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## Use of Secret Evidence by Government Lawyers: Balancing Defendants' Rights with National Security Concerns

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THE USE OF SECRET EVIDENCE BY GOVERNMENT  
LAWYERS: BALANCING DEFENDANTS' RIGHTS WITH  
NATIONAL SECURITY CONCERNS

TRACY L. CONN<sup>1</sup>

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Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.<sup>2</sup>

This practice, [the use of secret evidence,] which was a mainstay of every tyrannical regime in history and which the United States has consistently denounced, is now accepted.<sup>3</sup>

The ability to use secret evidence in trials involving national security matters is an extremely controversial power of the government lawyer. Although the use of secret evidence was a divisive issue before September 11, 2001, the terrorist attacks that day sparked the passage of new legislation that increased the power of the government lawyer to use classified evidence. By examining the cases involving secret evidence both before and after September 11, in particular the case of Zacarias Moussaoui, it becomes apparent that what is at stake is the appropriate balance

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<sup>2</sup>*Kiarelddeen v. Ashcroft*, 273 F.3d 542, 556 (3d Cir. 2001) (quoting *Wayte v. United States*, 470 U.S. 598, 611-12 (1985)).

<sup>3</sup>Steven W. Becker, "Mirror, Mirror on the Wall . . .": *Assessing the Aftermath of September 11th*, 37 VAL. U.L. REV. 563, 615-16 (2003).

between national security concerns and the constitutional rights of defendants. Current legislation gives prosecutors significant authority in determining whether and how secret evidence will be used and in what forum; it is crucial that government lawyers use this power with integrity. Only by appropriately balancing defendants' rights and national security concerns can justice be done in cases involving threats to national security.

#### I. THE USES OF SECRET EVIDENCE

##### A. *The Immigration and Nationality Act*

Secret evidence has been used by government lawyers since the 1950's, when its use was motivated by fear of the national security threat posed by Communists.<sup>4</sup> Enacted in 1952, the Immigration and Nationality Act (INA) allows the use of secret evidence in excluding aliens seeking entry to the United States as well as in considering applications by aliens for discretionary relief.<sup>5</sup> The term "secret evidence" usually refers to evidence that an immigrant in a deportation or exclusion proceeding is not allowed to see and the source of which is concealed,<sup>6</sup> but its use has been expanded to criminal cases. Government officials claim that such anonymity is necessary because without it no one would provide information about terrorist activities.<sup>7</sup> Additionally, in terms of the recent application of secret evidence, the anonymity of the source of such information protects highly advanced technical surveillance systems, such as satellite systems, from being compromised by revelations about the methods of the technology.<sup>8</sup>

Recently, particularly since the late 1980's, the Immigration and Naturalization Service (INS) has used secret evidence in detaining and deporting Muslims and Arabs.<sup>9</sup> Whereas in other contexts distinctions made based on national origin or race would come under heightened judicial scrutiny, the plenary power doctrine allows Congress to make immigration and deportation decisions on such bases.<sup>10</sup> "Because deportation is deemed not to be punishment, the constitutional protections

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<sup>4</sup>Ronald Smothers, *U.S. Bars or Expels Suspect Immigrants on Secret Evidence*, N.Y. TIMES, Aug. 15, 1998, at A1.

<sup>5</sup>Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 707-08 (2002).

<sup>6</sup>Smothers, *supra* note 4.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 19 (2003) [hereinafter Saito, *Plenary Power*]; see also Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 37 (2002) [hereinafter Saito, *American Jurisprudence*].

<sup>10</sup>Saito, *Plenary Power*, *supra* note 9, at 20.

guaranteed to all persons in criminal trials do not apply, allowing, among other things, the use of secret evidence and indefinite incarceration without a hearing.”<sup>11</sup>

In *Rafeedie v. Immigration & Naturalization Service*,<sup>12</sup> Fouad Rafeedie, a fourteen-year lawful permanent resident alien, was arrested upon trying to reenter the United States after a 1986 trip to Syria in which he attended the First Conference of the Palestine Youth Organization (PYO).<sup>13</sup> The INS claimed that the PYO was affiliated with the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization.<sup>14</sup> Rafeedie denied affiliation with any group engaged in or supporting terrorism.<sup>15</sup> Upon his arrest at the airport, Rafeedie was paroled for deferred inspection, but was eventually charged, the following year, with being excludable from the United States.<sup>16</sup> During the ensuing summary exclusion proceedings, the INS relied upon secret evidence, claiming that disclosing the evidence would be “prejudicial to the public interest, safety, or security of the United States.”<sup>17</sup> The District of Columbia Circuit disallowed the use of such evidence indirectly by finding that due process was required in the proceedings and by describing the perils of the use of secret evidence that would presumably endanger Rafeedie’s due process rights.<sup>18</sup> The court reasoned as follows: Rafeedie was a lawful permanent resident and the secret evidence involved concerned Rafeedie’s activities while in the United States; further, Rafeedie would have been entitled to due process had he been the subject of a deportation proceeding while living in the United States.<sup>19</sup> Therefore, due process was required in the exclusion proceedings.<sup>20</sup> The court also noted that if the use of secret evidence was allowed, Rafeedie could “prevail . . . only if he [could] rebut the undisclosed evidence against him . . . . It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.”<sup>21</sup>

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<sup>11</sup>*Id.* See also Smothers, *supra* note 4 (explaining that a Justice Department spokesman has said “that the courts have allowed the use of secret evidence because they consider grants of political asylum and other efforts for noncitizens as ‘discretionary benefits and extraordinary acts of sovereign generosity.’”).

<sup>12</sup>880 F.2d 506 (D.C. Cir. 1989).

<sup>13</sup>*Id.* at 508-09. In his original application for a reentry permit, Rafeedie claimed that he was visiting Cyprus to be with his mother, who required major heart surgery, but in truth his mother lived in Ohio. *Id.* at 508.

<sup>14</sup>*Id.* at 509.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Rafeedie v. Immigration & Naturalization Serv.*, 688 F. Supp. 729, 734 (D.D.C. 1988).

<sup>18</sup>*Rafeedie*, 880 F.2d at 523.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 516. For a shorter summary of the case, see Susan M. Akram & Kevin R. Johnson, “Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy”: *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 321-22 (2002).

Controversial secret evidence was used in another case soon after *Rafeedie*. The “Iraqi Seven”<sup>22</sup> were Iraqi Kurds who “worked for a CIA-funded Iraqi opposition group.”<sup>23</sup> Although the men were evacuated from Iraq to the United States by the United States government, the INS eventually initiated exclusion proceedings against them because of alleged visa violations.<sup>24</sup> The men were held for a year on the basis of secret evidence.<sup>25</sup> The group sought asylum in the United States, claiming that they would be persecuted if they returned to Iraq.<sup>26</sup> The immigration judge concluded, mainly on the basis of the secret evidence, that the men were threats to national security and thus could not remain in the United States.<sup>27</sup>

Despite the Iraqis’ attorney having the highest security clearance possible, he was prevented from seeing the evidence.<sup>28</sup> During a later stage of the litigation, the INS declassified most of the material, releasing five hundred pages of the secret evidence and giving unclassified summaries of the remainder of the evidence.<sup>29</sup> At that time it was revealed that much of the material had been “erroneously classified,” contained substantial translation errors, and demonstrated “ethnic and religious stereotyping by the FBI,” and further that some of the information was unreliable, “including rumors and innuendo.”<sup>30</sup> Five of the seven men eventually settled their cases by “withdrawing their asylum claims in exchange for release from detention.”<sup>31</sup>

#### B. *The Antiterrorism and Effective Death Penalty Act of 1996*

After the Oklahoma City bombing in 1995, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA), which permit the use of secret evidence in removal proceedings,<sup>32</sup> in particular, those resulting from allegations of terrorism.<sup>33</sup> This occurred even though, according to Steven W. Becker, these laws are “a clear violation of the constitutional right to confront and cross-examine those

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<sup>22</sup>Some articles describe the group as consisting of six men. *See, e.g.*, Smothers, *supra* note 4.

