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Secret Evidence and the Due Process of Terrorist Detentions

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SECRET EVIDENCE AND THE DUE PROCESS OF TERRORIST DETENTIONS

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Articles

Secret Evidence and the Due Process of Terrorist Detentions

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Courts across many common law democracies have been wrestling with a shared predicament: proving cases against suspected terrorists in detention hearings requires governments to protect sensitive classified information about intelligence sources and methods, but withholding evidence from suspects threatens fairness and contradicts a basic tenet of adversarial process. This Article examines several models for resolving this problem, including the "special advocate" model employed by Britain and Canada, and the "judicial management" model employed in Israel. This analysis shows how the very different approaches adopted even among democracies sharing common legal foundations reflect varying understandings of "fundamental fairness" or "due process," and their effectiveness in each system depends on the special institutional features of each national court system. This Article examines the secret evidence dilemma in a manner relevant to fore-

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seeable reforms in the United States, as courts and Congress wrestle with questions left open by Boumediene v. Bush.

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I. INTRODUCTION

The U.S. Supreme Court's 2008 decision in *Boumediene v. Bush* guarantees Guantanamo detainees a constitutional right to a meaningful opportunity to challenge detention in court, but it

leaves open significant substantive and procedural questions.¹ One of those open questions is how to handle the issue of classified evidence and the dangers of disclosing such information to a suspected terrorist detainee²—an issue the Chief Justice, in his dissent joined by three others, sharply criticizes the majority for failing to address.³ This Article helps to fill this gap, by evaluating and comparing several alternatives to deal with the challenge of secret evidence.

The secret evidence predicament pits fairness against security. Consider, for example, a detention hearing for an al Qaida suspect in which key information against him comes from a highly-placed informant inside the terrorist organization or from a foreign intelligence service whose government cannot afford politically to acknowledge continuing support for U.S. anti-terrorism efforts. This information may be crucial to the government's case, but disclosing it to the suspect could damage critical ongoing intelligence operations and cooperation. How should courts manage this problem?

In the wake of *Boumediene*, then-Attorney General Michael Mukasey admonished Congress “to resolve the difficult questions left open by the Supreme Court . . . [and to] ensure that the proceedings mandated by the Supreme Court are conducted

1. 128 S. Ct. 2229, 2269 (2008). While mandating that Guantanamo detainees receive access to U.S. federal courts empowered to correct errors after “meaningful review of both the cause for detention and the Executive’s power to detain,” *id.* at 2269, the Court made clear that it was “not address[ing] the content of the law that governs petitioners’ detention.” *Id.* at 2277.

2. *See id.* at 2276 (“We recognize . . . that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.”); *see also* *CIA v. Sims*, 471 U.S. 159, 175 (1985) (“The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”) (internal quotations omitted).

3. 128 S. Ct. at 2288 (Roberts, C.J., dissenting) (“If the Court can design a better system for communicating to detainees the substance of any information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.”).

in a responsible and prompt way and, as the Court itself urged, in a practical way.”⁴

[I]t is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence, and what that intelligence is. . . . We simply cannot afford to reveal to terrorists all that we know about them and how we acquired that information. We need to protect our national security secrets, and we can do so in a way that is fair to both the Government and detainees alike.⁵

Meanwhile, several other common law democracies as well as the European Court of Human Rights (ECHR) have been wrestling with the same issue in similar contexts. Recently, the ECHR, which was called to review British legislation on detentions of suspected terrorists, acknowledged in this context that not all the relevant evidence must be disclosed (although it insisted on some level of disclosure, as detailed below).⁶ Based on that decision, the British House of Lords then unanimously ruled that under article 6 of the European Convention on Human Rights (which guarantees a right to a fair trial), terrorism suspects facing serious liberty deprivation are entitled to disclosure of at least “the essence of the case against [them].”⁷

4. Michael B. Mukasey, U.S. Att’y Gen., Remarks at the American Enterprise Institute for Public Policy Research (July 21, 2008) (transcript available at <http://www.justice.gov/archive/opa/pr/2008/July/08-opa-633.html>).

5. *Id.* Prior to becoming Attorney General, then retired-judge Mukasey raised similar concerns about disclosure of classified information to terrorists through criminal litigation. *E.g.* Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

6. *A. v. United Kingdom*, Eur. Ct. H.R., para. 203 (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847470&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA39869> (noting the “requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances”); *id.* para. 220 (holding that where open material was only general assertions and the decision was based on closed materials, the requirements of Art. 5 of the Convention would not be met).

7. *Sec’y of State for the Home Dept. v. AF* [2009] UKHL 28, para. 65 (Lord Phillips).

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This Article draws on experience in the United Kingdom, Canada, Israel and the United States to identify and compare several models for handling classified information relied upon to support a decision to detain long-term a suspected terrorist outside of the criminal justice system. It finds a common reliance among all these systems on a baseline requirement that a suspect be told at least the “core” or “gist” of allegations against him. Beyond that baseline requirement, however, the systems—which share common roots—have adopted varying supplemental mechanisms. One, found in Israel, is a judicial management approach emphasizing robust court scrutiny of secret evidence, similar to that used in inquisitorial legal systems. A second, found in the United Kingdom and Canada, is the creation of special advocates, or government attorneys charged with representing the detainee’s interests with respect to secret evidence.

This Article aims to show how these different institutional or procedural approaches among common law democracies reflect different understandings about the role of judges and also different emphases among various due process values, especially fairness versus decision-making accuracy. As a normative matter, we aim to build a more complete analytic framework than currently exists to evaluate and compare the various models. We argue that the merits of doctrinal or institutional devices for handling secret evidence cannot be fully understood in isolation of other institutional features, because they often operate in combination—sometimes reinforcing each other but sometimes pushing against each other. Furthermore, the relative merits of the various approaches should be understood not only in terms of their effectiveness in regulating individual case adjudication, but also in terms of their systemic regulation of detention regimes and the state powers that underlie them. This analysis points to several lessons that should guide legal reform in the United States.

