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Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings

Matthew R. Hall†

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Introduction

The immigration statutes authorize the Immigration and Naturalization Service (INS) to submit classified information regarding an alien's involvement with terrorism to an immigration judge, in particular contexts during removal proceedings, without showing that evidence to the alien. The introduction of such "undisclosed" evidence obviously flouts traditional notions of procedural due process based on the adversarial system. Without access to the classified information, the alien does not know the full nature of the government's case and cannot present counterarguments.

The debate over the use of undisclosed evidence has tended toward extremes, with the government simply contending that constitutional procedural due process does not apply. The critics, on the other hand, argue that the introduction of undisclosed evidence violates the most basic norms of due process, that it perpetuates the sub-constitutional status of immigration law, and that it reflects prejudice toward Arabs and Moslems. This polarization directs attention away from the possibility of counterbalancing, even if only partially, the loss of certain traditional attributes of adversarial due process, with other, less conventional, measures designed to reduce the risk of error. This essay advances such a compromise, allowing the INS to introduce into evidence classified information disclosed only to an immigration judge while still providing a measure of meaningful procedural due process protection for the alien.

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In short, this essay articulates a formal understanding of the immigration judge's role when presented with classified information. The starting point lies with the proposition that, independent of any constitutional requirement of procedural due process, the statutory scheme requires the immigration judge to conduct a fair hearing. Because the immigration judge must abide by the congressional directive to allow classified evidence, it follows that the immigration courts must develop some understanding of what it means to admit classified information into evidence fairly. This essay proposes that an immigration judge confronted with classified evidence should assume an inquisitorial, rather than adjudicative, role. The immigration judge should probe the INS' submission under rigorous evidentiary standards, admitting only those pieces of evidence that bear sufficient indicia of reliability. Although the reliability determination would not rest on the adversarial process, neither would the alien lack any formal procedural protection regarding the admission of classified evidence.

Two dramatic consequences flow from this understanding of the proper role of the immigration judge. First, the debate over classified evidence would lose its all-or-nothing character. Even a victory for the government would not deprive the alien of all formal procedural protection. Nor would the alien receive some measure of procedural protection only by forcing the government to either declassify its evidence or abandon the matter. Second, should a reviewing federal court find that constitutional procedural due process did apply to the introduction of classified information, it would be able to analyze a formal set of procedural safeguards—rather than just the ad hoc decisions of a particular immigration judge—to determine whether the process met with the requirements of flexible due process.

Although the future of classified information in immigration proceedings remains unclear,[1] the dilemma posed by the executive branch's desire

1. For example, during the second presidential debate with Al Gore, candidate George Bush appeared to condemn the use of classified evidence as a form of racial profiling by stating, "Arab-Americans are racially profiled in what's called secret evidence. People are stopped, and we got to do something about that." Anne Gearan, *ABA May Back Immigration Law Changes*, AP Online, Feb. 16, 2001, *available at* 2001 WL 13673650. During 2000, Congress debated repealing significant portions of the classified evidence provisions. *See id.* Attorney General Ashcroft in congressional testimony on the status of classified evidence characterized the President as having "expressed his disapproval" and, indicated, prior to September 11, 2001, that the Administration had not taken a position on the use of classified evidence. Stephen Franklin & Ken Armstrong, *Secret evidence bill raises concerns; Often abused, laws called 'poisonous'*, CHI. TRIB., Sept. 30, 2001, at 1, *available at* 2001 WL 4120392.

Furthermore, even if the Bush Administration uses classified information in immigration proceedings, because of the closure of immigration proceedings involving matters related to the war on terrorism, the practice may not receive the scrutiny it did before September 11, 2001. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220 (3d Cir. 2002) (holding the immigration courts may not close proceedings involving counter-terrorism matters). *But see* Detroit Free Press v. Ashcroft, 303 F.3d 681, 709-10 (6th Cir. 2002) (holding that the immigration courts may not close proceedings involving counter-terrorism matters). In other words, because the Administration is con-

to use classified information in adjudications extends beyond the immigration sphere. Recently, because of the war on terrorism, proposals have emerged for the use of undisclosed evidence in military tribunals[2] and in judicial review of the designation of United States citizens as enemy combatants.[3] In other words, the problem delineated in this essay echoes broadly, and perhaps the compromise offered here for immigration proceedings could find some usefulness in these other contexts.

This essay will proceed by first examining the various uses of undisclosed evidence in immigration proceedings. Next, it will describe the polarization of the debate over undisclosed evidence and will illuminate the inability of such a polemic to adequately address or balance the legitimate concerns of each side. The essay will then offer a possibility for resolving the tension by altering the role of the immigration judge in proceedings involving undisclosed evidence in order to diminish the possibility of an erroneous decision. Finally, the essay will conclude by critiquing the wisdom of the proposed solution.

I. Undisclosed Classified Evidence in Immigration Proceedings

The immigration statutes expressly authorize the use of undisclosed, classified evidence detailing an alien's involvement with terrorism in three distinct contexts: (1) during an expedited removal proceeding of an inadmissible arriving alien,[4] (2) during a removal proceeding before the Alien Terrorist Removal Court ("ATRC"),[5] and (3) during an immigration judge's consideration of an alien's application for discretionary relief.[6] The expedited removal procedures and the ATRC expressly limit the consideration of classified information to an inquiry on whether the alien is removable because of involvement with terrorism or because the alien poses a national security threat.[7] While the discretionary application provision

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ducting many immigration proceedings in secret, we simply may not know the current extent, if any, of the use of classified information.

2. *See* Department of Defense, Military Commission Order No. 1, Procedures for Trials of certain Non-United States Citizens in the War on Terrorism, § 6(B)(3) (Mar. 21, 2002) (authorizing the military commission to close proceedings and consider information presented ex parte and in camera by the prosecution, without the presence of the accused, although with the presence of the appointed defense counsel, who may not disclose any secret information presented in such closed session).

3. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (noting the government's interest in submitting an ex parte supplement detailing procedures employed for the designation of Hamdi as an enemy combatant); Padilla *ex rel.* Newman v. Bush, 233 F.Supp.2d 564 (S.D.N.Y. 2002) (describing the government's submission of a sealed declaration detailing the procedures employed for the designation of Padilla as an enemy combatant but declining to consider the document considering the stage of the proceedings). *But cf.* Hamdi v. Rumsfeld, __F.3d __, 2003 WL 60109, *11–13 (4th Cir. Jan. 8, 2003) (holding that a declaration by an official at the Department of Defense adequately supported Hamdi's designation as an enemy combatant).

4. *See* Immigration and Nationality Act (INA) § 235(c), 8 U.S.C. § 1225(c)(2000).

5. *See* INA §§ 501–07, 8 U.S.C. §§ 1531–37 (2000).

6. *See* INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2000).

7. *See* INA § 235(c)(2)(B)(i), 8 U.S.C. § 1225(c)(2)(B)(i) (2000) (authorizing expedited removal for an arriving alien inadmissible on the certain national security and

does not contain such an explicit directive, the main forms of discretionary relief all contain eligibility bars based on an alien's involvement in terrorism or status as a national security threat.[8]

Because the use of classified evidence in expedited removal procedures generally stands on firm constitutional ground[9] and because the executive branch has never employed the ATRC, this essay focuses on the use of undisclosed information to defeat an application for discretionary relief. Nevertheless, an analysis of the adequacy of the proposed new role for the immigration judge depends upon an understanding of the procedures applicable to each use of classified information.

In the case of classified information introduced during expedited removal proceedings, the statutes and regulations provide minimal procedural protection—indeed, this process has been described as "summary" exclusion.[10] Foremost, the determination of removability rests not with an immigration judge, but with a Regional Director of the INS.[11] Although the alien may submit a statement, or information, to the INS official,[12] the statute does not contemplate any sort of hearing, does not explicate the nature of the evidentiary or deliberative process, and does not provide the alien with notice of particular allegations. Nor does the statute articulate a

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terrorism grounds specified in INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (2000)); INA § 504(g), 8 U.S.C. § 1534(g) (2000) (authorizing removal based on proof that the alien is a terrorist).

8. *See* INA § 208(b)(2)(A)(iv) & (v), 8 U.S.C. § 1158(b)(2)(A)(iv) & (v) (2000) (containing a bar on asylum for aliens involved in terrorism or posing a threat to national security); INA § 240A(c)(4), 8 U.S.C. § 1229b(c)(4) (2000) (same for cancellation of removal and adjustment of status); INA § 240B(a)(1) & (b)(1)(C), 8 U.S.C. § 1229c(a)(1) & (b)(1)(C) (2000) (same for voluntary departure); INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv) (2000) (same for withholding of removal).

Although the INS regulations contemplate the use of classified information to defeat an application for withholding of removal, see 8 C.F.R. § 240.11(c)(iv) (2001), that form of relief is often described as mandatory rather than discretionary. *See* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2000) (prohibiting the Attorney General from removing certain aliens, rather than granting the Attorney General the authority to elect whether to remove them or not); *see also* McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) (describing the evolution of the mandatory withholding provision). Accordingly, withholding may not constitute a form of relief falling under the ambit of the classified evidence statute.

In addition to the dispute over withholding, there is also a conflict over whether classified evidence may be introduced on consideration of an alien's request for release from detention on bond without violating constitutional due process. *Compare* Barbour v. Dist. Director, 491 F.2d 573, 577–78 (5th Cir. 1974) (allowing the use of classified evidence) *with* al Najjar v. Reno, 97 F. Supp. 2d 1329, 1350–57 (S.D. Fla. 2000) (finding the use of classified evidence violated constitutional rights) *and* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413–15 (D.N.J. 1999).

9. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213–14 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). *But see* Rafeedie v. INS, 880 F.2d. 506, 521–25 (D.C. Cir. 1989) (finding expedited removal proceedings unconstitutional as applied to a lawful permanent resident, but leaving open the possibility that additional procedures might provide adequate process).

10. *See Rafeedie*, 880 F.2d at 515.

11. *See* 8 C.F.R. § 235.8(b) (2001).

12. *See* INA § 235(c)(3), 8 U.S.C. § 1225(c)(3) (2000).

clear standard of proof. Instead, it merely provides that the INS official may order the removal of the alien if he is "satisfied on the basis of confidential information" that the alien falls under the inadmissibility provision for national security threats and aliens involved in terrorism.[13] Generally, however, an arriving alien bears the burden of proving admissibility.[14]

The ATRC, on the other hand, establishes procedures falling short of the full and open adversarial process obtained in a normal removal hearing, but far more advanced and detailed than those just described. Moreover, the ATRC accords the alien several rights absent in normal removal hearings. The ATRC is an Article III court.[15] The government must submit an ex parte and in camera request for a removal hearing to a judge, who may either deny the request and end the process, or approve the request and convene the hearing.[16] In contrast, the INS initiates a removal hearing simply by filing a notice to appear with the Immigration Court.[17] At the ATRC hearing, the alien benefits from the right to appointed counsel at public expense if necessary,[18] whereas in a normal removal hearing, the alien has only the right to have counsel present if the alien can obtain counsel on his or her own.[19]

The ATRC procedures accord the alien a summary of the classified evidence sufficient to allow the alien to prepare a defense; if after two attempts the government fails to craft a satisfactory document, the judge waives such a summary on the grounds that the alien poses a pronounced danger and a detailed summary would cause serious harm to the United States.[20] If the alien receives no summary, and is an alien lawfully admitted for permanent residence, the alien has the right to a special attorney appointed by the court to inspect and challenge the classified evidence on the alien's behalf—although the attorney may not disclose the evidence to the alien.[21] In any event, the ATRC procedures require the government to prove removability by a preponderance of the evidence,[22] in contrast to the government's clear and convincing burden in a removal hearing based on a charge of deportability,[23] and the alien's burden to prove admissibility clearly and beyond doubt in a removal hearing based on admissibility.[24] Notably, the statute expressly disclaims the application of the Federal

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13. *See* INA § 235(c)(2)(B)(i), 8 U.S.C. § 1225(c)(2)(B)(i) (2000).