<sup>23</sup>Akram & Johnson, *supra* note 21, at 323-24.

<sup>24</sup>*Id.*

<sup>25</sup>Smothers, *supra* note 4.

<sup>26</sup>Akram & Johnson, *supra* note 21, at 324.

<sup>27</sup>*Id.*

<sup>28</sup>Smothers, *supra* note 4.

<sup>29</sup>*See id.*; Akram & Johnson, *supra* note 21, at 324.

<sup>30</sup>Akram & Johnson, *supra* note 21, at 324.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 322.

<sup>33</sup>Spiro, *supra* note 5, at 708.

who proffer charges or testimony against another.”<sup>34</sup> Under AEDPA, special courts called “alien terrorist removal courts” can be created for such cases.<sup>35</sup>

After the passage of AEDPA, the INS initiated nearly two dozen deportation actions on the basis of secret evidence that it claimed would threaten national security if revealed.<sup>36</sup> In 1999, “twenty-five secret evidence cases were pending in the United States”;<sup>37</sup> by 2000, new cases involving secret evidence were arising monthly.<sup>38</sup>

Examples of cases that occurred in this time period include those of Nasser Ahmed, Anwar Haddam, Mazen al-Najjar, and Imad Hamad. Beginning in 1996, Nasser Ahmed, an Egyptian man whose children were United States citizens, was detained for more than three years, “mostly in solitary confinement,” while he was the subject of deportation proceedings, during which the INS relied primarily on secret evidence.<sup>39</sup> The INS claimed that Ahmed was a threat to national security because he was in some way associated with a terrorist organization.<sup>40</sup> The INS only revealed Ahmed’s alleged association after a year of his incarceration and never specified the group Ahmed was allegedly associated with.<sup>41</sup> When the INS eventually had to disclose the secret evidence, it was revealed that much of the information upon which the INS had relied was unsubstantiated.<sup>42</sup> The district judge ruled that Ahmed was not a national security threat and ordered that he be released.<sup>43</sup> “[I]t turned out that the FBI and INS [had been] attempting to make good on their threat to deport him for refusing to inform on Sheik Abdel Rahman, who was on trial for conspiracy in connection with the 1993 World Trade Center bombing.”<sup>44</sup>

Anwar Haddam, an elected member of the Algerian Parliament, a professor, and a spokesperson for the Islamic Salvation Front, was arrested in 1996 on the basis of secret evidence, which supposedly demonstrated his connection to terrorist organizations.<sup>45</sup> Shortly after his arrest, the INS commenced exclusion proceedings

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<sup>34</sup>Becker, *supra* note 3, at 615.

<sup>35</sup>Spiro, *supra* note 5, at 708. See also Smothers, *supra* note 4.

<sup>36</sup>Akram & Johnson, *supra* note 21, at 322.

<sup>37</sup>*Id.* at 321. Between 1992 and 1998, fifty cases involved secret evidence. Smothers, *supra* note 4. From 1990 to 2000, secret evidence was used to imprison approximately 100 people. Tim Weiner, *Congress Reviewing Use of Evidence Kept Secret*, N.Y. TIMES, May 23, 2000, at A19.

<sup>38</sup>Weiner, *supra* note 37.

<sup>39</sup>See Akram & Johnson, *supra* note 21, at 325-26; Saito, *Plenary Power*, *supra* note 9 at 19.

<sup>40</sup>Saito, *Plenary Power*, *supra* note 9, at 19.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 20.

<sup>45</sup>Akram & Johnson, *supra* note 21, at 325; *In re Haddam*, 2000 BIA LEXIS 20, \*7 (Bd. of Imm. App. 2000).

against him.<sup>46</sup> When the secret evidence was later disclosed, it was found to be unreliable.<sup>47</sup> The appellate judge stated that the evidence was conclusory and provided an insufficient basis for finding that Haddam was a danger to the United States or involved with terrorist organizations.<sup>48</sup> Haddam was released after four years of detention.<sup>49</sup>

In 1997, Mazen al-Najjar was arrested and removal proceedings were initiated against him on the basis of secret evidence.<sup>50</sup> The INS claimed that the thirteen-year United States resident had overstayed his student visa and constituted a security threat because he was “connected with terrorism.”<sup>51</sup> Al-Najjar was “an editor of the journal of the World and Islam Studies Enterprise (WISE), a think-tank based at the University of South Florida devoted to promoting discussion of Middle East issues.”<sup>52</sup> His arrest and detention were the result of an FBI investigation into the activities of “a former WISE administrator who became head of the Islamic Jihad.”<sup>53</sup> Al-Najjar was held for over three years before the secret evidence that was the basis of his imprisonment was disclosed during an “open evidence” hearing.<sup>54</sup> At this point it was discovered that the secret evidence, consisting of a video tape that was said to show that al-Najjar raised funds for Palestinian Islamic Jihad, a terrorist group, contained no such evidence.<sup>55</sup> As a result, the judge ordered the release of al-Najjar.<sup>56</sup>

In Imad Hamad’s case, the INS was determined to prevent Hamad from obtaining permanent resident status.<sup>57</sup> A resident of the United States since 1980, Hamad was a social worker who was married to a United States citizen.<sup>58</sup> In his immigration court hearings in 1989, the INS displayed photographs from the FBI showing Hamad “participating in demonstrations and fund-raising events for local Arab-American groups” and stated that Hamad was a member of the PFLP.<sup>59</sup> Proceedings related to

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<sup>46</sup>*In re* Haddam, 2000 BIA LEXIS 20 at \*7.

<sup>47</sup>Akram & Johnson, *supra* note 21, at 325.

<sup>48</sup>*In re* Haddam, 2000 BIA LEXIS 20 at \*112-14.

<sup>49</sup>Akram & Johnson, *supra* note 21, at 325.

<sup>50</sup>*Id.* at 324-25.

<sup>51</sup>Anthony Lewis, *Abroad at Home; The Uses of Secrecy*, N.Y. TIMES, Nov. 4, 2000, at A21.

<sup>52</sup>Akram & Johnson, *supra* note 21, at 324-25.

<sup>53</sup>*Id.* at 325.

<sup>54</sup>*Id.* at 324-25. Saito, *Plenary Power*, *supra* note 9, at 20.

<sup>55</sup>*See* Lewis, *supra* note 51.

<sup>56</sup>Akram & Johnson, *supra* note 21, at 325. One source states that “federal officials offered to release Al-Najjar if people who knew him would inform on others in the community” and that they were thus “using his incarceration to obtain information illegitimately.” Saito, *Plenary Power*, *supra* note 9, at 20.

