. This is the kind of information that might trigger an investigation, but it is not the kind of information that ought to be relied upon to deprive a person of liberty.

It is impossible to fight charges without knowing the nature of those charges, and who is making them. In U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) ***secret evidence*** was used to deny a WWII "war bride" the opportunity to come to the U.S. and join her husband. When eventually she was granted a hearing, the ***secret evidence*** was found to be untrustworthy in part because the "confidential source" that offered it turned out to be a jilted former lover of her husband.

The Sixth Amendment to the U.S. constitution prohibits the Government from using ***secret evidence*** in criminal proceedings against both citizens and non-citizens. Instead of using ***secret evidence***, the Government relies on the Classified Information Procedures Act, 18 U.S.C. App. 3, to protect classified information in criminal cases. CIPA does not permit the use of ***evidence*** not also provided the accused. However, the Sixth Amendment does not apply in civil proceedings, such as immigration proceedings. One of the problems with the use of ***secret evidence*** in immigration cases is the possibility that use would be expanded to other civil matters, such as civil asset forfeiture proceedings.

Some have suggested that the ***secret evidence*** provisions in the Immigration and Nationality Act provide protections similar to those afforded criminal defendants in CIPA cases. This is not true. CIPA prohibits the use of ***secret evidence*** against the accused; the INA permits it. CIPA requires the government to provide the accused with a summary of the classified information, and the summary must afford the accused with substantially the same ability to make his defense as would disclosure of the classified information. The INA has no explicit requirement for a summary whenever bond or an immigration benefit such as asylum is being denied. The summary provided to an alien accused of being a terrorist need not even meet the CIPA standard. Most importantly, when the decision maker is a jury deciding guilt or innocence in a criminal case involving CIPA, it bases its decision on no more than the ***evidence*** provided the accused. Whether the ***evidence*** consists of a summary of classified information, admissions of fact that the classified information would tend to prove, or declassified information, the jury and the accused in a CIPA case have the same ***evidence***. In contrast, the decision maker in ***secret evidence*** proceedings under the INA - whether an immigration judge or a judge sitting on the ***secret evidence*** court - will always have ***secret evidence*** that the accused cannot access.

Use of ***Secret Evidence*** in Deportation Cases Violates the Constitution

Every court that has addressed the constitutional question in the last dozen years has found the use of ***secret evidence*** in immigration proceedings against a person admitted to the United States, or seeking admission as a

lawful permanent resident returning from a trip abroad, unconstitutional under the Due Process Clause of the Fifth Amendment.

In Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) the court rejected an attempt by the INS to use ***secret evidence*** to exclude a lawful permanent resident from the United States upon his return from a trip abroad. In reaching this decision, the court said, "… Rafeedie -- like Joseph K. in Kafka's 'The Trial' -- can prevail … only if he can rebut the undisclosed ***evidence*** against him, i.e. prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden ." Id. at 516.

In American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995)), the court rejected an attempt by the INS to deny legalization to two Palestinians it accused of associating with a terrorist organization. In characterizing the INS use of ***secret evidence*** in that case, the court said, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations." Id. at 1069 (citations omitted).

Just a few months ago, a federal district court ordered the release of Hany Kiareldeen after he had been detained for 19 months based ***on secret evidence*** that is believed to have been offered by his estranged wife, with whom he was having a custody battle. In granting Mr. Kiareldeen's petition for habeas corpus, the court cited the Supreme Court's decision in Bridges v. Wixon and said, "The court cannot justify the government's attempt to 'allow (persons) to be convicted on unsworn testimony of witnesses -- a practice which runs counter to the notions of fairness on which our legal system is founded.' Kiareldeen v. Reno, 71 F.Supp.2d 402, 419 (D.N.J. 1999).

The Government relies primarily on Jay v. Boyd, 351 U.S. 345 (1945), a case in which the Supreme Court considered only a statutory challenge to a decision to deny suspension of deportation as a matter of discretion. The court expressly indicated that it was deciding the case on statutory, as opposed to constitutional grounds, and decided that the statute did not preclude the use of ***secret evidence***. 351 U.S. at 358, fn. 21. The Government relies on a dictum in that footnote suggesting that the particular use of ***secret evidence*** in the exercise of discretion in that case would not give it "difficulty" as a constitutional matter. Id. We believe, and the courts that have recently considered the matter have agreed, that because the Jay court did not reach the constitutional issue, it is scant authority for the proposition that the use of ***secret evidence*** in an immigration proceeding does not violate the Due Process Clause.