Methodologically, this is not meant to provide a comprehensive survey of jurisprudence in any of the systems we analyze. Rather, we draw on examples to illustrate several possible models, the comparison of which yields useful insights to guide legal reform. We exclude from our analysis the use of secret evi-

dence in *criminal* trials for several reasons.⁸ First, national criminal law often contains specific constraints on the use of secret evidence that do not apply in other administrative procedures that threaten liberty. For example, the U.S. Constitution mandates that criminal defendants be able to confront witnesses against them.⁹ Second, criminal justice is generally designed to favor overwhelmingly the avoidance of “false positives” over “false negatives,” i.e. conviction of the innocent over letting guilty free,¹⁰ whereas terrorism detention sometimes requires a different balance.¹¹ It is that latter flexibility that we wish to explore across several models with a common baseline of “due process” or “fundamental fairness” and sharing common foundational traditions. Third, administrative (non-criminal) detentions are not supposed to serve as alternatives to criminal trials, but rather to be used for preventive purposes. In fact, in some systems that use such detentions they are considered an option that should not be relied upon when it is possible to bring charges regarding past events, based on admissible evidence.¹² It is worth noting

8. For discussion of this matter in the criminal context, see SERRIN TURNER & STEPHEN J. SCHULHOFER, *THE SECRECY PROBLEM IN TERRORISM TRIALS* (Brennan Center for Justice 2005).

9. See U.S. CONST. amend. VI.

10. No wonder that the famous “J'accuse!” by Emile Zola referred, among other accusations, to the use of secret evidence in the infamous Dreyfus trial: “Finally, I accuse the first court-martial of violating the law by convicting the accused on the basis of a document that was kept secret, and I accuse the second court-martial of covering up this illegality, on orders, thus committing the judicial crime of knowingly acquitting a guilty man.” Emile Zola, *J'Accuse . . . ! Lettre au Président de la République*, L'AURORE, Jan. 13, 1898.

11. See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

12. For example, according to section 8 of the Prevention of Terrorism Act, 2005, c. 2 (U.K.), “[b]efore making, or applying for the making of, a control order against the individual, the Secretary of State must consult the chief officer of the police force about whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism,” *id.* § 8(2), and “[i]t shall then be the duty of the chief officer to secure that the investigation of the individual’s conduct with a view to his prosecution for an offence relating to terrorism is kept under review throughout the period during which the control order has effect,” *id.* § 8(4). Similarly, one of the criteria used by the Israeli Supreme Court when reviewing the justification for administrative detentions has been the possibility to bring criminal charges against the detained individual. See, e.g., HCJ 5784/03 Salama v. Commander of IDF Forces in Judea and Samaria [2003] 57(6) IrSC 721, 726 (“[I]t is preferable to take criminal steps against someone suspected of hostile activity of a security nature, rather than use the procedure of administrative detention. In criminal

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that the possibility of using secret evidence (and the controversy around it) may arise also in related areas which do not involve detention, such as freezing of assets of people who are suspected as aiding terrorist-related activity.¹³

Nor is this Article a complete account of all possible approaches to secret evidence, including an absolutist position against its use altogether.¹⁴ This Article takes as given a normative assumptive need to balance fairness and secrecy in some contexts and focuses on mechanisms for administering and enforcing that balance.

Part II describes the foundational principles common to all of the systems studied and how they give rise to a shared, minimum disclosure requirement. It then examines two competing models for supplementing that baseline requirement, Israel's judicial management and the United Kingdom and Canada's special advocates. Part III compares these competing models. It cautions that both models risk undermining the baseline disclosure

proceedings the defendant, suspected of terror activity . . . can confront the evidence brought against him, a defense that is sometimes not possible in administrative proceedings. Nevertheless, it must be remembered that for reasons of protecting intelligence sources, it is not always possible to use criminal proceedings.") (citation omitted).

13. The main example in this regard is the *Kadi* decision of the ECJ, which ruled against the possibility of freezing assets of individuals who were included in a list of people who aid terrorist activity (according to Security Council Resolutions, starting from Security Council Resolution 1267 from 1999), and were actually denied the possibility of a hearing, based on arguments regarding evidence in their matter. See *Joined Cases C-402P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council of the European Union and Comm'n of the European Cmty.*, 2008 E.C.R. I-6351. Moreover, one of the recent adjustments introduced into the UN regime of freezing assets directs, when a name is added to the list,

to make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List, further directs the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, to make accessible on the Committee's website narrative summaries of reasons for listing for entries that were added to the Consolidated List before the date of adoption of this resolution.

S.C. Res. 1822, ¶ 13, U.N. Doc. S/RES/1822 (June 30, 2008).

14. See generally JUSTICE, SECRET EVIDENCE 213-35 (June 2009), <http://www.justice.org.uk/publications/listofpublications/index.html> (using the find function, find "secret evidence"; then follow the highlighted "Secret Evidence" link) (calling for an end to the use of secret evidence in British proceedings). "This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts." *Id.* at 5.

requirements they are designed in part to protect, and it argues that the choice between models reflects differing priorities among the values of “fairness.” Part IV applies these insights to ongoing debates about detention law in the United States and argues that choices for handling secret evidence should be considered in the context of other institutional features.

II. DUE PROCESS AND SECRET EVIDENCE: A BASELINE AND TWO MODELS

All the systems reviewed in this paper share the common law tradition,¹⁵ adhere to adversarial process and acknowledge an understanding of fairness based on disclosure of relevant evidential materials to the person involved. Accordingly, they all accept as a starting point the duty to disclose at least the “core” of the accusation against a suspect facing deprivation of liberty by the state. The differences emerge when these systems define the minimum level of this core, and the procedures adopted to compensate for situations which do not allow for complete disclosure.

A. *The Core/Gist Requirement as a Baseline*

Each system discussed in this paper shares a baseline requirement that, at minimum, a summary or core of the evidence against an individual in an administrative decision be disclosed. The requirement of core disclosure serves to ensure that the individual concerned has adequate notice of the case against him, and has an opportunity to rebut the government’s allegations. National security concerns, especially those implicated in contemporary counter-terrorism policy, strain this traditional baseline protection.