<sup>57</sup>Smothers, *supra* note 4.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

the case occurred periodically for the next four years, but Hamad was never deported.<sup>60</sup> Five years later, the INS claimed that it had secret evidence demonstrating Hamad's terrorist connections.<sup>61</sup> After viewing the evidence, however, the judge finally granted Hamad permanent residency.<sup>62</sup> Later, in 1998, the INS declassified most of the secret evidence.<sup>63</sup> According to Hamad's lawyer, "[t]he things they said were secret evidence turned out to be the same declassified stuff we saw from the F.B.I. back in the 1989 hearing."<sup>64</sup>

### C. *The Secret Evidence Repeal Acts*

Media scrutiny of the use of secret evidence and the resulting constitutional concerns contributed to skepticism by courts, Congress, and the Justice Department about the necessity and propriety of using secret evidence.<sup>65</sup> In 1999, Congress proposed the first Secret Evidence Repeal Act.<sup>66</sup> The Act recommended (1) repealing the alien terrorist removal provisions of the INA, (2) allowing aliens in removal proceedings to view all evidence, (3) prohibiting the use of secret evidence in applications for immigration benefits, defined to include withholding of deportation or removal or granting of asylum, (4) entitling aliens under arrest and detention for removal or deportation to government-provided counsel, access to all evidence, and judicial review, and (5) exempting lawful permanent residents from security and related removal provisions, which allowed for the use of non-disclosed information.<sup>67</sup> Despite popularity in the House of Representatives and Attorney General Janet Reno's support of revision of the rules involving the use of secret evidence, the Secret Evidence Repeal Act of 1999 was never passed.<sup>68</sup>

In 2001, Congress proposed a second Secret Evidence Repeal Act.<sup>69</sup> If passed, the Act would have required that aliens in any immigration proceeding in which classified information would be used receive advance notice of such intention, that use of classified information be limited to terrorist activity deportation or opposition of an alien's admission when such information could not be obtained from open sources and the government requests declassification, that federal district courts review classified material upon the request of the Attorney General or the alien, and that the federal district court issue an order containing an unclassified summary of

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<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>Spiro, *supra* note 5, at 708-09; Smothers, *supra* note 4.

<sup>66</sup>Secret Evidence Repeal Act of 1999, H.R. 2121, 106th Cong. § 6 (1999).

<sup>67</sup>*Id.*

<sup>68</sup>*See* Weiner, *supra* note 37. The INS was opposed to such revisions, stating that limits on the use of secret evidence "will make us choose either between requesting an agency to declassify national security information, or going ahead and letting a benefit be granted to an alien who is a danger to national security." *Id.*

<sup>69</sup>Secret Evidence Repeal Act of 2001, H.R. 1266, 107th Cong. (2001).

classified material when possible.<sup>70</sup> Further, the Act would have entitled aliens subject to arrest and detention for removal or deportation to “(1) non-federally provided counsel; (2) examine all evidence, present evidence, and question witnesses; (3) have a complete record of the proceeding kept; and (4) judicial review.”<sup>71</sup> Like the Act of 1999, the Secret Evidence Repeal Act of 2001 would also have exempted lawful permanent residents from security and related removal provisions.<sup>72</sup>

While these statutes were being considered, the use of secret evidence continued. The most well-known case is that of Hany Kiardeeen, a man detained on the basis of secret evidence that turned out to be not only untruthful but invented by his vengeful ex-wife.<sup>73</sup> In 1998, the INS arrested Kiardeeen, a Palestinian-Israeli citizen<sup>74</sup> and United States resident since 1990, and began proceedings to deport him to Gaza on the basis of secret evidence.<sup>75</sup> A declassified summary of the secret evidence given to Kiardeeen’s attorney revealed that the evidence consisted of statements of anonymous informants alleging that Kiardeeen wanted to kill Attorney General Janet Reno and that he had met with Nidal A. Ayyad, one of the men convicted in the 1993 bombing of the World Trade Center, a week before the attack.<sup>76</sup> Kiardeeen denied every allegation.<sup>77</sup> Later, in immigration court, Kiardeeen also demonstrated numerous weaknesses in the secret evidence and that his accuser was probably his ex-wife.<sup>78</sup> The immigration court released Kiardeeen on bond pending any government appeal.<sup>79</sup> Numerous attempts by the INS to keep Kiardeeen in detention by staying his release were successful, in part because the INS argued that Kiardeeen posed a threat to national security; Kiardeeen was finally released in October of 1999.<sup>80</sup>

#### D. *The Use of Secret Evidence After September 11*

The terrorist attacks of September 11, 2001 have had a tremendous impact on the priorities of the federal government. Commentators theorize that not only is it decreasingly likely that a Secret Evidence Repeal Act will be passed,<sup>81</sup> but also that

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<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>Smothers, *supra* note 4.

<sup>74</sup>*Kiardeeen*, 273 F.3d at 545.

<sup>75</sup>*Secrecy and Due Process*, WASH. POST, Oct. 25, 1999, at A28 [hereinafter *Secrecy and Due Process*].

<sup>76</sup>Smothers, *supra* note 4.

<sup>77</sup>*Id.*

<sup>78</sup>*Secrecy and Due Process*, *supra* note 75.

<sup>79</sup>*Id.*

<sup>80</sup>*Kiardeeen*, 273 F.3d at 546-47.

<sup>81</sup>*See* Akram & Johnson, *supra* note 21, at 349-50; Saito, *American Jurisprudence*, *supra* note 9, at 38. This is particularly interesting considering that “[d]uring the 2000 Presidential

measures already enacted since September 11, particularly the Executive Order issued by President George W. Bush establishing military tribunals, demonstrate that the government supports the use of secrecy, particularly in cases involving Arabs and Muslims suspected of terrorism or association with terrorist groups.<sup>82</sup>

Dicta in *Kiareldeen v. Ashcroft* demonstrates that the terrorist attacks on September 11 made courts increasingly willing to support the use of secrecy to prevent further terrorist attacks. While cautioning that it was only examining whether the government “was justified in initiating the proceeding and going forward with the hearing before the immigration judge” and not the underlying merits of the case, the Third Circuit held that “there was ample substantial justification for the position adopted by the government.”<sup>83</sup> In doing so, the court noted that “[t]he eerie, if not prescient, information that the Joint Terrorism Task Force assembled from its sources, must be evaluated in light of ‘the degree of suspicion that attaches to particular types of [activities.]’” and that particularly in light of the harsh criticism of the FBI following the September 11th attacks, “[the information contained in the secret evidence] understandably created apprehension on the part of the Joint Terrorism Task Force, alerting the government to take all necessary action to investigate all leads and assure the defense of the nation.”<sup>84</sup>

In contrast, some commentators caution that “September 11 provides no cause to retard [the trend of criticizing the use of secret evidence], at least not in the courts.”<sup>85</sup> Spiro suggests that a form of in camera review could effectively be utilized to ensure informed decisions and he characterizes as “alarmist” arguments insisting that the use of secret evidence is necessary to fight terrorism.<sup>86</sup>

Since September 11, 2001, at least three cases have arisen that involve the use of secret evidence, those of Mohamed Atriss, Harpal Singh, and Zacarias Moussaoui. In Atriss’s case, the use of secret evidence was disallowed altogether; in Singh’s, the court has ordered the government to produce the secret evidence; and in Moussaoui’s case, struggles regarding the use of secret evidence continue.<sup>87</sup>

Mohamed Atriss is an American citizen who was born in Egypt.<sup>88</sup> Atriss has been “accused of selling phony identification documents to two of the Sept[ember] 11, 2001, hijackers.”<sup>89</sup> Although none of the charges in the case specifically refer to the hijackers, the prosecutors have mentioned Atriss’s connection to them in

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campaign, George W. Bush criticized the Clinton administration’s use of secret evidence proceedings against Arabs and Muslims as tantamount to unlawful racial profiling.” Akram & Johnson, *supra* note 21, at 349-50.

<sup>82</sup>See *infra* Part II.

<sup>83</sup>*Kiareldeen*, 273 F.3d at 554-55.

<sup>84</sup>*Id.* at 556-57.

<sup>85</sup>Spiro, *supra* note 5, at 709.

<sup>86</sup>*Id.*

<sup>87</sup>Moussaoui’s case will be discussed in Part III, *infra*.

<sup>88</sup>Dale Russakoff, *Use of Secret Evidence Rejected: Court Orders New Hearing for Suspect in Fake ID Case*, WASH. POST, Jan. 16, 2003, at A02, available at <http://foi.missouri.edu/secretcourts/useofsecret.html>.