Though the courts have repeatedly ruled against the INS in ***secret evidence*** cases, it continues to bring such cases. The cost has been substantial: years of detention based on unknown, unverified and unverifiable allegations that all too often turn out to be too flimsy to justify such detention. Congress can put an end to this nightmare.

How H.R. 2121 Would Address The Problems Arising from the Use of ***Secret Evidence***

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

The bill does not require release of dangerous terrorists. It merely requires the Government to make a choice. It must either reveal the ***evidence*** against a non-citizen whose liberty is in jeopardy, or it must keep that information fully ***secret*** and outside of immigration proceedings and determinations. Virtually every day, prosecutors make similar choices in criminal cases where a person's liberty is likewise at stake. Though required to make these choices, prosecutions of truly dangerous terrorists, such as those who bombed the World Trade Center and the federal building in Oklahoma City, have been successful.

The ***Secret Evidence*** Repeal Act has five simple themes. First, the Government may not use ***secret evidence*** to deport non-citizens. It eliminates from current law the ***secret*** court established in the 1996 anti-terrorism law. It

requires the Government to use the same removal proceedings against aliens accused of being terrorists that it uses to remove aliens accused of being deportable for other reasons.

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

The Government must either disclose this information to both the decision-maker in the case and to the non-citizen so that it can be challenged, or must keep it ***secret***.

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

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

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

The ***Secret Evidence*** Repeal Act is not designed to help "illegal aliens." It is designed to ensure that a fair process is used in proceedings to determine whether a non-citizen is in the United States lawfully. The Department of Justice asserts the power to use ***secret evidence*** against all non-citizens in the United States, whether they are lawful permanent residents, visitors, or people who entered without admission. Since the purpose of a removal proceeding is to determine whether a person is present lawfully, it begs the question to assert that H.R. 2121 - which is designed to ensure a fair proceeding - only helps "illegal aliens." When the Government loses a ***secret evidence*** case and the person against whom the ***evidence*** was used establishes that the law permits him to remain, it can hardly be said that he is an "illegal alien." Arguing that the ***Secret Evidence*** Repeal Act is designed to help "illegal aliens" is like arguing that the right to a trial by jury is designed to help guilty people. Instead, both are designed to promote fairness in proceedings when a person's liberty is at stake.

Alternatives To H.R. 2121

Some opponents of H.R. 2121 have suggested that alternatives to the bill would better "balance" national security interests against the liberty interests of the accused non-citizen. However, the alternatives suggested do not meet constitutional requirements.

Some view the procedures of the ***secret evidence*** court established in the 1996 anti-terrorism law - prior to the amendments adopted a few months later in the 1996 immigration law - as an appropriate model. It is not. It was little improved from the 1991 anti-terrorism provisions proposed by the Bush Administration's Department of Justice. Both pieces of legislation allowed for the deportation of non-citizens, including lawful permanent residents, based

on secret evidence the source of which might be the government of the alien's native country, with only a generalized summary provided the non-citizen and with a one-sided appeals process.

In fact, the 1996 anti-terrorism law's ***secret evidence*** court proceedings have civil liberties problems that did not appear in legislation when it was proposed in 1991. The anti-terrorism law allows for deportation if the Government proves its case merely by a "preponderance of the ***evidence***." INA Section 504(g), 8 U.S.C. 1534(g). Even the 1991 proposal required the Government to prove its deportation case by "clear and convincing ***evidence***" - a much higher standard. "Clear and convincing ***evidence***" is the standard required in the INA for other deportation cases. INA Section 240(c)(3)(A), 8 U.S.C. 1229a(c)(3)(A). It is similar to the standard of proof the Supreme Court established for deportation cases in Woodby v. Immigration Service, 385 U.S. 276 (1966) (no deportation order may be entered unless the Government proves by clear, unequivocal, and convincing ***evidence*** that the facts alleged as grounds for deportation are true). The Woodby court explicitly rejected the "preponderance of the ***evidence***" standard for deportation cases. 385 U.S. at 284-285.