15. Formally speaking, Israeli law is considered a “mixed legal system,” which has been shaped by both the common law tradition and continental legislation, but in fact, despite many instances of legislation borrowed from Europe, the foundations of the legal culture are common law oriented. *See generally* Daphne Barak-Erez, *Codification and Legal Culture: In Comparative Perspective*, 13 TUL. EUR. & CIV. L.F. 125 (1998).

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1. Natural Justice and Disclosure Requirements

Common law traditions of due process generally find their roots in the concept of “natural justice” as developed in English administrative law. This concept included two major procedural requirements regarding administrative decisions that threaten liberty: that an individual be given a proper opportunity to be heard—and to this end should be given due notice of the hearing as well as adequate notice of the evidence against him—and that the decision maker be disinterested and unbiased.¹⁶

For the purposes of this paper, the relevant aspect of natural justice is the right to be heard as developed at common law. At present, the English and other European courts apply this concept of fairness also with reference to section 6 of the European Convention on Human Rights, which states that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁷

One of the goals of the embedded duty of notice is to give the individual who might be affected by an administrative act an effective opportunity to prepare his own case regarding that act, answer any arguments that might be brought up against him and test the quality of the government’s evidence. As explained by British Lord Denning in *Kanda v. Government of Malaya*: “[The accused] must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”¹⁸ Indeed, if any allegations are to be made against an individual by an administrative authority, that person is typically entitled to know

16. See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 440–45 (9th ed. 2004); see also JUSTICE, *supra* note 14, at 14–28 (describing historical development of these natural justice principles). The JUSTICE report, for example, quotes Francis Bacon in 1826: “[F]or injustice it is plain, and cannot be denied, that we hear but the one part: whereas the rule *audi alteram partem* is not of the formality, but the essence of justice.” *Id.* at 15.

17. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222 [hereinafter ECHR] (entered into force Sept. 3, 1953).

18. *Kanda v. Gov’t of Malaya* [1962] 1 A.C. 322 (P.C. 1962) (appeal taken from the Federated Malay States).

the particulars of those allegations, as well as the body of evidence employed by the authority in its decision-making process, so as to allow him to effectively answer those allegations and refute any prejudicial evidence. This is sometimes referred to as the administrative authority's duty of adequate disclosure¹⁹ or as the individual's right to see adverse evidence. In the United Kingdom, a failure to meet the duty of adequate disclosure by the authority traditionally establishes a prima facie presumption of procedural unfairness.²⁰

2. Balancing Disclosure with Public Interest: The Core/Gist Approach

The general rule of disclosure has some limits, such as in cases where disclosure might be harmful to the public interest.²¹ However, even when such conflicting interests arise, "the person claiming to be aggrieved should nevertheless be adequately apprised of the case he has to answer, subject to the need for withholding details in order to protect overriding interests."²² Where the statutory framework limits the duty of disclosure, due to conflicting interests, the requirements of natural justice may still be met "by telling [the adversely affected person] the substance of the case he has to meet, without disclosing the precise evidence or the sources of information."²³

In *R. v. Gaming Board for Great Britain*, a case challenging the British Gaming Board's licensing procedures as violating principles of natural justice, the Court of Appeals (Lord Denning M.R.) explained that even though much of the information and evidence employed by the board in its licensing procedure must remain confidential, since revealing that information or the sources that provided it may be contrary to public interest, "[the board] must let [the applicant] know what their impressions are

19. LORD WOOLF ET AL., *DE SMITH WOOLF & JOWELL'S PRINCIPLES OF JUDICIAL REVIEW* 312, 323 (5th ed. 1999).

20. *Id.* at 324.

21. *Id.* at 326.

22. *Id.* at 327.

23. WADE & FORSYTH, *supra* note 16, at 516.

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so that he can disabuse them.”²⁴ Lord Denning added that: “[W]ithout disclosing every detail, I should have thought that the board ought in every case to be able to give to the applicant sufficient indication of the objections raised against him such as to enable him to answer them.”²⁵ As such, full disclosure is not mandated, but the individual concerned must be informed of a core of information sufficient to enable a rebuttal to the charges against him.

In the United States, discussion of principles of natural justice is guised under an analysis of due process of law, the essential requirements of which track natural justice: “notice and an opportunity to respond.”²⁶ Before the modern evolution of due process doctrine, the U.S. Supreme Court in a number of cases required that the core of the evidence against an individual be disclosed to him. For example, in *Simmons v. United States*²⁷ the Supreme Court held that in an appeal to the Department of Justice of a decision to deny an individual’s conscientious objector claim, a gist of the facts proffered by the government must be supplied to the individual. The Court noted the importance of balancing secrecy with “the demands of fairness”²⁸ explaining that the government need not disclose its full report “because we [are] of the view that other safeguards in the proceeding, particularly the furnishing of a fair résumé, maintain[s] the basic elements of fair play.”²⁹

24. *Gaming Bd. for Great Britain v. R. ex parte Benjamin*, [1970] 2 Q.B. 417, 430 (C.A.).

25. *Id.* at 431.

26. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

27. 348 U.S. 397 (1955). Note that this case took place well before American procedural due process doctrine shifted dramatically in such cases as *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the latter of which is discussed, *infra*, at notes 198, 212 and accompanying text. In *Roth*, the Court required an initial showing that the government had “deprived” an individual either of liberty or some positive-law based entitlement that sufficed to “trigger” due process protections. In the present context, we do not address the procedural due process trigger issue, because the focus is on patent executive deprivations of liberty, and instead focus exclusively on the doctrinal issue of what process is then due.

28. *Id.* at 403.

29. *Id.* See also *Gonzales v. United States*, 348 U.S. 407 (1955) (holding that in a conscientious objector prosecution, the individual was entitled to know the gist of the Justice Department’s report in order to be afforded an opportunity to reply).