<sup>89</sup>*Id.*

hearings.<sup>90</sup> The prosecutors sought to use secret evidence in Atriss's trial, stating that secrecy was justified because release of the material would threaten national security.<sup>91</sup> They were allowed to use the evidence in a bail proceeding after the judge found that it came from a credible witness.<sup>92</sup> The appellate court handling the case, however, held that the prosecutors "lacked adequate basis" to use the secret evidence and ordered the lower court judge to hold a hearing about the reasons behind the attempts to use secret evidence.<sup>93</sup> The appellate judge also suggested that federal officials testify at the hearing about the threat posed to national security by the evidence.<sup>94</sup> It appears unlikely that the use of secret evidence will be allowed because federal officials say that they "believe[] Atriss knew no more about the hijackers than about hundreds of other illegal immigrants who patronized him."<sup>95</sup>

In 1999, Harpal Singh and his wife, Rajwinder Kaur, Indian citizens, sought asylum in the United States.<sup>96</sup> In denying them asylum, the immigration judge stated that "the pair engaged in terrorist activities related to their effort to establish a separate Sikh state . . . in India."<sup>97</sup> Because the judge also found that it would be inappropriate to deport the couple because they would likely suffer torture and persecution upon their return to India, Singh and Kaur were detained, although Kaur was later released.<sup>98</sup> Although the couple denied participating in terrorism, the government stated that secret evidence justified their detention.<sup>99</sup> In May of 2003, the Ninth Circuit ordered the government to produce the classified documents that it claims demonstrate Singh's connection to terrorist activity.<sup>100</sup>

## II. THE USA PATRIOT ACT AND PRESIDENT GEORGE W. BUSH'S EXECUTIVE ORDER ESTABLISHING MILITARY TRIBUNALS

The tragic events of September 11, 2001 inspired the passage of two pieces of legislation, the USA PATRIOT Act and President Bush's Executive Order establishing military tribunals. Both laws involve controversial infringements on constitutional rights, but have been justified by the threat to national security posed by past and future terrorism.

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<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup>Jessie Mangaliman, 'Secret Evidence' Review is Ordered, THE MERCURY NEWS (May 21, 2003), at <http://www.bayarea.com/mld/mercurynews/news/5910009.htm>.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*See id.*; Singh v. Immigration & Naturalization Serv., 328 F.3d 1205, 1206 (9th Cir. 2003).

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) was signed into law on October 26, 2001.<sup>101</sup> Although the USA PATRIOT Act was actually prepared before September 11 and has provisions concerning domestic and foreign terrorists, the Act is commonly thought to have been designed and implemented as a specific response to the attacks on September 11.<sup>102</sup> According to one commentator, September 11 provided a rare opportunity for the government to “enact proposals that previously had been rejected or were found to be unconstitutional and . . . enlarge their own powers while concomitantly eroding the civil liberties of law-abiding American citizens.”<sup>103</sup>

Comprised of over three hundred pages,<sup>104</sup> the USA PATRIOT Act includes a considerable number of provisions regarding the appropriate law enforcement prevention measures for and response to terrorist activities. Each type has been criticized as infringing on the constitutional rights of suspected terrorists. For instance, one major component of the USA PATRIOT Act is its authorization of information-sharing between law enforcement and intelligence agencies.<sup>105</sup> Although such practices have previously led to abuses and infringements on the privacy of American citizens,<sup>106</sup> the failure of the government to prevent the events of September 11 despite the detection by several federal agencies of increasingly suspicious activities by known associates of terrorists motivated the current demand for information-sharing.<sup>107</sup> That such information-sharing is now sanctioned by the federal government creates “the specter of intelligence agencies, once again, collecting, profiling, and potentially harassing U.S. persons engaged in lawful, First Amendment-protected activities.”<sup>108</sup>

Additionally, government agencies now have significantly increased information-gathering power. Before passage of the USA PATRIOT Act, in order to use evidence against a “foreign power” collected from electronic surveillance in a criminal trial, the primary purpose of the investigation had to have been the

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<sup>101</sup>Becker, *supra* note 3, at 592.

<sup>102</sup>*Id.* at 592-93.

<sup>103</sup>*Id.* at 592.

<sup>104</sup>John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081, 1088 (2002).

<sup>105</sup>See USA PATRIOT Act § 203(d)(1), 115 Stat. 272, 281 (2001); Becker, *supra* note 3.

<sup>106</sup>Becker, *supra* note 3, at 596.

<sup>107</sup>For information on the investigations of various FBI offices, see *The FBI’s Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001: Hearing Before the Joint Comm. on Intelligence*, 107th Cong. 1-15, 24 (2002) (statement of Eleanor Hill, Staff Director, Joint Intelligence Inquiry Staff), available at <http://intelligence.senate.gov/0210hr/021017/hillunclass.pdf> [hereinafter Intelligence Committee Statement].

<sup>108</sup>Becker, *supra* note 3, at 597 (quoting John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, 29 HUM. RTS. 3, 3 (2002)).

gathering of foreign intelligence, and not investigating crimes.<sup>109</sup> This rule was designed to insure that such searches and seizures only proceed after probable cause has been established.<sup>110</sup> Section 218 of the USA PATRIOT Act, however, only requires that a *significant* purpose of an investigation be the gathering of foreign intelligence in order to allow the use of wiretap evidence, thus potentially allowing investigators to evade the probable cause requirement.<sup>111</sup> Critics caution that the combined result of the intelligence-sharing and intelligence-gathering provisions could be the chilling of speech of those involved in political, religious, or humanitarian efforts.<sup>112</sup>

Other provisions that increase the evidence-gathering powers of the government and infringe on Fourth Amendment rights include section 213, which authorizes delayed notice of searches if “immediate notification . . . may have an adverse result,”<sup>113</sup> section 216, which gives the government significantly increased power to monitor one’s computer activity,<sup>114</sup> section 206, which permits the use of “roving wiretaps” that effectively monitor a person rather than a particular device,<sup>115</sup> and section 203(a)(1), which dramatically increases the ability of federal prosecutors to obtain information from grand jury witnesses about a variety of subjects and report it to numerous other federal agencies.<sup>116</sup> Additionally, when the Attorney General certifies a non-citizen as a suspected terrorist, under the authority of section 412, the INS may indefinitely detain that person.<sup>117</sup> Such practices violate the immigrant’s due process rights<sup>118</sup> and are particularly disconcerting when the Attorney General’s conclusions are based on secret evidence.<sup>119</sup>

The use of secret evidence is also specifically advocated by the USA PATRIOT Act. Section 106 increases the President’s power to seize the property of any foreign person, organization, or country that has “planned, authorized, aided, or engaged in such hostilities or attacks against the United States.”<sup>120</sup> Although property owners

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<sup>109</sup>*Id.* at 598.

<sup>110</sup>*Id.*

<sup>111</sup>See USA PATRIOT Act § 218, 115 Stat. at 291; Becker, *supra* note 3, at 598-99.

<sup>112</sup>Becker, *supra* note 3, at 601.

<sup>113</sup>USA PATRIOT Act § 213, 115 Stat. at 285-86.

<sup>114</sup>USA PATRIOT Act § 216(b)(1), (c), 115 Stat. at 288-90.

<sup>115</sup>USA PATRIOT Act § 206, 115 Stat. at 282.

<sup>116</sup>See USA PATRIOT Act § 203(a)(1), 115 Stat. at 278-79; see also Becker, *supra* note 3, at 607-08; Akram & Johnson, *supra* note 21, at 328 (noting that the USA PATRIOT ACT has “bolstered federal law enforcement surveillance powers over citizens and noncitizens associated with ‘terrorism’”).

<sup>117</sup>See USA PATRIOT Act § 412(a), 115 Stat. at 350-51; Becker, *supra* note 3, at 609.

<sup>118</sup>Becker, *supra* note 3, at 609-10; Whitehead & Aden, *supra* note 104, at 1094-95.

<sup>119</sup>See Whitehead & Aden, *supra* note 104, at 1095 (noting that “the lack of concern for the rights of non-citizens runs thematically through the Administration’s response to the terrorist attacks”).