14. 8 C.F.R. § 235.1(d) (2001) ("Each alien seeking admission . . . shall establish to the satisfaction of the immigration officer that he or she is not subject to removal under the immigration laws.").

15. *See* INA § 502(a), 8 U.S.C. § 1532(a) (2000).

16. *See* INA § 503(a), 8 U.S.C. § 1533(a)–(c) (2000).

17. *See* 8 C.F.R. § 239.1(a) (2001) ("Every removal proceeding conducted under section 240 of the Act to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the Immigration Court.").

18. *See* INA § 504(c)(1), 8 U.S.C. § 1534(c)(1) (2000).

19. *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2000).

20. *See* INA § 504(e)(3), 8 U.S.C. § 1534(e)(3) (2000).

21. *See* INA § 504(e)(3)(F), 8 U.S.C. § 1534(e)(3)(F) (2000).

22. *See* INA § 504(g), 8 U.S.C. § 1534(g) (2000).

23. *See* INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2000).

24. *See* INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A) (2000).

Rules of Evidence in proceedings before the ATRC.[25]

In contrast to the treatment of classified information during an expedited removal proceeding conducted by an INS official or during an ATRC hearing before a federal judge, when the government introduces classified information to defeat an application for discretionary relief, an immigration judge considers the matter as part of an otherwise traditional removal proceeding. Moreover, the statutory and regulatory provisions describe an intermediate level of procedures attending the proffer of such evidence. Specifically, the immigration court appears to have some gatekeeping authority to determine whether the classified information is relevant.[26] If it is found relevant, the immigration judge informs the alien of the proffer of classified information.[27] If the application in question concerns asylum, the alien receives an unclassified summary of the classified information from the classifying agency only if the agency determines that it can issue the summary "consistently with safeguarding both the classified nature of the information and its sources."[28] If the application concerns adjustment of status, the immigration judge makes the determination of whether such a summary is possible.[29] In any event, the regulations provide that "[t]he summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence."[30] Beyond these minimal protections, the alien has no access to the classified information[31] and has only those rights otherwise accorded during removal proceedings. In other words, the alien possesses a right to counsel, but not to appointed counsel.[32] The alien bears the burden of establishing eligibility for any discretionary relief and that such relief should be granted as a matter of discretion.[33] Further, if the evidence indicates that a ground for mandatory denial of an application for discretionary relief applies—such as the alien's involvement with terrorism or the alien's threat to national security—then the alien must refute that evidence and prove by a preponderance of the evidence that no such bar applies.[34]

25. *See* INA § 504(h), 8 U.S.C. § 1534(h) (2000).

26. *See* 8 C.F.R. § 240.11(a)(3) (2001) (governing applications for adjustment of status and providing for the consideration of classified information if the immigration judge determines that such information is "relevant"); 8 C.F.R. § 240(b)(3)(iv) (2001) (governing applications for asylum and authorizing the immigration judge or the Board of Immigration Appeals to determine the relevancy of any proffered classified evidence).

27. *See* 8 C.F.R. §§ 240.11(a)(2), 240(b)(3)(iv) (2000).

28. 8 C.F.R. § 240.11(b)(3)(iv) (2000).

29. *See* 8 C.F.R. § 240.11(a)(3) (2000).

30. 8 C.F.R. § 240.11(b)(3)(iv); *see id.* ("[t]he immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence").

31. *See* INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2000).

32. *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2002).

33. *See* 8 C.F.R. § 240.8(d) (2001).

34. *See id.*

II. The Polarized Debate over Undisclosed Classified Evidence

The government defends the use of classified evidence to defeat applications for discretionary relief by noting that the Supreme Court approved of the practice in *Jay v. Boyd*.[35] The government's defense continues by focusing its case on the lack of any liberty or property interest triggering a constitutional right to procedural due process.[36] In other words, the government contends that the alien possesses no stake in the outcome of any application for discretionary relief from removal because the executive branch distributes those benefits as a matter of sovereign grace if at all.[37] Accordingly, aliens have no right to procedural due process in an application for discretionary relief because they would suffer no deprivation upon the denial of the application. Phrased differently, even if one treated the loss of the opportunity to apply and establish eligibility as a deprivation, the alien has no reasonable expectation to the receipt of discretionary relief.[38]

Opponents of the use of classified evidence object on several grounds.[39] First, they note that *Jay* resolved only a dispute over the statutory permissibility of classified evidence.[40] Second, the critics contend, the Court's seeming approval of the constitutionality of classified evidence constitutes mere dicta.[41] Third, the critics note that, even under the government's interpretation of *Jay*, the use of classified evidence to defeat certain forms of mandatory relief from removal, such as withholding of removal, would not be authorized by statute or precedent.[42] Finally, the critics point to *Kwong Hai Chew v. Colding*,[43] rather than *Jay*, as the relevant precedent.[44] Although *Colding* arose in the context of an expedited removal proceeding, the Court held that procedural due process prevented the use of

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35. 351 U.S. 345, 352–59 & n.21 (1956).

36. *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

37. *See, e.g.*, *Jay*, 351 U.S. at 354 (stating, with regard to discretionary relief from deportation, that "a grant thereof is manifestly not a matter of right under any circumstances"); INS v. Yang, 519 U.S. 26, 30 (1996) (describing discretionary relief from deportation as an "act of grace" akin to a presidential pardon because it involves "unfettered discretion").