This “core” or “gist” requirement has been reinforced in its use in immigration proceedings. For example, in *R. v. Home Secretary ex parte Fayed*, a British case challenging the naturalization procedure that permitted the rejection of an applicant’s petition for naturalization based on undisclosed considerations, Lord Woolf stated that:

[It is not required] that the Secretary of State do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can. In some situations even to do this could involve disclosing matters which it is not in the public interest to disclose, for example for national security or diplomatic reasons. If this is the position then the Secretary of State would be relieved from disclosure and it would suffice if he merely indicated that this was the position to the applicant who . . . could challenge the justification for the refusal before the courts.³⁰

The Court quashed the decisions of the Home Secretary due to the failure to disclose even the “gist of matters” to the applicants.³¹ Similarly, the Supreme Court of Canada in *Chiarelli v. Canada (Minister of Employment & Immigration)*, a case concerning the sufficiency of the evidence provided to an alien in his deportation proceedings, ruled that the government need not give extensive details of the case against him.³² In the Court’s view, no injustice occurred so long as an individual received “sufficient information to know the substance of the allegations against him, and to be able to respond.”³³

These cases illustrate that even in instances where disclosure of information may impair the public’s interest, a core of information must still be disclosed to an individual. The use of the

30. *R. v. Sec’y of State for the Home Sec’y ex parte Fayed*, [1997] 1 All E.R. 228, 241 (C.A.).

31. *Id.* at 242; WADE & FORSYTH, *supra* note 16, at 517; *see also* *Lazarov v. Sec’y of State of Canada*, [1973] F.C. 927 (Can.) (noting that in the citizenship determination process an individual must be given privy to the allegations against him to “an extent sufficient to enable to him to respond to them and he must have a fair opportunity to dispute or explain them”).

32. *Chiarelli v. Canada (Minister of Employment & Immigration)* [1992] 1 S.C.R. 711.

33. *Id.* at 746, para. 52.

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core is a flexible means by which courts can balance the interest of the individual concerned with broader public interests that may be implicated in the disclosure of the government's information.

The core requirement functions as a means to ensure a fair playing field between the individual and the government. For example, in *Roberts v. Parole Board*, the House of Lords recognized that the use of a special advocate, a concept described below, cannot be a replacement for knowledge of the case against an individual.³⁴ Lord Woolf warned that the special advocate procedure, which had yet to be used at the hearing, might not be a sufficient replacement for the "core, irreducible, minimum entitlement"³⁵ that an individual is owed in order to challenge any evidence which decisively weighs on the legality of his detention. Lord Woolf explained:

If a case arises where it is impossible for the board both to make use of information that has not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing then the rights of the prisoner have to take precedence³⁶

In order to satisfy the prisoner's fundamental right to a fair hearing, however, Lord Woolf added, reinforcing the primacy of the gist of information to the calculation, that "if the board comes to a decision in favour of the prisoner or reveals at least the gist of the case against the offender, then there may be no injustice to the prisoner"³⁷

In the United States, the failure to provide adequate disclosure has also been viewed as a contravention of fairness. In *Joint Anti-Fascist Refugee Committee v. McGrath* the Supreme

34. *R. (on the application of Roberts) v. Parole Bd.* [2005] UKHL 45, para. 60, [2005] 2 A.C. 738, 776 (Lord Woolf); *see also Sec'y of State for the Home v. M.B.* [2007] UKHL 46, para. 35, [2008] 1 A.C. 440, 479 (Lord Bingham of Cornhill) (agreeing with Lord Woolf in *Roberts v. Parole Board*).

35. *Roberts*, [2005] UKHL 45, para. 68, [2005] 2 A.C. at 779.

36. *Id.* para. 78, at 781-82 (Lord Woolf).

37. *Id.* para. 83, at 783. Similarly in *R. v. Secretary of State for the Home Department, ex parte Duggan*, the Queen's Bench Division concluded that in determinations of a prisoner's security risk level, "fairness . . . requires that the gist of the reports be revealed." [1994] 3 All E.R. 277, 288 (Q.B.).

Court ruled that the Attorney General acted outside the scope of his power by designating organizations as Communist without any process of reasoning.³⁸ Justice Frankfurter's concurring opinion referred to principles of natural justice in concluding that petitioners were owed due process by the government in making determinations of Communist designations: "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."³⁹

3. Terrorist Detention and the Core/Gist Approach

These concepts become more challenging when they are applied in the context of national security. The British House of Lords was faced with the issue of disclosure of information in this context when it had to review decisions to mandate liberty restrictions against suspected terrorists. Under the Prevention of Terrorism Act, the British Government is authorized to issue control orders,⁴⁰ which are akin to issuances of home arrest for part of the day, and place limitations on the liberty of individuals suspected of being terrorists.⁴¹

British courts have recently had occasion to examine whether these control orders can survive refusals to disclose critical information to suspects in the name of significant national security interests. The House of Lords confronted this difficulty in the watershed case of *Secretary of State for the Home Depart-*

38. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). Note, again, that this case long pre-dates modern due process doctrine. *See supra* note 27.

39. *Id.* at 170.

40. Britain has chosen to manage the threat of terrorism without full detention powers granted by Part 4 of the Anti-Terrorism, Crime and Security Act, 2001, c. 24, after the House of Lords ruled in *A v. Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 A.C. 221, that the application of Part 4 violated the United Kingdom's commitments under the European Convention. The result was a legislative reform in which the British Parliament enacted the Prevention of Terrorism Act, 2005, c. 2.

41. Limitations on liberty include, for example, curfews, limitations on travel and associations and requirements to check in with government authorities. *See* Prevention of Terrorism Act, 2005, c. 2, § 1(4)(d)-(f), (p).

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ment v. MB.⁴² The case concerned control orders imposed on two individuals, on the grounds of their suspected involvement with Islamist extremists. Both orders were based on evidence not disclosed to the appellants or their legal representatives. It is not clear from the language of the opinions whether the Law Lords indeed required an irreducible core requirement to be disclosed to MB and AF. The Lords held that a trial judge may have a control order quashed if he/she determines that the hearing was ultimately unfair⁴³—leaving for another day whether a hearing without a core of disclosed information might in some cases be fair.