<sup>120</sup>See USA PATRIOT Act § 106, 115 Stat. at 278; Whitehead & Aden, *supra* note 104, at 1127.

may be able to appeal such a seizure under section 316 by claiming that the property was not an asset of suspected terrorists, section 316 also allows the government to use secret evidence in such a proceeding if revealing the evidence could compromise national security.<sup>121</sup>

In addition, the USA PATRIOT Act both centralizes law enforcement authority in the Department of Justice and increases the scope of individuals under scrutiny for terrorist activities.<sup>122</sup> In fact, “[t]he extent to which the[] executive branch powers have been consolidated in one official, the Attorney General, is unprecedented in recent history.”<sup>123</sup> The USA PATRIOT Act is focused only on the activity of terrorists, but the Act redefines “domestic terrorism” to include a considerably broader range of threatening activities than ever before.<sup>124</sup> Such wide-sweeping provisions create the possibility that the government will selectively target political groups with interests and priorities contrary to its own, groups that would not have been considered terrorist groups in previous years. Focusing such broad powers in one person, the Attorney General, creates a tremendous potential for abuse.

Less than a month after the passage of the USA PATRIOT Act, President Bush issued an Executive Order, which enabled government lawyers to try non-citizens suspected of terrorism or harboring terrorists in military courts in which those defendants would have very few rights.<sup>125</sup> In addition to infringing on the Sixth Amendment’s guarantee of a jury trial by dictating that trials would be held in front of a panel of military officers,<sup>126</sup> the Order explicitly stated that the tribunals would not utilize “the principles of law or the rules of evidence” that are normally required in criminal trials because of the threat posed by international terrorism.<sup>127</sup> This meant that defendants in military tribunals are not entitled to the presumption of innocence and their guilt does not have to be proven beyond a reasonable doubt in

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<sup>121</sup>See USA PATRIOT Act § 316, 115 Stat. at 309; Whitehead & Aden, *supra* note 104, at 1129.

<sup>122</sup>See Whitehead & Aden, *supra* note 104, at 1088-93.

<sup>123</sup>*Id.* at 1089.

<sup>124</sup>See USA PATRIOT Act § 802, 115 Stat. at 376; Whitehead & Aden, *supra* note 104, at 1189.

<sup>125</sup>See Military Order of Nov. 11, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57,833 (Nov. 13, 2001). See also Akram & Johnson, *supra* note 21, at 328; Becker, *supra* note 3, at 581.

<sup>126</sup>Edward Alden, *National Security vs. Due Process*, FIN. TIMES, July 15, 2003, available at <http://www.derechos.org/nizkor/excep/alden.html>. Also, according to Becker, “[n]either the Constitution nor any federal statute permits the President to create a military court with the jurisdiction to try all cases of alleged international terrorism against the United States” and the Military Order violates the International Covenant on Civil and Political Rights. Becker, *supra* note 3, at 583-85. Additionally, Becker argues that the two cases cited as precedent for the legality of the military tribunals are inapposite because in those cases the tribunals were established after a formal declaration of war, whereas Congress did not declare war after the events of September 11. *Id.* at 587-91. Thus, the legality of military tribunals is suspect to begin with.

<sup>127</sup>Whitehead & Aden, *supra* note 104, at 1118-19 (citing Military Order of Nov. 11, 2001, 66 Fed. Reg. at 57,833).

order to be convicted.<sup>128</sup> Further, the Order stated that all evidence with “probative value to a reasonable person” could be utilized, but evidence that, if revealed, would threaten national security could be kept secret.<sup>129</sup> Additionally, military tribunals were authorized to impose the death penalty with only a two-third majority vote in support.<sup>130</sup>

On March 21, 2002, however, the rules of trials in military tribunals were modified somewhat. The latest version of the rules requires that defendants be provided court-appointed military lawyers if they do not retain private counsel, that journalists be allowed to observe trials, that proceedings be closed when classified material is being discussed, that defendants be presumed innocent, that in order to convict the tribunal must find there to have been proof beyond a reasonable doubt by a two-thirds vote, that there be a unanimous verdict in order to impose the death penalty, and that appeals be heard by “panels of military and/or civilian specialists,” among other provisions.<sup>131</sup> In practice, however, these alterations may not make a substantial difference because section 7(B) of the Department of Defense’s Military Commission Order states that, “[i]n the event of any inconsistency between the President’s Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President’s Military Order shall govern.”<sup>132</sup>

Additionally, although defendants will be entitled to counsel, “defense attorneys are likely to be selected or scrutinized by the government because much of the evidence against their client will be classified information.”<sup>133</sup> Also, the judges in such tribunals will be military officers who are probably very conscious of and concerned about national security interests.<sup>134</sup> “Suspects tried under this Order will be under the exclusive jurisdiction of the military tribunals,” and thus they will not be entitled to any appeals other than the Secretary of Defense or President’s review of the military tribunal’s final decision.<sup>135</sup> “[T]he Order provides the President . . . with the greatest array of legal powers to be exercised in the justice system that has ever been vested in a single person, office, or branch of government since the birth of this nation.”<sup>136</sup>

Although it is frequently argued that terrorism offenses are not significantly different from other criminal infractions and thus should also be tried in ordinary

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<sup>128</sup>Becker, *supra* note 3, at 582.

<sup>129</sup>See Whitehead & Aden, *supra* note 104, at 1119; Becker, *supra* note 3, at 582, 613.

<sup>130</sup>Whitehead & Aden, *supra* note 104, at 1119.

<sup>131</sup>Becker, *supra* note 3, at 585-86.

<sup>132</sup>*Id.* at 586. Department of Defense Military Commission Order No. 1, § 7(A), (B) (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

<sup>133</sup>Emanuel Gross, Trying Terrorists – Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights, 13 *IND. INT’L & COMP. L. REV.* 1, 51 (2002).

<sup>134</sup>*Id.* at 69.

<sup>135</sup>Whitehead & Aden, *supra* note 104, at 1119; see also Gross, *supra* note 133, at 51.

<sup>136</sup>Becker, *supra* note 3, at 581.

criminal courts,<sup>137</sup> supporters of military tribunals argue that terrorists are war criminals and therefore should be tried in military tribunals.<sup>138</sup> Additionally, trials in civilian courts may give terrorists a forum from which they can spread their views, continue to inspire fear, and perhaps even communicate with comrades.<sup>139</sup>

### III. SECRET EVIDENCE IN THE ZACARIAS MOUSSAOUI CASE

Although the use of secret evidence was controversial before September 11,<sup>140</sup> recently, the Zacarias Moussaoui case has brought it back into the headlines. The case is a powerful illustration of the additional policy concerns that have arisen since September 11 and the issuance of Bush's Executive Order.

Soon after September 11, 2001, newspapers began to announce that the "20th hijacker" had been identified. Moussaoui, a French citizen of Moroccan descent, was already in the custody of the INS awaiting deportation when the attacks on September 11 occurred.<sup>141</sup> He had attracted the attention of the FBI because of strange behavior exhibited during flight school training.<sup>142</sup> In February of 2001, Moussaoui began to take flight lessons in a small Cessna plane.<sup>143</sup> By May he had grown tired of these lessons and contacted Pan American International Flight School to learn how to fly a Boeing 747, a considerably larger plane.<sup>144</sup>

Because most students learning to fly Boeing 747s have pilots' licenses, work for an airline, and have accumulated "several thousand flight hours" and Moussaoui had none of these attributes, he attracted the attention of his instructors.<sup>145</sup> In August of 2001, one of the flight instructors contacted the Minneapolis branch of the FBI.<sup>146</sup> The FBI office began an "international terrorism investigation of Moussaoui"

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<sup>137</sup>See, e.g., Gross, *supra* note 133, at 69 (stating that "[i]t follows that the entire process remains within a special military system; whereas, the offense itself is no different from any other criminal offense tried within the civilian framework"); Spiro, *supra* note 5, at 665 (arguing that "[t]errorism . . . ultimately reduces to a kind of criminal activity, which can be addressed as such"); Becker, *supra* note 3, at 614 ("Our system of criminal justice, with due process for all, is fully capable of dealing with all types of criminal violations.").