38. *Cf. Roth*, 408 U.S. at 577 (eliminating the rights versus privileges distinction as the determinant for whether procedural due process exists and replacing that wooden doctrine with the test of whether a person has a reasonable expectation to the continued receipt of the benefit).

39. For strong arguments against the use of classified evidence in immigration proceedings dealing with discretionary relief, see generally Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999); David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2000–01); D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INTEREST L.J. 25 (2000–01); Kelley Brooke Snyder, Note, *A Clash of Values: Classified Information in Immigration Proceedings*, 88 VA. L. REV. 447 (2002).

40. *See Jay*, 351 U.S. at 357-59.

41. *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 410-11 (D.N.J. 1999).

42. *See supra* discussion in note 8.

43. 344 U.S. 590 (1953).

44. *See Kiareldeen*, 71 F. Supp. 2d at 409.

classified evidence against a resident alien.[45] Indeed, the Court stated that although Congress could "prescribe conditions" for an alien's "expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."[46] The critics then attack the notion that the use of undisclosed classified evidence could ever conform to even the most rudimentary standards of procedural due process.[47] As the Supreme Court stated in *Greene v. McElroy*:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[48]

The critics of classified evidence also inveigh against the procedure both as ripe for ideological abuse and as a breeding ground for racial, religious, and national prejudice.[49] These charges flow from the Cold War history of the practice of using classified evidence, its predominant use against Arabs and Moslems accused of involvement with terrorism,[50] and the statutory provisions that allow classified evidence to disqualify an alien from relief based on associational relationships or expressive conduct relating to a group that espouses terrorism.[51]

For the purposes of this essay, the import of the debate lies not in the analysis of which side presents the superior claim, but instead in the recog-

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45. *Colding*, 344 U.S. at 595–98.

46. *Id.* at 579–98.

47. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995).

48. 360 U.S. 474, 496 (1959); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("democracy implies respect for the elementary rights of men . . . [and] must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of the facts decisive of rights"); Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) ("It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.").

49. *See, e.g.*, Akram, *supra* note 39, at 53 ("Using secret evidence to deport Arabs and Muslims appears to be the latest manifestation of a war waged by various government agencies against these ethnic and religious groups; a war waged ostensibly to combat 'terrorism,' but which raises the disturbing specter of ideological bias.").

50. *See, e.g.*, Cole, *supra* note 39, at 268 ("For the last decade, virtually all of the INS's targets for these tactics—secret evidence and guilt by association—have been Arabs or Muslims."); *id.* at 283 ("The constitutional prohibition on guilt by association problems developed in response to McCarthy era laws that penalized association with the Communist Party.").

51. *See* INA § 212(a)(3)(B)(i)(IV)(aa), 8 U.S.C.A. § 1182(a)(3)(B)(i)(IV)(aa) (West Supp. 1992) (providing that a representative of a designated foreign terrorist group is inadmissible), (bb) (providing that a representative of a group that publicly endorses terrorism is inadmissible upon determination by the Secretary of State that such conduct undermines efforts to reduce terrorism); INA § 212(a)(3)(B)(i)(V), 8 U.S.C.A. § 1182(a)(3)(B)(i)(V) (West Supp. 1992) (providing that membership in a foreign terrorist organization constitutes grounds for inadmissibility); INA § 212(a)(3)(B)(i)(VI), 8 U.S.C.A. § 1182(a)(3)(B)(i)(VI) (West Supp. 1992) (providing that an alien who uses his position of prominence to endorse or espouse terrorism is inadmissible upon determination by the Secretary of State that such conduct undermines efforts to reduce terrorism).

nition that each side presents only arguments for absolute victory. The government wants a result that would eliminate constitutional procedural due process from the consideration of applications for discretionary relief. The critics of classified evidence see a foundational conflict with the due process essentials of notice and the opportunity to be heard. Neither side offers any arguments that would allow a decision-maker to balance or reconcile the important arguments on each side. Such a situation seems particularly vexing given our current circumstances in the war on terrorism and the need for a simultaneous assessment of the gravity of the national security risks we face and the consequences for liberty entailed by draconian measures designed to eliminate those risks.[52] Phrased differently, before we can make a wise choice of either policy or law, we need not only to understand the concerns at each end of the debate, but also the possibility of a compromise between those extremes.

III. A Potential Resolution of the Problem of Classified Evidence

A resolution to the problem of classified evidence is one that attempts to do more than simply pick a winning side; instead, a meaningful resolution is one that balances both the government's and the critic's arguments. In other words, a resolution must allow the government to use classified evidence, but still provide some meaningful procedural due process protection to an alien. Such a resolution depends on what constitutes "meaningful" due process.[53] The modern Supreme Court's approach to due process appears to be based on instrumentalism—the goal of due process is to ensure accuracy and consistency, and to avoid mistaken deprivations.[54] The parameters of due process are flexible so long as they balance the risk of error, the interest of the individual, and the interest of the gov-

52. Indeed, the danger of such a polemical and polarized debate lies also in the possibility of escalation by the executive branch. If the government perceives that its basic national security concerns are inadequately balanced, the temptation grows to assert that the use of classified evidence is unreviewable under the political question doctrine. The Supreme Court has expressly left open the possibility that immigration procedures, that otherwise violate the Constitution, might be nonjusticiable. *See* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) ("there may be actions of the Congress with respect to aliens that are so essentially political as to be nonjusticiable").

53. The Supreme Court may offer crucial guidance on constitutional procedural due process in immigration cases when it decides the case of *Demore v. Kim* which concerns the constitutionality of mandatory detention for aliens placed in removal proceedings directly after release from their prison sentences. *See* Kim v. Ziglar, 276 F. 3d 523 (9th Cir. 2001) *cert. granted sub nom.*, Demore v. Kim, 122 S. Ct. 2696 (U.S. June 28, 2002) (No. 01-1491).