There are suggestions in the decision that could be interpreted as a willingness to recognize the possibility of complete non-disclosure.⁴⁴ The analysis is complicated by the process of judicial review in the context of control orders, which includes the option of disclosure to a special advocate who represents the controlled person, but not to him (as explained below). Accordingly, Lord Carswell stated:

There is a very wide spectrum of cases in which closed material is relied on by the Secretary of State. At one extreme there may be cases in which the sole evidence adverse to the controlee is closed material, he cannot be told what the evidence is or even given its gist and the special advocate is not in a position to take sufficient instructions to mount an effective challenge to the adverse allegations. At the other end there may be cases where the probative effect of the closed material is very slight or merely corroborative of strong open material and there is no obstacle to presenting a defence. There is an infinite variety of possible cases in between. The balance between the open material and the closed material and the probative nature of each will vary from case to case.⁴⁵

42. [2007] UKHL 46, [2008] 1 A.C. 440.

43. *Id.* paras. 69–70, at 490 (Baroness Hale).

44. *See id.* para. 74, at 492 (Baroness Hale) (“It is quite possible for the court to provide the controlled person a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed.”).

45. *Id.* para. 85, at 496 (Lord Carswell).

This emerging vagueness around the gist concept, which previously seemed relatively clear, is intensified in decisions based on this leading judgment, as indicated by the judgment of the Court of Appeals in *Secretary of State for the Home Department v. AF*.⁴⁶ Here the court interpreted the decision in *MB* as leaving open the possibility of complete non-disclosure in certain cases. The judgment states that,

[t]here is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there is, the irreducible can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed.⁴⁷

However, more recently the European Court of Human Rights and the House of Lords have reaffirmed that even within the context of national security, the gist remains an irreplaceable measure of protection. The European Court of Human Rights examined the issue of secret evidence in its decision in *A. and Others v. United Kingdom*.⁴⁸ There the applicants challenged the procedure used to determine the legality of their detention, especially the lack of disclosure of evidence.⁴⁹ The United Kingdom at this time employed special advocates to assist an individual facing detention where the government relied on secret evidence. The Court held that while special advocates were a useful procedural protection,⁵⁰ they were not a substitute for the disclosure of the core of the evidence against an individual. Therefore, in some cases “[w]here . . . the open material consisted purely of general assertions and [the court’s] decision to uphold the certification and maintain the detention was based solely or to a deci-

46. [2008] EWCA (Civ) 1148, [2009] 2 W.L.R. 423 (U.K.).

47. *Id.* para. 64, at 455.

48. *A. v. United Kingdom*, Eur. Ct. H.R. (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847470&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. This decision is interesting not only for its examination of the procedural fairness of the special advocate system, but also for its determinations regarding preventative detentions under the European Convention on Human Rights.

49. *Id.* para. 214.

50. *Id.* para. 220.

sive degree on closed materials, the procedural requirements of [the Convention] would not be satisfied.”⁵¹ The Court held that in a number of individual cases, the Convention’s right to a fair trial had been violated.⁵² It appears that, at least under the European Convention, the requirement of a core disclosure if one is facing detention remains required for a hearing to be fair.

Based on this decision of the European Court of Human Rights, the British House of Lords overruled its prior decision and unanimously held that, pursuant to the European Convention, a defendant facing a control order has a right to disclosure of at least “sufficient information about the allegations against him to enable him to give effective instructions” to the special advocate.⁵³ “The Grand Chamber has now made clear,” writes Lord Phillips, “that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.”⁵⁴

A tentative lesson to be drawn from this discussion is that the very basic core/gist requirement comes under tremendous pressure as the public interest stakes against information disclosure rise in national security cases.⁵⁵ Against this background, supplementary models have been introduced in several common

51. *Id.*

52. *Id.* paras. 223–24.

53. *Sec’y of State v. AF* [2009] UKHL 28, para. 59. Following these rulings at least two individuals subject to control orders have had them revoked by the Secretary of State, Frances Gibb, *Top terror suspect is freed over secrets fear*, THE TIMES OF LONDON, Sept. 7, 2009, available at 2009 WLNR 17526352; Alan Travis, *Terror Suspect Freed After Home Secretary Revokes Second Control Order*, THE GUARDIAN, Sept. 24, 2009, available at <http://www.guardian.co.uk/politics/2009/sep/24/control-order-revoked-imam-ae>, and a court has released another, *Sec’y of State for the Home Dep’t v. O’Connor* [2009] EWHC (Admin) 1966, para. 3 (noting that “non-disclosure has gone so far as to deny AN knowledge of the essence of the case against him. The essence of that case has now been withdrawn. It therefore follows that the decision of the Secretary of State was made upon grounds upon which no reliance can now be placed.”). The media reported that the Secretary of State released the two individuals because the government would be unable to prove the grounds for the control orders without jeopardizing state secrets. See Gibb, *supra*; Travis, *supra*.

54. *Sec’y of State v. AF* [2009] UKHL 28, para. 65.

55. See Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2006) (arguing that providing the gist of secret evidence undermines the integrity and effectiveness of adversarial process).

law systems to meet the challenge of procedural fairness in national security contexts.

B. The Judicial Management Model

One model for improving on the core/gist baseline is found in Israeli law, which permits administrative detention of certain individuals considered threats to national security, subject to judicial review.⁵⁶ As in the case of British control orders, the key question becomes what specific kind of judicial review adequately safeguards fairness when national security imperatives dictate nondisclosure of information. As explained below, judges in Israel have developed an approach in a number of detention contexts which we label the “judicial management model.”

1. The Statutory Scheme

Israel inherited provisions allowing for administrative detentions for security reasons from the pre-independence legal system governing British Mandatory Palestine, as enacted in the Defense (Emergency) Regulations of 1945.⁵⁷ This regime was later replaced by a new law—the Emergency Powers (Detention) Law of 1979—which, while preserving the possibility of preventive administrative detentions, afforded greater procedural safeguards.⁵⁸ According to the 1979 law:

Where the Minister of Defence has reasonable cause to believe that reasons of state security or public security require that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period, not ex-

56. On the Israeli detention law system, see generally Mara Rudman & Mazen Qudry, *The Emergency Powers (Detention) Law: Israel's Courts Have a Mission—Should They Choose to Accept It?*, 21 COLUM. HUM. RTS. L. REV. 469 (1990).