<sup>138</sup>Gross, *supra* note 133, at 58.

<sup>139</sup>*Id.* at 61-62. It has also been suggested that neither civilian courts nor military tribunals are appropriate to try such cases and that instead a federal terrorist court may be a better option. This suggestion is aimed in particular at solving the problems involved with secret evidence. "Such a court could craft procedures that would allow for the administration of secret evidence without exposing the sources and methods employed by U.S. intelligence." Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 5 (2003).

<sup>140</sup>Spiro, *supra* note 5, at 704.

<sup>141</sup>See Intelligence Committee Statement, *supra* note 107, at 15, 22.

<sup>142</sup>*Id.* at 16-18.

<sup>143</sup>*Id.* at 16.

<sup>144</sup>*Id.* at 16-17.

<sup>145</sup>*Id.*

<sup>146</sup>*Id.* at 17.

because they believed Moussaoui was a national security threat.<sup>147</sup> By the time of the investigation, Moussaoui was illegally remaining in the United States, as he had entered using his French passport, which allowed him to stay in the country without a visa until May 22, 2001, ninety days after his arrival.<sup>148</sup>

Moussaoui continued to exhibit bizarre behavior, including displaying an unusual interest in “the operation of the plane’s doors and control panel.”<sup>149</sup> Moussaoui also stated that he would “‘love’ to fly a simulated flight from Heathrow Airport in England to John F. Kennedy Airport in New York.”<sup>150</sup> After determining that it would be dangerous to allow Moussaoui to complete any more flying lessons, FBI agents temporarily detained Moussaoui, and then took him into custody after discovering that he was in the United States illegally.<sup>151</sup> When Moussaoui showed the FBI agents his passport case, they saw that he had a bank statement for an account in Oklahoma in which \$32,000 had been deposited in cash.<sup>152</sup> Moussaoui was unable to explain the details surrounding the deposit.<sup>153</sup>

Moussaoui’s activity aroused the suspicions of numerous government agents.<sup>154</sup> In particular, Moussaoui’s desire to fly a simulated England-to-New York flight made one CIA officer suspect that he may be a hijacker, only furthering concerns resulting from Moussaoui’s earlier denial that he was a Muslim while a companion of Moussaoui’s had told the FBI that Moussaoui was a fundamentalist.<sup>155</sup>

By the end of August, the FBI determined that there was “insufficient information to show that Moussaoui was an agent of any foreign power.”<sup>156</sup> The FBI began to arrange for Moussaoui to be deported to France in mid-September.<sup>157</sup> Then, the attacks of September 11 occurred.

After that day, the FBI’s investigation of Moussaoui continued and on December 11, 2001, exactly three months after the attacks, Moussaoui was indicted on one charge each of conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to commit aircraft piracy, conspiracy to destroy aircraft, conspiracy to use weapons of mass destruction, conspiracy to murder United States employees, and conspiracy to destroy United States property.<sup>158</sup> That day, at a news conference, Attorney General Ashcroft stated that “[t]he first indictment ha[d] been

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<sup>147</sup>*Id.*

<sup>148</sup>*Id.* at 16-17.

<sup>149</sup>*Id.* at 17.

<sup>150</sup>*Id.*

<sup>151</sup>*Id.* at 17-18.

<sup>152</sup>*Id.* at 18.

<sup>153</sup>*Id.*

<sup>154</sup>*See id.* at 19-20.

<sup>155</sup>*Id.* at 20.

<sup>156</sup>*Id.* at 22.

<sup>157</sup>*Id.*

<sup>158</sup>*See* Indictment of Zacarias Moussaoui, available at <http://www.usdoj.gov/ag/moussaoui/indictment.htm> [hereinafter Indictment of Zacarias Moussaoui].

brought against the terrorists of September 11th.”<sup>159</sup> Ashcroft described the indictment as charging Moussaoui with “undergoing the same training, receiving the same funding, and pledging the same commitment to kill Americans as the hijackers.”<sup>160</sup> The indictment also alleged that Ramzi Binalshibh funded the efforts of Moussaoui and others from Germany.<sup>161</sup> The government stated that it would seek the death penalty for Moussaoui.<sup>162</sup>

The Moussaoui case has been unpredictable and complicated from the beginning. On January 3, 2002, when Moussaoui was arraigned, he “refused ‘in the name of Allah’ to enter a plea.”<sup>163</sup> The judge entered a not guilty plea for Moussaoui.<sup>164</sup> Throughout the case, Moussaoui has continually criticized both his counsel and the judge.<sup>165</sup> On April 22, 2002, Moussaoui told the court that he wanted to represent himself.<sup>166</sup> After Judge Leonie Brinkema warned Moussaoui that by acting as his own attorney he would not have access to the classified material that would be used against him, Moussaoui stated that he understood the consequences of self-representation and Brinkema determined that he could represent himself with the assistance of co-counsel.<sup>167</sup> Though Moussaoui has made numerous motions to dismiss his co-counsel, Brinkema has denied them due to Moussaoui’s demonstrated lack of understanding of the American legal system, the complexity of the charges, the large amount of secret evidence to which Moussaoui does not have access, the fact that the government is seeking the death penalty, and the “strict conditions of [his] confinement.”<sup>168</sup>

In August of 2002, Moussaoui filed a motion “to get access to so-called secret evidence” in which he requested a copy of the videotape in which Osama bin Laden

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<sup>159</sup>News Conference Regarding Zacarias Moussaoui, DOJ Conference Center (Dec. 11, 2001), *available at* [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12\\_11.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.htm) [hereinafter News Conference].

<sup>160</sup>*Id.*

<sup>161</sup>*See* Indictment of Zacarias Moussaoui, *supra* note 158.

<sup>162</sup>News Conference, *supra* note 159; Phil Hirschhorn, *Judge Denies Moussaoui Request for Help from Muslim Attorney*, *at* <http://www.cnn.com/2002/LAW/07/12/moussaoui.trial/index.html> (July 12, 2002).

<sup>163</sup>Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to The Government’s War on Terror*, 13 *IND. INT’L & COMP. L. REV.* 787, 793 (2003).

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>Viveca Novak, *How the Moussaoui Case Crumbled*, *TIME*, Oct. 19, 2003, *available at* <http://foi.missouri.edu/secretcourts/moussaouicase.html>.