54. Laurence H. Tribe, American Constitutional Law 671 (2d ed. 1988) (explaining that the Supreme Court has pursued "an almost exclusively instrumental vision in its due process jurisprudence"). In contrast to the instrumentalist vision of procedural due process, the intrinsic approach views process as important in and of itself. *See id.* at 666. The process embodies concepts of participation and the rule of law. *See id.* (quoting Justice Frankfurter as stating that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been

ernment.[55] Accordingly, a resolution to the problem of classified evidence depends crucially on the articulation of standards guiding the immigration judge in the admission of classified information to ensure, to the extent possible given the national security constraints, the admission of accurate evidence.[56]

The attempt to arrive at a standard to guide the immigration judge should begin with an examination of the current test for the admission of evidence. Presently, immigration judges may admit evidence only if it is probative and if its admission is fundamentally fair.[57] The touchstone for fairness is the reliability and trustworthiness of the evidence.[58] According to the federal courts, this standard stems directly from the Fifth Amendment's guarantee of procedural due process.[59] Furthermore, this standard applies not just to removal hearings generally, but also to the admission of evidence during the consideration of applications for discretionary relief.[60]

Assume, however, that the government is correct and an alien possesses no liberty or property interest in an application for discretionary relief. The government advances this argument to demonstrate the acceptability of classified evidence. In other words, the government contends that the statute authorizing the use of classified evidence poses no constitutional due process problem. But the government proves too much if its

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done." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171–72 (Frankfurter, J., concurring)).

55. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). Although the Court applied the *Mathews* test to immigration proceedings in *Landon v. Plasensia*, 459 U.S. 21, 34 (1982), it is worth noting that the Court has rejected the *Mathews* test in areas where, as with immigration, Congress exercises plenary power. For example, in *Weiss v. United States*, 510 U.S. 163, 177 (1994), the Court explained that judicial deference was at its "apogee" when reviewing Congress' plenary power over the military. *See id.* at 177. The *Weiss* Court stated that the appropriate test for due process is "whether the factors militating in favor of [additional procedures] are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177-78.

56. Indeed, such an approach recognizes that neither the immigration judge, nor the Board of Immigration Appeals, possess the authority to resolve the constitutional dilemma raised by the classified evidence statutes. *See, e.g.*, Liu v. Waters, 55 F.3d 421, 426 (9th Cir. 1995) (explaining that "the BIA lacks jurisdiction to decide questions of the constitutionality" of immigration statutes); *see also* Johnson v. Robinson, 415 U.S. 361, 368 (1974) (citing cases for the general rule that the "adjudication of the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies") (internal quotation marks omitted).

57. *See, e.g.*, Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975) (holding that the sole test for the admission of evidence in an immigration proceeding is whether the evidence is probative and its admission fundamentally fair); Navarrette-Navarrette v. Landon, 223 F.2d 234, 237 (9th Cir. 1955) (stating that under less stringent rules, an administrative tribunal may admit evidence that a court would not, but the admission of evidence must be fair); In re Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) ("To be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as not to deprive respondents of due process of law as mandated by the fifth amendment.").

58. *See* Obianuju Ezeagwuna v. Ashcroft, 301 F.3d 116, 127 (3d Cir. 2002); Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996).

59. *See, e.g.*, *Trias-Hernandez*, 528 F.2d at 369; *Obianuju Ezeagwuna*, 301 F.3d at 127.

60. *See, e.g.*, *Obianuju Ezeagwuna*, 301 F.3d at 127.

reasoning eliminates procedural due process altogether. What standards would guide an immigration judge considering an application for discretionary relief? Could the immigration judge act unfairly? Could the immigration judge make a biased decision? How should the immigration judge make discretionary decisions regarding the admission of particular pieces of evidence?

A statutory and regulatory scheme as elaborate as the one governing removal hearings explicitly contains a myriad of specific procedural requirements. Some of these provisions may answer the above questions. For example, the regulations appear to resolve the question of whether bias is permissible by directing the immigration judge to "withdraw if he or she deems himself or herself disqualified."[61] In other words, rather than eliminating procedural due process altogether, the government's victory would seem merely to eliminate constitutional due process, leaving intact numerous specific procedural safeguards in the statutes and regulations governing immigration judges and removal hearings. With constitutional due process out of the way, Congress's decision to allow the use of undisclosed classified evidence poses no problem. Nevertheless, even with constitutional due process out of the way, statutory and regulatory due process remain.

In addition to the specific requirements of statutory and regulatory due process, the immigration scheme is pregnant with the implied procedural standards directing the immigration judge's decision-making. Although not explicit, there must be an implicit overarching statutory standard governing the immigration judge's admission of evidence. Congress could not have intended that the immigration judge act with unbridled discretion in all matters not explicitly covered by statute or addressed by regulation. On the question of the admission of evidence, then, the normal standard (absent explicit rules of evidence or particular countervailing reasons) would seem to be the one Congress most likely intended, even if only implicitly. In other words, even absent constitutional due process, the test for the admission of evidence in an immigration proceeding should be whether the evidence is probative and its admission fundamentally fair, with fundamental fairness turning on whether the evidence is reliable and trustworthy. In other words, it is impossible to understand how the immigration courts could admit statutorily-authorized evidence without some principle based on traditional notions of fairness.[62]

What then should the immigration judge do when confronted with classified information proffered into evidence—without disclosure to the alien—by the INS? A traditional adversarial system relies on challenges by the aggrieved party to weed out unreliable evidence. The system is bol-

61. 8 C.F.R. § 240.1(b) (2001).