57. Defense (Emergency) Regulations, 1945 Palestine Gazette no. 1442, Supp. No. 2, at 1055.

58. Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1979) (Isr.) [hereinafter, Israeli Detentions Law]. For a brief review of the history of administrative detention legislation in Israel, see paragraph 6 of Justice Rubinstein's opinion in HCJ 9441/07 *Agbar v. I.D.F. Commander in Judea & Samaria* [2007] (not published).

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ceeding six months, stated in the order.⁵⁹

This order may be extended from time to time.⁶⁰ The detainee has the right to have his detention reviewed by a President of a District Court within forty-eight hours,⁶¹ and after that at least every three months.⁶²

The procedure for review of the detainee's status enables the state to refrain from full disclosure of the underlying evidence. According to section 6(c) of the law:

In proceedings under section 4 or 5, the President of the District Court may accept evidence without the detainee or his representative being present and without disclosing the evidence to them if, after studying the evidence or hearing submissions, even in their absence, he is satisfied that disclosure of the evidence to either of them may impair state security or public security.⁶³

Thus, the statutory standard of review in Israel is quite deferential to the security interests of the state. The Israeli Detentions Law, by its own language requires the judge to consider only whether the disclosure of evidence will impair state security, rather than balance the individual's interests with those of the state when making a determination of what evidence must be disclosed. As we will see, judges have worked within this framework to develop means to provide further protections to individuals.

In 2002, Israel enacted the Incarceration of Unlawful Combatants Law,⁶⁴ which applies to the detention of foreigners who reside outside Israel and are apprehended for certain terrorist-related activities.⁶⁵ This law includes similar mechanisms of

59. Israel Detentions Law, § 2(a).

60. *Id.* § 2(b).

61. *Id.* § 4.

62. *Id.* § 5.

63. *Id.* § 6(c).

64. Incarceration of Unlawful Combatants Law, 5762-2002 (Isr.), available at <http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AE8E770BDE6/0/IncarcerationLawedited140302.doc> [hereinafter Israeli Unlawful Combatants Law].

65. The distinction between the two detention laws was analyzed in *CrimA 6659/06 A v. Israel* [June 11, 2008], available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (not published).

judicial review, with adjustments that take into consideration the different context—such as allowing the first judicial review to take place within fourteen days,⁶⁶ and then allowing that every additional review will take place at least every six months.⁶⁷ This law also expressly provides for the possibility of using secret evidence disclosed only to the court:

It shall be permissible to depart from the laws of evidence in proceedings under this Law, for reasons to be recorded; the court may admit evidence, even in the absence of the prisoner or his legal representative, or not disclose such evidence to the aforesaid if, after having reviewed the evidence or heard the submissions, even in the absence of the prisoner or his legal representative, it is convinced that disclosure of the evidence to the prisoner or his legal representative is likely to harm State security or public security.⁶⁸

Similar principles of judicial review coupled with authorized limits on disclosure of evidence to suspects also apply to detentions conducted in the occupied territories based on military orders.⁶⁹

2. A Judge-Made Mechanism

The fact that the review of detention decisions is conducted without full disclosure of the evidence casts a shadow on the significance of judicial review in each of these detention contexts. Against this background, the Israeli Supreme Court has developed an activist approach in its review role of the non-disclosed evidence,⁷⁰ in a way that starts to look like the practice of inquisitorial legal systems. This practice of the court has been described by Professor Itzhak Zamir, a scholar of Israeli public

66. Israeli Unlawful Combatants Law, § 5(a).

67. *Id.* § 5(c).

68. *Id.* § 5(e).

69. *See, e.g., infra* at II.B.2.

70. This activist judicial approach is not limited to detentions law. In general, the judiciary has been at the fore of protections of individual rights in Israel. *See* Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, in *JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY?* 55 (M. Gibney & S. Frankowski eds., 1999) (“Until quite recently, human rights in Israel have been protected almost exclusively by judge-made law.”).

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law and later a Justice on the Israeli Supreme Court, in the following manner:

Due to the gravity of this situation, the Supreme Court instituted a practice which has no basis in law. The court dealing with the case suggests to the applicant that the administrative authority, which keeps the evidence under a cloak of secrecy, present the evidence only to the judges, behind closed doors, not in the presence of the applicant. If the applicant agrees to this proposal, the court will then examine the confidential evidence.⁷¹

More recently, Chief Justice Beinisch described this practice in *A v. State of Israel*, a Supreme Court case that challenged the constitutionality of the provision allowing the non-disclosure of evidence according to the new Unlawful Combatants Law (alongside several other provisions of this law):⁷²

[I]n view of the of the problems inherent in relying upon administrative evidence for the purpose of detention, the judicial system has over the years developed a tool for control and scrutiny of intelligence material, in so far as this is possible in a proceeding of the kind that takes place in judicial review of administrative detention. In these proceedings the judge is required to question the validity and credibility of the administrative evidence that is brought before him and to assess its weight.⁷³

The reviewing court plays a special role by performing the aforesaid examination of evidence in a critical fashion, even viewing it from the position of the detainee (were he able to access it). As explained by Chief Justice Beinisch:

In view of the problems inherent in submitting privileged evidence *ex parte*, the court that carries out

71. Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 399 (1989).

72. CrimA 6659/06 A v. State of Israel [2008], available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (not published).