<sup>167</sup>*Id.*

<sup>168</sup>Hirschhorn, *supra* note 162, *at* <http://www.cnn.com/2002/LAW/07/12/moussaoui.trial/index.html>. Moussaoui is being held in solitary confinement. Warren Richey, *In Terror Case, Security Trumps Legal Rights*, *THE CHRISTIAN SCIENCE MONITOR*, Aug. 7, 2002, *available at* <http://www.csmonitor.com/2002/0807/p02s02-usju.html>. Moussaoui is kept in his cell for twenty-two hours a day and can only have contact with his attorneys and his immediate family. Phil Hirschhorn, *Moussaoui Talks to ‘Standby’ Lawyers*, *available at* <http://www.cnn.com/2002/LAW/08/03/attacks.moussaoui/index.html> (Aug. 3, 2002).

discusses the attacks on September 11.<sup>169</sup> Brinkema denied the motion stating that “the defendant’s repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and pledged allegiance to Osama bin Laden are strong evidence that the national security could be threatened if the defendant had access to classified information.”<sup>170</sup> The judge further stated that “the United States’ interest in protecting its national security information outweighs the defendant’s desire to review the classified discovery” and that Moussaoui’s “Fifth and Sixth Amendment rights are adequately protected by standby counsel’s review of the classified discovery and their participation in any proceedings . . . .”<sup>171</sup> The judge also noted that the government was in the process of declassifying some of its information to which Moussaoui would then have access.<sup>172</sup>

Moussaoui’s case was delayed once until January of 2003 and then again until March of 2003, the first time because of the time required for Moussaoui to review the large volume of evidence to be used by the government at trial and the second time because the FBI accidentally left classified documents in Moussaoui’s cell after questioning him.<sup>173</sup> On January 30, 2003, the judge held a secret hearing, from which even Moussaoui was barred, during which the prosecutors explained their theory of the case.<sup>174</sup> Rather than believing that Moussaoui was the “twentieth hijacker,” prosecutors stated that they would seek to prove that Moussaoui intended to hijack and fly a fifth plane into the White House.<sup>175</sup> Although Moussaoui’s standby counsel was allowed to attend the hearing, because Moussaoui does not have national security clearance, they could not discuss with him the classified evidence mentioned at the hearing.<sup>176</sup> In April of 2003, however, Brinkema ruled that the government must release some portions of the classified transcript of the hearing to Moussaoui so that he can know the government’s theory of the case and prepare his defense.<sup>177</sup> Although defendants are not ordinarily entitled to know the

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<sup>169</sup>Richey, *supra* note 168, at <http://www.csmonitor.com/2002/0807/p02s02-usju.html>.

<sup>170</sup>Order at 2, *United States v. Zacarias Moussaoui*, 2003 U.S. Dist. LEXIS 2017 (E.D. Va. 2003) (No. 01-455-A), available at <http://news.findlaw.com/cnn/docs/terrorism/usmouss82302ord.pdf>.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.* at 3.

<sup>173</sup>Tom Jackman, *Moussaoui Received Classified Documents: U.S. Agents Searched Jail Cell After Prosecutors Turned Over Papers by Mistake*, WASH. POST, Sept. 27, 2002, at A09, available at <http://foi.missouri.edu/secretcourts/moussaoui.html>. A different source states that the trial was postponed until June rather than March so that each side would have adequate time to prepare. Jerry Markon, *Moussaoui Trial Postponed for Third Time: No New Date Set Pending Outcome of Government’s Appeal*, WASH. POST, Feb. 13, 2003, at A08, available at <http://foi.missouri.edu/secretcourts/moussaouitrial.html>.

<sup>174</sup>Toni Locy, *Moussaoui Case Prosecutors Have Fifth-Plane Theory*, USA TODAY, Apr. 25, 2003, available at <http://foi.missouri.edu/secretcourts/moussaoui2.html>.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.*

<sup>177</sup>Phil Hirschhorn, *U.S. Must Supply 9/11 Suspect With Details on New Theory, Judge Rules*, available at <http://www.cnn.com/2003/LAW/04/29/moussaoui/> (Apr. 29, 2003).

government's theory of the case before trial, Brinkema stated that because Moussaoui's counsel already heard the theory in the hearing, Moussaoui is also entitled to know what it is.<sup>178</sup>

At the same hearing, Judge Brinkema ruled that Moussaoui could question Binalshibh in a videotaped deposition; Binalshibh had been captured by the United States.<sup>179</sup> Moussaoui claims that Binalshibh can help him prove that, although he is a member of al Qaeda, he was not involved with the attacks on September 11.<sup>180</sup> The Justice Department appealed the decision to the Fourth Circuit Court of Appeals, stating that permitting Moussaoui to question Binalshibh would cause "immediate and irreparable" harm to national security and would imperil the prosecution of other major terror suspects.<sup>181</sup> Assistant Attorney General Michael Chertoff argued that Moussaoui does not have a constitutional right to question enemy combatants being held overseas, despite the fact that they may have information that could aid in his defense.<sup>182</sup> Moussaoui's defense counsel stated that Ashcroft had filed a secret affidavit in which he stated that he would not make Binalshibh available to the defense and that the government should be penalized for this decision.<sup>183</sup>

A three-judge panel of the Fourth Circuit "reject[ed] the government's appeal," ruling that the lower court's order had not reached an appropriate stage for review.<sup>184</sup> The court stated that if the Justice Department refused to allow Moussaoui to interview Binalshibh and the trial court sanctioned the government, the Fourth Circuit could then intervene in the trial and suggest that the prosecution and defense attempt to find an alternative solution.<sup>185</sup> The government, refusing to consider alternatives, stated that it would ask the three-judge panel to reverse its ruling and

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<sup>178</sup>*Id.*

<sup>179</sup>Locy, *supra* note 174, at <http://foi.missouri.edu/secretcourts/moussaoui2.html>.

<sup>180</sup>Philip Shenon, *Justice Dept. Warns of Risk to Prosecution and Security*, N.Y. TIMES, June 3, 2003, available at <http://foi.missouri.edu/secretcourts/justicedept.html>. "Binalshibh had reportedly told investigators that Moussaoui was considered too unreliable for the 9/11 attacks, did not know about them and was to be used only if absolutely necessary." Novak, *supra* note 166. Moussaoui would also like to question captured al Qaeda members Khalid Shaikh Mohammed, Mohamed al-Hawsawi, and Abu Zubaydah, who he claims will say that he was not involved in the September 11 attacks. Phil Hirschorn & Terry Frieden, *Doubt Cast on Moussaoui Trial: Judge Laments Government's 'Shroud of Secrecy'*, available at <http://foi.missouri.edu/secretcourts/doubtcast.html> (Apr. 5, 2003). Mohammed "told investigators that Moussaoui was to be used for a separate attack unrelated to 9/11." Novak, *supra* note 166.

<sup>181</sup>Shenon, *supra* note 180.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.*

<sup>184</sup>Neil A. Lewis, *Bush Officials Lose Round in Prosecuting Terror Suspect*, N.Y. TIMES, June 27, 2003, available at <http://foi.missouri.edu/secretcourts/bushofficials.html>.

<sup>185</sup>*Id.* See Jerry Markon, *Court Seeks Deal on Terror Witness Access*, WASH. POST, Apr. 16, 2003, at A12. The appellate court stated that if the government offered substitutions, the district court would have to determine whether a substitution would "provide the defendant with substantially the same ability to make his defense as would" access to Binalshibh. *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018, \*1 (4th Cir. 2003).

that it was also considering appealing to the full Fourth Circuit, contending that “the government should not be forced to suffer a sanction for refusing to permit a deposition that will endanger national security before obtaining appellate review of the district court’s order.”<sup>186</sup>

Despite repeated statements by the Justice Department that it is confident that the case can proceed in civilian courts,<sup>187</sup> the government also stated that it would consider transferring Moussaoui’s case to a military tribunal in order to avoid the consequences of Brinkema’s decision.<sup>188</sup> Brinkema herself expressed doubt that the case could be fully adjudicated in civilian court due to the large amount of secret evidence in the case.<sup>189</sup> Judge Brinkema has stated that she is “‘disturbed by the extent to which the United States’ intelligence officials have classified the pleadings, orders and memorandum opinions in this case.’”<sup>190</sup>

The Justice Department continued to refuse to allow Moussaoui access to Binalshibh,<sup>191</sup> stating that permitting such questioning “would needlessly jeopardize national security at a time of war with an enemy who has already murdered thousands of our citizens.”<sup>192</sup> In response, Judge Brinkema ruled that the government could not seek the death penalty or “present evidence that Moussaoui was involved in the [September 11] attacks.”<sup>193</sup> The government appealed the decision to the Fourth Circuit.<sup>194</sup> The Fourth Circuit affirmed Judge Brinkema’s order to produce Binalshibh<sup>195</sup> and rejected the government’s suggestion that Moussaoui only be provided summaries of Binalshibh’s statements.<sup>196</sup> The Fourth Circuit determined that an alternative solution could be reached, however, and

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<sup>186</sup>Associated Press, *Prosecutors Will Try Again for Ruling on Moussaoui*, July 2, 2003, available at <http://foi.missouri.edu/secretcourts/prosecutors.html>.