62. Indeed, the regulation on the "Scope of Rules" may express the general principle of fairness, even if it does not specify the standard for decisions on the admission of evidence: "These rules are promulgated to assist in the expeditious, *fair*, and *proper* resolution of matters coming before Immigration Judges." 8 C.F.R. § 3.12 (2001) (emphasis added).

stered with confidence that, even if dubious evidence comes in, the fact-finder will appraise its weight and credibility in light of confrontational processes. None of these adversarial forces, however, pertain in the case of classified evidence. Accordingly, in order to test proffered classified information for reliability and trustworthiness, the immigration judge must step outside the adversarial system.[63]

Such a role for the immigration judge is not a creation of whole cloth. Foremost, the statutes direct the immigration judge not only to "receive evidence" but also to "interrogate, examine, and cross-examine the alien and any witnesses."[64] Accordingly, the Second and Ninth Circuits have recognized that the immigration judge has an affirmative inquisitorial responsibility—unlike an Article III judge who acts solely as an adjudicator and fact-finder—to establish the record.[65] Furthermore, the Ninth Circuit has underscored the particular need for the immigration judge to function in an inquisitorial mode when the alien is unrepresented by counsel.[66] By analogy, because the alien is not only unrepresented by counsel, but effectively absent from that portion of the proceeding dealing with classified information, the immigration judge must assume an inquisitorial role.

In other words, the statutes and regulations already contemplate an inquisitorial role for the immigration judge, and not just as an ad hoc solution to the problem of classified evidence. Beyond the general duty to establish the record described above, the statutes and regulations give the immigration judge the power to issue subpoenas sua sponte[67] and to order the taking of depositions.[68] Moreover, nothing in the regulations or statutes bars such a role.[69]

Additionally, the chief immigration judge has directed the immigration courts to exercise their authority to rule on the "use, relevance, or admissibility of classified information" in a manner that will "promote a

63. Independent of the need for a more active judicial role in classified evidence cases, some scholars have argued that the inquisitorial system offers marked advantages in all cases. *See generally* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (arguing that the non-adversarial approach to "judicialized fact-gathering has immense advantages over traditional American practice" under the adversarial system).

64. INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2000).

65. *See* Yang v. McElroy, 277 F.3d 158, 162 & n.3 (2d Cir. 2002); Jacinto v. INS, 208 F.3d 732–34 (9th Cir. 2000).

66. *See Jacinto*, 208 F.3d at 732–33.

67. *See* INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2000) ("The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence."); 8 C.F.R. § 3.35(b)(1) (2001) ("An Immigration Judge may issue a subpoena on his or her own volition . . . .").

68. *See* 8 C.F.R. § 240.7(c) (2001) ("The immigration judge may order the taking of depositions pursuant to § 3.35 of this chapter.").

69. The regulations confer upon the immigration judge the authority to "take any other action consistent with applicable law and regulations as may be appropriate," 8 C.F.R. § 240.1(a)(1)(iv) (2001), and "to receive and consider material evidence, rule upon objections, and *otherwise regulate the course of the hearing*," 8 C.F.R. § 240(c) (2001) (emphasis added).

fair and expeditious trial."[70] Although this directive does not articulate the precise standards or practice the immigration judges should adopt, it reflects an understanding that immigration judges must make discretionary decisions regarding which pieces of classified information come into evidence and that those decisions must be guided by a concern for fairness.

Having established that immigration judges assume an inquisitorial role and, in that capacity, test any proffered classified information to determine its reliability and trustworthiness before accepting it into evidence, it remains to describe how this process might work in practice and to elucidate the standards that might be necessary to give teeth to the testing process. This practical understanding must address the assertions of the critics of classified information that the INS often proffers no more than double or triple hearsay statements by FBI agents, rather than original declarants.

Imagine, as an example, an alien who has overstayed his visa, is placed in removal proceedings, and applies for adjustment of status.[71] The FBI and INS have classified information that, they believe, demonstrates that the alien has joined a designated terrorist organization, and is thus ineligible for adjustment of status. Crucial to this belief is a tape of a phone call in which the alien responds to a solicitation for membership by saying softly—in Arabic—"*tawakkalt ala Allah.*" The FBI has translated this as: "I have made my decision. I put my fate in God's hands." Further, the FBI has reached the conclusion that this statement demonstrates that the alien accepted the invitation to join the group. The INS seeks to introduce, as classified evidence, statements by a supervising FBI agent detailing the investigation and its conclusions.[72]

The immigration judge would face a series of challenges in ascertaining the reliability and trustworthiness of this proffer. First, the immigration judge would face the problem of hearsay. Presumably, there are other people at the FBI who have personal experience with this investigation: the person who recorded the phone call, the person who believes that the voice uttering the crucial words belongs to the alien in question, the person who transcribed the Arabic phrase as "*tawakkalt ala Allah,*" the person who translated this phrase into English, and the person who analyzed the phrase (either in Arabic or English) and concluded that it demonstrated an intent to join the terrorist group. Even if these people (of course, the same person may have performed multiple tasks) provide evidence directly, the

70. Operating Policy and Procedures Memorandum 98–10: Classified Information in Immigration Court Proceedings (Office of the Chief Immigration Judge, 1998) *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

71. The details of this hypothetical are drawn loosely from the investigation into the crash of EgyptAir 990 as described in William Langewiesche, *The Crash of EgyptAir 990*, ATLANTIC MONTHLY, Nov. 2001, at 41.

72. David Cole argues that one of the chief problems with the classified evidence cases brought by INS is that "the INS has often relied on double and triple hearsay assertions by FBI agents, and has refused to produce original declarants even when asked to do so by the immigration judge." Cole, *supra* note 39, at 277.

immigration judge would need to determine whether they were qualified to reach their conclusions. With regard to the Arabic statement itself, the immigration judge would face a best evidence problem over whether the government needs to introduce the recording itself, a transcript, a summary, the analytical end-product, or some combination of the above. Suppose further that the government's translation of the phrase is suspect and that other Arabic experts might translate *"tawakkalt ala Allah"* variously as: "I put my faith in God," "I rely on God," or "I depend in my daily affairs on the omnipotent Allah alone."