73. *Id.* para. 43.

a judicial review of an administrative detention is required to act with caution and great care when examining the material that is brought before it for its inspection alone. In such circumstances, the court has a duty to act with great caution and to examine the privileged material brought before it *from the viewpoint of the detainee*, who has not seen the material and cannot argue against it.⁷⁴

In her judgment, Chief Justice Beinisch relied on an earlier decision of the High Court of Justice in the matter of *Barham v. Justice Colonel Shefi*.⁷⁵ In *Barham*, the petitioner, detained according to the legislation on administrative detentions in the occupied territories,⁷⁶ argued that the military judge, in his review of the undisclosed materials serving as the basis for his detention, should question the informants who provided the information. Justice Or, delivering the court's decision, did not accept this argument but did emphasize the importance of the judge's intensified scrutiny in an examination of non-disclosed materials which constitute the basis for the detention decision:

[T]he military judge may and should consider not only the question whether *prima facie* the competent authority was entitled to decide what it decided on the basis of the material that was before it, but the judge should also consider the question of the credibility of the material that was submitted as a part of its assessment of the weight of the material. Indeed, the fact that certain "material" constitutes valid administrative evidence, does not exempt the judge from examining its degree of credibility against the background of the other pieces of evidence, and the entirety of the case's circumstances. As such, the "administrative evidence" label does not exempt the judge from the need to demand and receive explanations from the bodies that are able to provide them. To say otherwise, would mean to greatly weaken the process

74. *Id.* (emphasis added).

75. HCJ 4400/98 *Barham v. Justice Colonel Shefi* [1998] IsrSC 52(5) 337.

76. Administrative Detentions Order (as amended), promulgated by the military commander of the area.

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of judicial review and to allow for the elimination of liberty for extended periods of time, on the basis of poor and inadequate material.⁷⁷

Thus, while a reviewing court need not call witnesses for questioning, it should attempt to test the quality and credibility of the government's evidence

Not only must the judge review the evidence for its reliability, but she also should test the government's case generally. Justice Procaccia's opinion in *Khadri v. I.D.F Commander in Judea and Samaria*,⁷⁸ further articulates the view of the court acting almost as the detainee's advocate:

The administrative detention entails, more than once, a deviation from the rules of evidence, among other reasons, since the materials raised against the detainee are not subjected to his review. This deviation imposes on the court a special duty to take extra care in the reviewing of the confidential material, and to act as the detainee's "mouth" where he is not exposed to the adverse materials, and cannot defend himself.⁷⁹

Justice Rubinstein expressed a similar view to that of Justice Procaccia in *Agbar v. I.D.F Commander in Judea and Samaria*.⁸⁰ In the course of discussing the evidentiary problems arising from the procedure of administrative detention, Justice Rubinstein opined that:

[I]n this situation the detainee does not enjoy a full and adequate opportunity to defend himself against the arguments raised against him – he is not exposed to the majority of the evidences, he cannot review them and he is unable to cross examine. This obliges the court to employ extra care and strict examination of the evidence brought be-

77. [1998] IsrSC 52(5) at 346.

78. HCJ 11006/04 *Khadri v. I.D.F Commander in Judea and Samaria* [2004] (not published).

79. *Id.* para. 6.

80. HCJ 9441/07, para. 8 [2007] (not published).

fore him. *The court must become “temporary defense attorney.”*⁸¹

The Israeli Supreme Court has expressed this view in many other instances.⁸² In sum, while the security services in Israel may be granted more latitude in excluding the individual affected from the relevant evidence against him, courts reviewing these decisions try to compensate for this handicap through their heightened scrutiny of the evidence.

It is important to add that the active role the Israeli Supreme Court has taken upon itself is not supposed to replace the duty to disclose to the detained person the gist of the allegations against him. In recent decisions, the Supreme Court has made it clear that the state has to disclose the basic allegations to the detained, as an independent duty, alongside the full disclosure of evidence to the court.⁸³ Still, there may be doubts whether disclosure of core allegations alone gives enough basis for effective defense (e.g. if the detained knows that he is suspected to be a member of a said terrorist organization, but does not know who were the people who attributed this allegation to him).

81. *Id.* (emphasis added).

82. *See, e.g.*, HCJ 5555/05 Federman v. Commander of the Central Command [2005] IsrSC 59(2) 865, 869 (according to Justice Rubinstein: “[The issue of undisclosed evidence] imposes a special and enhanced duty on the adjudicating authorities in the military system, and on this court . . . to carefully examine what is brought before them, while acting also as a mouth of sorts for whom the material was hidden from”); Administrative Detention App. 8788/03 Federman v. Minister of Defense [2003] IsrSC 58(1) 176, 187 (according to Justice Grunis: “Due to the limited involvement of the detainee and his counsel in the procedure undergoing before the Chief Justice of the district court, the Chief Justice must act as a mouth to the detainee and examine the material brought before him in an intensive and thorough fashion”); Administrative Detention App. 6183/06 Gruner v. Minister of Defense [2006] (not published) (according to Justice Cheshin, “during the discussion regarding the approval of the [administrative] arrest warrant, the chief justice of the district court must adopt an active course, that does not characterize the traditional role of the court in our adversary system”).

83. *See* HCJ 2595/09 Sofi v. State of Israel [2009] (not published). In this case, Justice Rubinstein stressed that the limitation on disclosure should be “narrowed . . . to the necessary minimum.” *Id.* para. 21. *See also* HCJ 1510/09 Atamana v. State of Israel [2009] (not published). In *Atamana*, Justice Hayut stressed that eventually all the relevant allegations were revealed to the detainee. At the same time, it is clear from these two decisions that the authorities did not tend to reveal the gist of the accusations to the detained, and they did that eventually only under the pressure of the court.

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C. *The Special Advocate Model*

Another model used to bolster the gist requirement that balances secrecy and the ability to challenge evidence against a suspect is based on the use of “special advocates,” attorneys who, unlike the suspect or his other legal representatives, are given access to secret evidence and are charged with refuting the state’s arguments and evidence—on behalf of the suspect or in some cases on behalf the state—in a closed adversarial hearing.⁸⁴ The special advocate supplements the core by seeking disclosure of additional secret evidence to the suspect as well as providing an additional level of evidentiary scrutiny and legal challenge to evidence that remains undisclosed to the suspect.

