

106TH CONGRESS
2D SESSION

S. 3139

To ensure that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 28 (legislative day, SEPTEMBER 22), 2000

Mr. ABRAHAM (for himself, Mr. FEINGOLD, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To ensure that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Secret Evidence Repeal
5 Act of 2000”.

1 **SEC. 2. APPLICATION OF PROCEDURES USED UNDER CLAS-**
2 **SIFIED INFORMATION PROCEDURES ACT**
3 **(CIPA) TO IMMIGRATION PROCEEDINGS.**

4 (a) APPLICATION OF PROCEDURES USED UNDER
5 CLASSIFIED INFORMATION PROCEDURES ACT (CIPA) TO
6 IMMIGRATION PROCEEDINGS.—

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

10 “APPLICATION OF PROCEDURES USED UNDER CLASSI-
11 FIED INFORMATION PROCEDURES ACT TO IMMIGRA-
12 TION PROCEEDINGS

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

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

23 “(2) LIMITATION.—The Attorney General may
24 seek to use classified information only in an immi-
25 gration proceeding in which the alien is alleged to be
26 deportable under section 237(a)(4)(B) or to oppose

1 an application for admission or an application for
2 discretionary relief from removal and only after
3 issuing the following certification:

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

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

14 “(b) REFERRAL OF CLASSIFIED MATTERS TO DIS-
15 TRICT COURT.—

16 “(1) IN GENERAL.—In the case of an immigra-
17 tion proceeding in which the Attorney General or the
18 alien moves for a referral under this section to con-
19 sider matters relating to classified information that
20 may arise in connection with the proceeding, the
21 presiding officer shall forward the petition for review
22 to a Federal district court for the district in which
23 the alien resides or the place where the immigration
24 proceedings are pending, of the use of such informa-
25 tion in such proceeding under subsection (c). Any

1 evidence which is the subject of a petition shall not
2 be considered in the immigration proceeding and
3 shall not be examined by the presiding officer, ex-
4 cept as provided in paragraph (3).

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

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

23 “(c) APPLICATION OF CIPA.—

24 “(1) IN GENERAL.—Subject to the succeeding
25 provisions of this section, in the cases described in

1 subsection (b)(1) involving review by a Federal dis-
2 trict court of the use of classified information in an
3 immigration proceeding, the provisions of the Classi-
4 fied Information Procedures Act (18 U.S.C. Appen-
5 dix III) (in this section referred to as ‘CIPA’) shall
6 apply to an alien who is a subject of the immigration
7 proceeding in the same manner as it applies to a de-
8 fendant in a criminal proceeding subject to such Act.

9 “(2) GENERAL RULES OF APPLICATION.—In
10 applying such Act under subsection (a), the fol-
11 lowing general rules apply:

12 “(A) Any reference in such Act to—

13 “(i) a criminal defendant or a trial (or
14 pre-trial) proceeding is deemed to be a ref-
15 erence to the alien who is the subject of
16 the immigration proceeding and to the im-
17 migration proceeding;

18 “(ii) an indictment or information at
19 issue is deemed to be a reference to a no-
20 tice to appear;

21 “(iii) a dismissal of an indictment or
22 information is deemed a reference to termi-
23 nation of the immigration proceeding
24 against an alien; and

1 “(iv) a trial court is deemed a ref-
2 erence (in the case of an administrative
3 immigration proceeding) to the presiding
4 officer in such proceeding.

5 “(B) The provisions of section 2 of such
6 Act (other than the last sentence) shall not be
7 applied.

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

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

17 “(E) In lieu of the reports described in
18 section 13 of CIPA, the Attorney General shall
19 report annually and in writing to the chairmen
20 and ranking minority members of the Commit-
21 tees on the Judiciary of the Senate and the
22 House of Representatives on the implementa-
23 tion of this section. Such reports shall include
24 the following information about each case
25 brought under this section:

1 “(i) The alien’s country of citizenship
2 or, if the alien was stateless, the country in
3 which the alien last habitually resided out-
4 side of the United States.

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

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

8 “(iv) Whether the Federal district
9 court approved the summary of classified
10 information and the deletions or admis-
11 sions proffered by the Attorney General.

12 “(v) Whether the alien was ultimately
13 ordered removed under section
14 237(a)(4)(B) or was granted or denied ad-
15 mission or the benefit for which the alien
16 applied.

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

22 “(e) CONSTRUCTION CONCERNING DECLASSIFICA-
23 TION OF INFORMATION.—Nothing in this section shall be
24 construed as preventing an alien in an immigration pro-
25 ceeding from seeking access to classified information

1 under section 552 of title 5, United States Code, or, in
 2 the case of information which is not disclosed based on
 3 section 552(b)(1) of such title, from initiating an action
 4 to seek to declassify some or all of the information in-
 5 volved.

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

7 “(1) IMMIGRATION PROCEEDING.—The term
 8 ‘immigration proceeding’ means any administrative
 9 proceeding under this Act.

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

14 (b) CONFORMING AMENDMENT.—Title V of the Im-
 15 migration and Nationality Act (8 U.S.C. 1531–1537) is
 16 repealed.

17 (c) CLERICAL AMENDMENTS.—The table of contents
 18 for such Act is amended—

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

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

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

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

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

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

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

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

19 **SEC. 4. REPEAL OF USE OF SECRET EVIDENCE IN BOND**
 20 **PROCEEDINGS.**

21 Section 236 of the Immigration and Nationality Act
 22 (8 U.S.C. 1226) is amended by adding at the end the fol-
 23 lowing:

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

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

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

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

12 **SEC. 5. REPEAL OF USE OF SECRET EVIDENCE AGAINST**
13 **LAWFUL PERMANENT RESIDENTS, ASYLUM**
14 **SEEKERS, AND ALIENS PAROLED INTO THE**
15 **UNITED STATES.**

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

22 **SEC. 6. TRANSITION.**

23 (a) APPLICATION TO DETAINEES.—Not more than
24 30 days after the effective date of this Act, the Attorney
25 General shall, with respect to any alien then detained or

1 whose liberty is otherwise restricted by the Attorney Gen-
2 eral, on the basis in whole or in part of information sub-
3 mitted by the Government ex parte and in camera to an
4 immigration judge, to the Board of Immigration Appeals
5 or to any court—

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

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

18 (A) release such alien if such alien is de-
19 tained; and

20 (B) cease all restrictions on the liberty of
21 such alien if such restrictions exist,
22 unless detention is warranted solely on the basis of
23 evidence disclosed to the alien; or

24 (3) release such alien.

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

10 (1) provide such alien a copy or transcript of
11 such information and a reasonable opportunity to re-
12 spond to such information, and grant or deny the
13 application or reopen the proceedings and afford the
14 alien de novo reconsideration of the application, as
15 the case may be, based solely on evidence in the pub-
16 lic record; or

17 (2) withdraw from the record of any pro-
18 ceedings involving such alien any and all evidence,
19 testimony, or other information submitted by the
20 Government ex parte and in camera to the immigra-
21 tion judge, the Board of Immigration Appeals, or to
22 any court, as the case may be, and grant or deny
23 the application or reopen the proceedings and afford
24 the alien de novo reconsideration of the application,

1 as the case may be, based solely on evidence in the
2 public record; or

3 (3) grant the application.

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

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

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

15 **SEC. 7. REGULATIONS.**

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

23 **SEC. 8. EFFECTIVE DATE.**

24 The amendments made by this Act shall take effect
25 on the date of the enactment of this Act and shall apply

1 to all aliens without regard to the date of arrival, admis-
2 sion, entry, or parole into the United States.

