TESTIMONY

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CONCERNING

THE USE OF CLASSIFIED EVIDENCE IN IMMIGRATION PROCEEDINGS

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I am pleased to have the opportunity to discuss with you on behalf of the Department of Justice and the Immigration and Naturalization Service (INS) the use of classified evidence in immigration proceedings. The INS has an enormously complicated task in welcoming those who deserve our welcome and removing those who do not. I appreciate the chance to describe what we do when classified information bears upon that task. I cannot, as you understand, address specific cases because of ongoing litigation and the need to protect sensitive law enforcement information.

Congress has authorized the consideration of classified information by statute, and several regulations allow the INS to present relevant classified information that it has in its possession. The Immigration and Nationality Act (INA) clearly envisions the consideration of such evidence in several places, including sections 235(c) and 240(b)(4)(B). Section 240(b)(4)(B) of the INA provides for the consideration of appropriately classified evidence in in camera proceedings where introduced “in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief.” Though recently enacted, section 240(b)(4)(B) essentially codifies a practice that has been sanctioned by the federal courts and the Board of Immigration Appeals dating back over four decades. [See Jay v. Boyd, 351 U.S. 345 (1956); Knauff v. Shaughnessy, 338 U.S. 537 (1950); U.S. ex rel. Mezei v. Shaughnessy, 345 U.S. 206 (1953); U.S. ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953); U.S. v. Barbour, 491 F.2d 573 (5th Cir. 1974).] This authority has been incorporated in the Attorney General's regulations since at least 1961 and currently can be found in the regulations covering various forms of relief, including asylum and withholding, adjustment of status, bond, and cancellation of removal. [See 8 C.F.R. §§ 240.11(a)(3), 240.11(c)(3)(iv), 240.33(c)(4), 240.49(a), and 240.49(c)(4)(iv). See also former part 242.17.]

These authorities reflect the realization by all three branches of government that there are certain situations in which the government has highly relevant information that should be considered in determining immigration status, but that that information cannot be made public without compromising intelligence-gathering operations, sources, or national security. If the INS has in its possession relevant and reliable information that an individual poses a risk to the national security, the INS presents the information to the immigration judge, even if the information is classified. The immigration judge then determines the weight which the evidence should be given.

In general, when the INS presents classified evidence in camera and ex parte it does so only to demonstrate inadmissibility, deny bond, and demonstrate ineligibility for relief sought. 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, as an overstay or on other grounds, seeks relief from removal – asylum, withholding of removal, suspension, or adjustment of status – and other agencies have provided substantive classified information which indicates that the alien is ineligible for such relief or does not merit the exercise of discretion, the INS has a duty in the interest of the national security to bring such information to the attention of the immigration court. It is important to note that while the use of classified information has garnered much recent media attention, it is, in fact, quite rare. Classified evidence is introduced and considered in less than 20 out of nearly 300,000 cases adjudicated by the immigration courts each year.

The most compelling governmental interest is the protection of the national security. This principle is embedded in the immigration procedures designed by Congress to prevent harm to this country by precluding entry to the United States by any individual who may pose a threat to the national security. This principle explains why the need to maintain the confidentiality of information, methods and sources relating to national security dangers is so important.

Section 105 of the INA authorizes the INS to maintain direct and continuous liaison with 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 an Office of Counterterrorism, whose purpose is to coordinate counterterrorism efforts within INS, and between INS and other law enforcement and intelligence agencies.

In addition, through legislation passed by Congress over the last several years, the INS has been given specific new and expanded authorities to use relevant classified information. For example, the Immigration Act of 1990 enhanced the INS' authority to exclude, arrest, and deport aliens involved in a variety of terrorist activities. The INS counterterrorism authority was again enhanced in 1996 through enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Both laws amended the INA to provide specific criminal and administrative removal provisions directly concerning alien terrorists and their supporters. The new laws also created the Alien Terrorist Removal Court (ATRC), a forum in which, though it has yet to be utilized, the Government may use classified information to prove that an alien is deportable under the terrorist charge. Taken as a whole, these new tools clarify Congress' expectation that the INS must play a larger and increasingly critical role in counterterrorism activities.

These laws have substantially strengthened the INS' authority to remove aliens who support or are directly involved in terrorist activities. Classified information, by its very nature, relates to information concerning the security of the United States or highly sensitive law enforcement matters. The INS is obligated to use it when it is credible and relevant to issues of national security. We have taken measures to ensure that the use of classified information is tightly controlled: approval by the Commissioner of the INS, as well as both the Office of General Counsel and the Office of Field Operations at Headquarters, is currently required before it may be used in any case. In addition, Deputy Attorney General Eric Holder has been overseeing a thorough review of the regulations and policies relating to the use of classified evidence. As part of that review, the Office of 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 only if it cannot be declassified.