Others favor a "cleared counsel" model. In this model, an attorney with a security clearance is chosen by the non-citizen to review the classified information and argue to the court about whether the information proves what it is alleged to prove. The cleared counsel would be prohibited from sharing classified information with the non- citizen. However, this model fails to provide adequate protection when a person's liberty is at stake. Often, only the non-citizen knows why a particular person's allegations might be lacking in credibility. This is illustrated by the Knauff case mentioned above. Only the accused WWII "war bride" could know why the person who secretly offered the ***secret*** information against her might have had reason to offer false information.

Still others favor an amendment to the anti-terrorism bill offered by Representative Nadler at the 1995 mark-up of the legislation, incorporated into the Nadler-Berman-Conyers substitute and rejected on the House floor in 1996. In proceedings before the ***secret evidence*** court, the amendment would have increased the quality of the summary of classified information given the accused to the standard set forth in the Classified Information Procedures Act (CIPA). The summary would have to afford the accused with substantially the same ability to make his defense as would disclosure of the classified information. While this amendment would have advanced the due process rights of the accused non-citizen, it is not at all clear that it would pass constitutional muster, and it would not put a non-citizen in a deportation case in the same position as a criminal defendant in CIPA proceedings. Most importantly, the amendment would not ensure the protection of due process rights as required by the Fifth Amendment because the amendment applies only to proceedings before the ***secret evidence*** court, which the Government has never used. It would not address the abuses in any of the past or pending ***secret evidence*** cases because none of them were brought in the ***secret evidence*** court.

Even with respect to proceedings in the ***secret evidence*** court, the amendment falls short. CIPA operates against the backdrop of the Sixth Amendment's confrontation clause. It was drafted not to confer or to diminish substantive rights, but to establish procedures under which rights could be protected when the defendant or the Government wanted to use classified information. The rights - including the right to discover and use information - are conferred by the Sixth Amendment as interpreted by the Supreme Court and by Federal Rule of ***Evidence*** No. 16. To put the non-citizen in a deportation case in substantially the same position as a criminal defendant in CIPA proceedings, these rights to obtain and confront the ***evidence*** against the accused would have to be conferred in immigration cases. If that is done, some will certainly object to giving non-citizens accused of being terrorists discovery of classified information relevant to their defense. If that is not done, the non-citizen would be unable to challenge the adequacy of the summary because neither she nor her attorney would in the vast majority of cases have access to the classified information upon which the summary is based.

For all of these reasons, we believe H.R. 2121 an approach superior to the alternatives that have been suggested.

Conclusion.

The fight against terrorism need not involve compromise of our most cherished constitutional rights.

The American Civil Liberties Union strongly supports the ***Secret Evidence*** Repeal Act (H.R. 2121), compliments Reps. Bonior, Campbell, Conyers and Barr for introducing it, and encourages the House Judiciary Committee to quickly mark-up the bill.

Supplement:

SECRET EVIDENCE

What the Courts Are Saying

Supreme Court Justice Frankfurter in Joint Anti-Fascist Refugee Comm. v. McGrath:

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done." (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)).

Supreme Court Justice Jackson in Knauff v. Shaughnessy:

"The plea that ***evidence*** of guilt must be ***secret*** is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." (U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (Jackson, J., dissenting)).

Federal Appeals Court for the District of Columbia ***on Secret Evidence*** in Rafeedie v. INS:

"… Rafeedie -- like Joseph K. in Kafka's 'The Trial' -- can prevail … only if he can rebut the undisclosed ***evidence*** against him, i.e. prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden ." (Rafeedie v. INS, 880 F.2d 506, 516, (D.C. Cir. 1989))

Federal Appeals Court for the Ninth Circuit, ***on Secret Evidence*** in ADC v. Reno: "One would be hard pressed to design a procedure more likely to result in erroneous deprivations."

"Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the … balancing (test adopted by the Supreme Court to determine whether INS conduct violates a non-citizen's due process rights) suggests that use of undisclosed information in adjudications should be presumptively unconstitutional." (American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1069; 1070-71 (9th Cir. 1995)).

Federal District Court in New Jersey in Kiareldeen v. Reno:

"Here, the government's reliance ***on secret evidence*** violates the due process protections that the Constitution directs must be extended to all persons within the United States, citizens and resident aliens alike."

"Despite repeated requests from the Immigration Judge, the government made no recorded efforts to produce witnesses, either in camera or in public, to support its allegations of terrorism. The petitioner was thus denied the opportunity to meaningfully cross-examine even one person during his extended detour through the INS' administrative procedures. The INS' actions unconstitutionally damaged Kiareldeen's due process right to confront his accusers. The quality of the ***evidence*** offered by the government as the basis for petitioners' continued detention does not attain that level of reliability sufficient to satisfy the constitutional standard of fundamental fairness. Even the majority opinion of the Board of Immigration Appeals, which overruled the (immigration judge's) decision to release the petitioner on bond, noted: 'Like the Immigration Judge and the dissent, we have some concerns about the reliability of some of the classified information.' The court finds that to be an understatement."

"Here, the court cannot justify the government's attempt to 'allow (persons) to be convicted on unsworn testimony of witnesses -- a practice which runs counter to the notions of fairness on which our legal system is founded.' " (citation omitted) (Kiareldeen v. Reno, 71 F.Supp.2d 402, 414; 418; 419 (D.N.J. 1999)).

Federal Court for the Eastern District of Virginia in Haddam v. Reno:

"The use of ***secret*** ***evidence*** against a party, ***evidence*** that is given to, and relied on, by the (immigration judge and the Board of Immigration Appeals) but kept entirely concealed from the party and the party's counsel, is an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest." (Haddam v. Reno, 54 F. Supp.2d 588, 598 (E.D. Va. 1999)). (The Haddam court did not address the constitutional issues arising from the use of ***secret*** ***evidence***).

Donn Livingston, Immigration Judge, In In Re Nasser Ahmed: "The INS seems to be asking the court to abdicate its statutory and regulatory duty to decide the respondent's asylum claim based on the ***evidence*** presented at the hearing. The court will respect the expertise of law enforcement personnel and their dedication to protecting our country. But the court will not defer to their credibility findings, their weighing of the ***evidence*** or their interpretations of law. … (T)hese issues are to be resolved by the (immigration) court which will make its own findings and conclusions based on the ***evidence*** presented."

"It appears that some of the classified information could be gathered from non-confidential sources. If the information could be presented in open court as coming from an unclassified source, the respondent would be able to confront the ***evidence*** against him. This is certainly a desirable feature of any court proceeding. Indeed, the court is concerned about the possibility for abuse in this area. Imagine, for example, an agency which has two sources of ***evidence*** of a particular fact. One source is classified and the other source is public. If the agency chooses to present the information through the public source, the respondent will have an opportunity to confront the ***evidence***. However, if the agency chooses to present the ***evidence*** through a classified source, the ***evidence*** could remain unassailable. Imagine further the situation where an agency has classified information of a certain fact, but does not yet have a public source for that fact. If the agency knows it can present the classified information in camera, what is the incentive to expend investigatory resources on developing a public source for that ***evidence***?"

"Virtually all of the ***secret*** information is hearsay not subject to any exception to the hearsay rule. Most of this information is double or triple hearsay. Of course, hearsay ***evidence*** may be admissible in deportation proceedings (citation omitted). However, hearsay may be relied upon only if it is probative and its use would not be fundamentally unfair (citations omitted)."

"The government's failure to respond to the credibility questions leaves the court utterly unable to assess the reliability of the government's hearsay ***evidence***. The FBI urges the court to defer to its assessment of credibility. ...However, the FBI has refused to provide the court with ***evidence*** from which the court could make an independent evaluation of the credibility of its sources. In light of that refusal, this court must reject the ***secret*** information as being of unproven reliability."

(In Re Nasser Ahmed, No. A90 674 238 (7/30/99)).

END

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