<sup>187</sup>See, e.g., Hirsch Korn & Frieden, *supra* note 180; Greg Gordon, *Judge Concerned About Secrecy in Moussaoui Case*, STAR TRIB. (Minneapolis, Minn.), Apr. 5, 2003, available at <http://foi.missouri.edu/secretcourts/judgeconcerned.html>; Josh White, *Memos Reveal Doubt on Proper Court for Moussaoui*, WASH. POST, June 3, 2003, at A08, available at <http://foi.missouri.edu/secretcourts/memosreveal.html>.

<sup>188</sup>*The Trial of Zacarias Moussaoui*, N.Y. TIMES, July 28, 2003, available at <http://foi.missouri.edu/secretcourts/trialzacarias.html>.

<sup>189</sup>See, e.g., Philip Shenon, *Judge Critical of Secrecy in Terror Case Prosecution*, N.Y. TIMES, Apr. 4, 2003, available at <http://foi.missouri.edu/secretcourts/judgecritical.html>.

<sup>190</sup>Hirsch Korn & Frieden, *supra* note 180.

<sup>191</sup>Associated Press, *Justice Department Again Defies U.S. Judge*, THE GLOBE AND MAIL (Toronto, Ont.), Sept. 10, 2003, available at <http://foi.missouri.edu/secretcourts/jdagaindefies.html>.

<sup>192</sup>*Id.*

<sup>193</sup>Eunice Moscoso, *Sept. 11 Counts Against Moussaoui Barred: Prosecution May Not Seek Death Penalty*, THE ATLANTA JOURNAL CONSTITUTION, Oct. 3, 2003, available at <http://foi.missouri.edu/secretcourts/sept11counts.html>.

<sup>194</sup>*United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

<sup>195</sup>*Id.* at 476.

<sup>196</sup>*Id.* at 477-78.

removed the sanctions against the government.<sup>197</sup> The Fourth Circuit stated that “no punitive sanction is warranted here because the Government has rightfully exercised its prerogative to protect national security interests by refusing to produce the witnesses.”<sup>198</sup>

#### IV. CONCLUSION: THE USE OF SECRET EVIDENCE AFTER SEPTEMBER 11: DUE PROCESS VS. NATIONAL SECURITY CONCERNS

The current controversies in the Moussaoui case reveal that in addition to the concerns involved with the use of secret evidence before September 11, the events of September 11 and the resulting legislation created considerable additional policy issues.

Before September 11, concern was widespread about the substantive content of the material being kept secret. In numerous cases in which classified evidence that the government cited as the basis for indictment and conviction has been revealed, the evidence has not provided a sufficient basis for detention.<sup>199</sup> The potential for related abuse of such evidence is especially worrisome in the post-September 11 era because of the possibility of the widespread use of secret evidence in military tribunals in which defendants have even fewer rights than in civilian courts.<sup>200</sup>

Additionally, there is evidence that secret evidence has been used only in cases concerning certain groups, in particular, Arabs and Muslims.<sup>201</sup> Apart from the problems inherent in racial-profiling in any application of criminal law, discriminatory use of secret evidence also threatens to chill the political speech of Arabs and Muslims.<sup>202</sup>

The Moussaoui case demonstrates that national security concerns are of the utmost priority to the federal government and that, in some cases, they can trump concerns about a defendant’s individual liberties. The case also shows that although both the judges and the government lawyers involved attempt to resolve the priorities

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<sup>197</sup>*Id.* at 476.

<sup>198</sup>*Id.*

<sup>199</sup>*See* Akram & Johnson, *supra* note 21, at 326 (stating that “[a]s the secret evidence cases have slowly moved toward conclusion, the government’s claims in all of the cases evaporated. No case has included sufficient evidence of terrorism-related charges necessary to justify detention.”); Saito, *Plenary Power*, *supra* note 9, at 19 (“in none of these cases did the INS’s secret evidence even allege, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity.”).

<sup>200</sup>Newspapers have also begun to file suits against judges claiming that the sealing of files violates the media’s First Amendment right to monitor the activity of courts. *See* Associated Press, *Legal Newspaper Sues Over Secrecy Issue*, available at <http://foi.missouri.edu/secretcourts/legalnewspaper.html> (May 7, 2003). The use of military tribunals would increase the extent to which this right is threatened.

<sup>201</sup>Akram & Johnson, *supra* note 21, at 322 (“Although denying that it selectively uses secret evidence against Arabs and Muslims, our research has not uncovered a single secret evidence case not involving an Arab or Muslim noncitizen.”); Smothers, *supra* note 4 (noting that two United States senators are voicing concern because all of the current cases using secret evidence are against people of Arab descent or Muslims).

<sup>202</sup>*Id.* at 326.

of national security and constitutional rights, often the parties come to differing conclusions about the appropriate course of the case. Bush's Executive Order gives the government lawyer considerable power in this situation. Because prosecutors can threaten to drop a case and bring it in a military tribunal where defendants' constitutional rights are even less protected, judges may resolve some motions in the government's favor simply to give the defendant the greatest protection of his rights. By tailoring decisions to the specific facts of cases and avoiding complete dismissal where possible, judges encourage government lawyers to keep their cases in civilian courts. The ability of government lawyers to bring their cases in military tribunals in the first place, however, does give the prosecution significant influence over the balance between national security concerns and defendants' rights.

The events of recent years, including the attacks of September 11, combat in Iraq, and frequent terror alerts, demonstrate that concern about national security is strongly justified. The visibility and emotional impact of these issues, though, does not decrease the additional threat imposed by curtailment of defendants' rights. The ability of the government lawyer to utilize secret evidence both furthers the justice done in cases involving national security and threatens to set a dangerous precedent allowing the restriction of defendants' rights when priorities are deemed important enough.

In order to preserve the integrity of our criminal justice system, government lawyers should bring terrorism cases in civilian courts to the extent that they can do so without threatening important cases that involve significant substantive secret evidence. Numerous critics caution that we must remain aware of the long-term consequences of the current use of secret evidence and military tribunals.<sup>203</sup> A reconsideration of the Secret Evidence Repeal Acts after the trials of those connected to the September 11 attacks would be well advised. Because Bush's Executive Order gives government lawyers significant power and discretion, it is imperative that secret evidence be used only when necessary and only when the secret evidence effectively proves elements of a crime in order for the government to maintain integrity and the country's trust in these important prosecutions.

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<sup>203</sup>See, e.g., *The Trial of Zacarias Moussaoui*, *supra* note 188 (stating that "[t]ribunals must not become an end run around two centuries of constitutional law"); Akram & Johnson, *supra* note 21, at 345 ("[I]mmigration reforms and executive action, which have the appearance of responding to the acts of terrorism, will remain with us long after the immediate terrorist threat has passed and adversely affect the rights of all immigrants and many citizens."). Critics note that changing our legal system significantly would also be a victory for terrorists. See, e.g., Whitehead & Aden, *supra* note 104, at 1133 ("If the American people accept a form of police statism in the name of a promise of personal security, that would be the greatest defeat imaginable."). Other authors, however, state that the denial of constitutional rights to certain groups would not be a change in American legal history because such practices have significant precedent. See, e.g., Saito, *American Jurisprudence*, *supra* note 9, at 5, 39 (stating that "the structuring of American law . . . consistently den[ies] constitutional and international legal protections to large sectors of the population" and that "the current use of secret evidence and secret proceedings . . . are not aberrational so much as extensions of the policies and practices which have been in place at least since the 1950s.").