Varying the facts slightly introduces another dilemma, namely the use of non-FBI sources or informants. Suppose that, instead of a recording of the key conversation, the FBI relied on a human source reporting the conversation. The immigration judge might then face the need for the protection of such a source, while also harboring concerns about the possibility of bias or fabrication. Consider, for example, the possibility that the source might be a former spouse actively pursuing a custody battle with the alien.[73]

How then should an immigration judge proceed? Should the immigration judge create for each case a set of approaches designed to ensure that only those pieces of classified information that bear indicia of reliability come into evidence? Alternatively, is it possible to articulate some standard that could generally guide an immigration judge through multiple cases? The general standard certainly seems preferable to ensure uniformity, to promote efficiency, and to channel judicial review. Fortunately, the problems confronting the immigration judge in the above hypothetical all seem answerable with resort to the Federal Rules of Evidence and established case law.[74]

An immigration judge could address the problems flowing from the tape recording by applying, inquisitorially, the federal evidentiary rules on hearsay, best evidence, expert witnesses, and the corresponding case law. Such an approach, while imperfectly tailored to a non-adversarial immigration proceeding seems preferable to the creation of a new body of stan-

73. *See Kiareldeen*, 71 F. Supp. 2d at 416–17 (detailing Kiareldeen's assertions that his ex-wife served as the FBI's source against him in order to seek revenge after a bitter divorce).

74. Scholars and administrative lawyers have long debated the merits of mandating the use of the Federal Rules of Evidence in all Administrative proceedings. *See, e.g.*, Michael Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353 (1991) (detailing the Department of Labor's evidentiary rules); Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987) (reporting the recommendation of the Administrative Conference that Congress should not mandate the use of the Federal Rules of Evidence, but that agencies should adopt their own evidentiary regulations). This article does not wade into the middle of this debate, but instead argues for the use of the federal rules of the limited purpose of efficiently screening classified information for reliability and trustworthiness in absence of adversarial testing. Notably, the use of the federal rules in this special context should not change the long-standing rule that the formal evidentiary rules do not apply in immigration proceedings. *See, e.g.*, Navarrette-Navarrette v. Landon, 223 F.2d 234, 237 (9th Cir. 1955); In re Devera, 16 I. & N. Dec. 266, 268–69 (B.I.A. 1977).

dards on a case by case basis. As explained, the immigration judge has the subpoena tool available to facilitate any inquisitorial inquiry into the application of these standards.

This approach is not free from problems, however. It remains unlikely that the immigration judge could ever learn of alternate possible translations without adversarial, non-classified proceedings. Without the ability to bring in experts from outside the FBI, or more generally, experts without security clearance, the immigration judge might not find out that reasonable alternate translations exist. Perhaps the best to be hoped for is simply an inquisitorial testing of any experts with questions such as: "Is your translation the only possible one?" or "Are there other translators at the FBI who might differ regarding the translation?" Similarly, the immigration judge could be stymied by a biased human source who dishonestly refuses to disclose a conflict of interest. Again, the only resort might be inquisitorial questions concerning the source's relationship to the alien.

These limitations, however, do not diminish the vast improvement over either a standardless approach to the admission of classified evidence, or even an approach based only on the vague concept of fairness. The Federal Rules of Evidence offer operational definitions for particular kinds of evidence deemed reliable and trustworthy. While administrative law has generally eschewed the need for such rigid standards, they seem appropriate to the unusual context of classified information because the non-adversarial nature of the process and the need for some structure to guide the immigration judge. Moreover, the use of the federal rules provides exactly the kind of formalized procedural due process needed to counterbalance the loss of notice of the particulars and the opportunity to be heard.

Ultimately, this long-winded description of the new role for the immigration judge has a brief conclusion: the immigration judge should assess the reliability of any proffered classified evidence by employing the Federal Rules of Evidence in an inquisitorial manner and by admitting only those pieces of evidence allowed under the Rules. Such an approach would provide considerable procedural due process protection for the alien. It would ensure that any classified evidence conformed to a uniform standard of admissibility.[75] Concededly, it would not test that evidence as rigorously as, or with the perspective of, the adversarial process. Nevertheless, by assuming an inquisitorial role, rather than merely an adjudicative role, the immigration judge would provide a surrogate for the alien.[76] By employing the Federal Rules of Evidence, the immigration judge would provide the alien with the protection of formal procedures to ensure the reliability and

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75. Should the government refuse to produce original declarants when ordered to do so by the immigration judge, then the immigration judge should just refuse to admit the underlying information into evidence. *See generally* David Cole, *Secrecy, Guilt By Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2001-02).

76. Accordingly, this proposal would correct one of the most salient deficiencies of the current system—the lack of any incentive for the INS to test their own sources rigorously. *See id.* at 277 ("Attorneys who know that their evidence cannot be challenged by their adversaries have less incentive to test their sources to determine whether they have the truth, as the allegations will not be subjected to testing in court.").

trustworthiness of any classified evidence.[77]

Critique

A critique of this proposal could take several forms. First, one could ask whether it adequately balances the government's interest in national security with the critics' concern for civil liberties. From the government's perspective, the expanded role for the immigration judge means intense scrutiny of national security information and analysis by a magistrate. The process holds the potential for consuming significant resources and requiring the testimony of investigators, analysts, and possibly non-government sources. Even though the proposal leaves the possibility of using classified evidence intact, the government might view it as too burdensome, especially given scarce resources in the war on terrorism.[78] From the critics' perspective, the situation is, perhaps, even worse. Nothing in the proposal directly addresses the core concern that the consideration of undisclosed evidence by the immigration judge deprives the alien of the traditional due process protections of notice and the opportunity to be heard. Although the inquisitorial role of the immigration judge and the heightened standards of the Federal Rules of Evidence may provide some offsetting effect, the critics may well feel that these small measures hardly balance the loss of a fully adversarial hearing.