The regulations provide that an alien may receive an unclassified summary of classified evidence used by the INS whenever the classifying agency determines that it can do so while protecting both the information and its source. The INS has directed its attorneys that in all cases where the INS intends to use classified information, the Office of General Counsel must inquire whether the agency that originated the information is able to provide an unclassified summary of the information to the alien and his or her counsel. If the agency determines that such a summary is possible, it provide it to the alien. The INS has no independent authority to provide an unclassified summary without the approval of the classifying agency.

The applicable regulations and statute do not entitle aliens or their counsel to access to classified information that may be presented to the immigration court, and the applicable Executive Order prevents such disclosure even to counsel with a security clearance. Section 4.2 of Executive Order 12958 authorizes the release of classified information only to persons with the required security clearance who have a "need-to-know" the information. Under the Executive Order, a person has a need-to-know if he requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. E.O. 12958, Section 4.1(c). The representation of aliens in immigration proceedings constitutes a private, rather than governmental, function.

Determinations to use classified evidence are made on a case by case basis without regard to aliens' religion, nationality or ethnic origin, and are based solely upon national security considerations. The INS firmly believes that it would be wrong to consider such characteristics in deciding whether to use classified information in a particular proceeding.

During the Cold War era, in camera proceedings were most common in cases involving nationals of Soviet-bloc countries. Within recent years, classified information has been used in cases involving aliens from several regions, including the Indian subcontinent, the Caribbean, Northern Ireland, and the former Soviet Union. In light of events of the past several years, however, from the World Trade Center to Khobar Towers to the Nairobi/Tanzania bombings, United States law enforcement and intelligence agencies are focusing substantial efforts on groups with ties to the Middle East. When it obtains relevant, probative information from these law enforcement and intelligence agencies, including classified information, the INS has a duty to present the information to the immigration court.

Though, as I mentioned, I cannot discuss any particular case now in litigation, one group of cases has recently cast significant attention on this set of issues. This group of cases resulted from an extraordinary evacuation of thousands of people from emergency circumstances in Iraq. To provide some context for understanding the small group of classified information cases that followed, I would like to briefly discuss that evacuation process.

In the fall of 1996, in the face of Iraqi military incursions into Kurdish Northern Iraq, approximately 6,500 Iraqi nationals were evacuated from Northern Iraq, through Turkey, to Guam. The evacuation effort focused on former United States Government employees, voluntary agency workers, and oppositionists who were members of either the Iraqi National Congress or the Iraqi National Accord, two opposition groups engaged in efforts to undermine the regime of Saddam Hussein. The purpose of the emergency evacuation was to get them out of harm's way and enable them to seek refugee protection in the United States.

The extraordinary challenge facing the United States government was, under the most urgent schedule, to (1) identify those who should be evacuated; (2) ensure that the persons who appeared for evacuation were in fact those who had been identified, and (3) make some effort to learn whether any of the evacuees posed a threat to the United States or would not otherwise merit refugee protection. Because of the imminent threat in Iraq, and strict limits on the time available to stage the evacuation on Turkish soil, it was difficult to meet each of these goals. By comparison with normal procedures for admitting refugees from overseas, the urgent time constraints on the evacuation prohibited adequate security screening.

On Guam, all of the evacuees were interviewed by a team of asylum officers from the INS. These officers, gathered from offices around the United States and sent to Guam on an emergency basis, worked to determine as promptly as possible whether the evacuees qualified for asylum. To compensate as much as possible for the impossibility of proper screening procedures in Iraq or Turkey, agents of the Federal Bureau of Investigation (FBI) conducted interviews of the evacuees during the processing in Guam. Following the interviews, the vast majority of the evacuees -- over ninety-nine percent -- qualified for protection and now enjoy asylum in the United States.

The FBI identified only twenty-five of the 6,500 evacuees as potential risks to national security, and it recommended that these persons not be admitted to the United States. As a result of these concerns, the government decided to bring these twenty-five evacuees to the continental United States and place them in

formal exclusion proceedings. This did not mean a final denial of their claims; they have the opportunity in proceedings to enlist the assistance of counsel and present their applications for asylum to an immigration judge. At the same time, however, the immigration court proceedings provide a forum for an independent body to consider the evidence suggesting national security concerns. Of the twenty-five evacuees placed in formal exclusion proceedings because of initial concerns over national security, the INS decided to present classified information in nine of their cases.

Thank you for the opportunity to discuss with you the INS' use of classified evidence in immigration proceedings. I hope that I have been able to provide you with a better understanding of the issue and the circumstances under which such evidence is considered in immigration proceedings. I welcome whatever questions you may have. Thank you.