Notably, the proposal advanced in this essay brings the procedures attending the use of classified evidence during the consideration of an application for discretionary relief closer to the standard established by the ATRC. Although the ATRC accords a resident alien a surrogate attorney empowered to examine and challenge proffered classified evidence, it disallows the use of the Federal Rules of Evidence. In other words, by creating the position of special attorney, the ATRC attempts to provide certain aliens with notice and an opportunity to be heard. Although the inquisitorial model advanced in this essay does not take the same step as the ATRC, it attempts to compensate by raising the bar for the admission of evidence. As such, this essay attempts to move the process away from the model established by expedited removal proceedings, in which the government's classified evidence undergoes no formal testing at all. Although this proposal fails to satisfy the intrinsic values of procedural due process, it does take a significant step toward placing this particular use of classified evi-

77. This proposal could become reality on several paths, however unlikely. A federal court could reach the same conclusion upon consideration of an appropriate case. Of course, Congress could adopt the concept by statute. Alternately, the Department of Justice could enact regulations. Less obviously, perhaps, the Board of Immigration Appeals could adopt the proposal in a precedent decision pursuant to 8 C.F.R. § 3.1(g). As the Supreme Court has held, the Board has the authority to interpret the immigration statutes and federal courts must accord such interpretations *Chevron* deference. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).

78. *Cf.* Hamdi v. Rumsfeld, ___F.3d___, 2003 WL 60109, *15 (4th Cir. Jan. 8, 2003) (rejecting a probing hearsay analysis of governmental declaration in order to preserve proper judicial deference to the executive's national security and war powers).

dence more firmly on the instrumentalist path.[79]

More importantly, perhaps, is the question of whether the immigration judge's inquisitorial application of the Federal Rules of Evidence would allow the classified information process to survive constitutional due process scrutiny (presuming the government lost its arguments concerning *Jay* and the lack of any protected interest in an application for a discretionary benefit). In other words, could the proposal survive scrutiny under the *Mathews v. Eldridge* test? Even if, in the abstract, the use of classified evidence could pass *Mathews*, the Supreme Court has set, as the bare minimum of procedural due process, the fundamental due process protections of notice[80] and the opportunity to be heard.[81] On the other hand, in his seminal work on the parameters of a fair hearing, Judge Friendly offered that, should an agency be provided more process in one area, then the elimination of another aspect of traditional due process might be conceivable.[82]

Of the eleven attributes of a fair hearing identified by Judge Friendly, the alien retains five in a proceeding involving undisclosed classified evidence: the right to an unbiased tribunal, the right to a record, the right to a decision on the record, a statement of the reasons for such a decision, and judicial review.[83] Because of the use of classified evidence, the remaining rights are eliminated or abridged: the right to notice of the grounds for the action, the right to present reasons against the action, the right to call witnesses, the right to know the evidence against one, the right to counsel, and the right to a proceeding open to the public.[84] The essential question is whether the expanded inquisitorial role of the immigration judge, coupled with rigorous evidentiary standards, compensates for the loss or abridgment of these traditional due process rights.[85] The strongest argument for the constitutionality of the practice is that the alien possesses only an attenuated interest in discretionary benefits, even if the alien reasonably expects the opportunity to apply meaningfully for such relief. Further, the government's interest emanates from both immigration and national security, two areas in which judicial deference is particularly appropriate.[86] Ultimately, however, because of the essential nature of notice and the opportunity to be heard, the Supreme Court may simply need to carve out a categorical exception for classified evidence presented

79. *See supra* note 54 and accompanying text.

80. *See* Memphis Light, Gas, & Water v. Craft, 436 U.S. 1, 13–16 (1978); Brock v. Roadway Express, Inc., 481 U.S. 252, 259–60 (1987).

81. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); *Memphis Light*, 436 U.S. at 17–19; Goss v. Lopez, 419 U.S. 565, 581 (1975).

82. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975).

83. *See id.* at 1279–95.

84. *See id.*

85. *See also* Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23. 29–30 (1996) (concluding that the ATRC serves as a model in exactly this sort of balancing by following Judge Friendly's advice and "replacing the lost procedures with other powerful reinforcements.").

86. *See Aguirre-Aguirre*, 526 U.S. at 424.

in immigration proceedings.[87]

A more general objection to the proposal might focus on the constellation of public, as opposed to individual, problems created by allowing the government to make decisions in secret. In other words, even if the individual received some kind of adequate process, would it undermine public trust to allow such a procedure or would it lead to corrosive cynicism?[88] Based on the view that procedural due process has essential intrinsic value, the danger would seem great. In contrast, if due process is widely understood as an instrumental good, rather than an intrinsic one, then an open and vibrant public debate over whether to allow the use of classified evidence would seem desirable.

As explained earlier, a meaningful debate requires more than an analysis of which all-or-nothing argument should prevail. Indeed, a polarized debate, with no possibility of compromise, seems ripe for the production of cynicism in a democracy. From this perspective, the central advantage of the proposal advanced in this essay is that it moves beyond polemical discourse favoring either the government or civil libertarians. As such, it offers the public an opportunity to balance otherwise mutually exclusive visions.

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87. This exception could take the form of a deviation from the traditional requirements of notice and opportunity to be heard in the limited context of classified evidence proceedings, or it could entail a test for constitutional due process that strikes the balance in a significantly different manner than the *Mathews* test in recognition of the special considerations attendant at the intersection of immigration law and national security. *See Weiss*, 510 U.S. at 177-78 (discussing the special due process test for analysis of procedures adopted under Congress' plenary power over the military).

88. For an analysis of cynicism and the importance of transparent government, see generally Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280 (2002).