1. Modern Origins

Canada and the United Kingdom⁸⁵ currently utilize special advocates to offer a measure of procedural fairness to those facing deprivation of their liberty due to alleged terrorist connections, and for whom classified or closed materials are the source of the allegations against them.⁸⁶ Judicial decisions from both national and supranational courts have influenced this model and provided an impetus for further procedural protection.⁸⁷

84. See generally John Ip, *The Rise and Spread of the Special Advocate*, PUB. L. 717-41 (2008) (detailing the historical development of special advocates as a way to balance secrecy and fairness).

85. New Zealand has also taken steps to implement the use of special advocates. Indeed, special advocates were appointed on an ad hoc basis in the case of *Zaoui v. Attorney General*, [2004] 2 N.Z.L.R. 339 (H.C.), where the Attorney General of New Zealand issued a security risk certificate against Zaoui under the Immigration Act. Following this hearing, New Zealand’s parliament has worked to amend its immigration legislation to provide for the statutory use of special advocates in immigration proceedings where closed materials are relied upon by the government. New Zealand’s model is largely influenced by the existing methods used in Canada and the U.K. See generally John Ip, *The Adoption of the Special Advocate Under New Zealand’s Immigration Bill* (Nov. 8, 2008) (unpublished manuscript, on file with The Columbia Journal of Transnational Law).

86. Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.) §§ 83(1.2), 85 [hereinafter IRPA]; Special Immigration Appeals Commission Act, 1997, c. 68 (Eng.) [hereinafter SIAC]; Special Immigration Appeals Commission (Procedure) Rules 2003, S.I. 2003/1034, arts. 35, 37 (U.K.) [hereinafter SIAC Rules]; Prevention of Terrorism Act, 2005, c. 2, § 1 (U.K.) [hereinafter PTA].

87. See *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831; Sec’y of State for the

The European Court of Human Rights played a significant role in shaping the special advocate system in both the United Kingdom and Canada. In 1996, the Court, in *Chahal v. United Kingdom*, heard the case of a detained immigrant who challenged the procedures of his deportation appeal, namely that the appeals court did not have access to closed information relating to his threat to national security and was thus ill-equipped to review the decision of the Home Secretary to deport him.⁸⁸ The Court ruled unanimously that the United Kingdom was in violation of Article 13 of the European Convention on Human Rights, which provides for an “effective remedy before a national authority” where rights of the Convention are violated.⁸⁹ The Court found the protections afforded to Chahal were deficient where he was unable to challenge his detention in court because materials that were relied upon by the government were disclosed neither to him nor the court.⁹⁰

In its opinion, the Court referenced Canada’s Immigration Act of 1976 as a means by which to strengthen judicial review in proceedings where classified materials are involved, through the use of special security-cleared counsel to examine witnesses and “test the strength of the State’s case.”⁹¹ The Court opined that the use of special advocates “accommodate[s] legitimate security concerns about the nature and sources of intelligence information and yet accord[s] the individual a substantial measure of procedural justice.”⁹² The Court’s advice did not fall on deaf ears and following the *Chahal* opinion, the U.K. Parliament enacted the Special Immigration Appeals Commission Act of 1997, which provided, in part, for the use of a special advocate in immigration proceedings to represent the interests of a complainant on appeal where classified materials were relied upon by the State.⁹³ Following the September 2001 terrorist attacks in the United

Home Dep’t v. MB [2007] UKHL 46, [2008] 1 A.C. 440; A v. Sec’y of State for the Home Dep’t [2004] UKHL 56, [2005] 2 A.C. 68; Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.).

88. 1996-V Eur. Ct. H.R. at 1844–46.

89. ECHR, *supra* note 17, Art. 13; 1996-V Eur. Ct. H.R. at 1871.

90. 1996-V Eur. Ct. H.R. at 1870–71.

91. *Id.* at 1869.

92. *Id.* at 1866–67.

93. SIAC, *supra* note 86, § 6.

States, Parliament incorporated the use of special advocates in hearings for suspected terrorists, first in the Anti-terrorism, Crime and Security Act of 2001⁹⁴ and later in the Prevention of Terrorism Act of 2005.⁹⁵

The House of Lords in *M.B. v. Secretary of State for the Home Department*⁹⁶ solidified the legitimacy of special advocates in light of the jurisprudence of the European Court of Human Rights. It accepted that the use of special advocates will often result in a fair hearing, and thus refused to issue a declaration of incompatibility between challenged domestic law and the ECHR,⁹⁷ though some members warned that special advocates could not replace the requirement to provide an individual with a gist of the materials against him.⁹⁸

Canada implemented the use of special advocates in national security contexts in 2007, borrowing from the United Kingdom.⁹⁹ The impetus was *Charkaoui v. Canada (Immigration and Citizenship)* where the Supreme Court found that section 7 of the Canadian Charter of Rights and Freedoms¹⁰⁰ requires at min-

94. Under section 21 of the Anti-terrorism, Crime and Security Act, 2001, c. 24, § 1, the Secretary of State was given broad powers to indefinitely detain non-citizens that he or she reasonably believed to be a threat to national security and suspected to be a terrorist. In order to detain these individuals, the United Kingdom in section 30 of the 2001 Act asserted a derogation from the Convention by declaring a state of national emergency, the legitimacy of which was challenged successfully in *A v. Secretary of State*.

95. The PTA repealed the detention provisions of the Anti-terrorism, Crime and Security Act and instead provides for control orders that impose restrictions of movement and association. See PTA, *supra* note 86, § 1(4).

96. [2007] UKHL 46, [2008] 1 A.C. 440.

97. *Id.* para. 70, at 490 (Baroness Hale).

98. *Id.* para. 84, at 495 (Lord Carswell) (noting “a qualification that the powers conferred do not extend to withholding particulars of reasons or evidence where to do so would deprive the controlee of a fair trial”); *id.* para. 35, at 480 (Lord Cornhill) (suggesting that even with a special advocate “the task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person”).

99. See SPECIAL SENATE COMMITTEE ON THE ANTI-TERRORISM ACT, FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES: MAIN REPORT OF THE SPECIAL SENATE COMMITTEE ON THE ANTI-TERRORISM ACT, at 30–42 (Feb. 2007) (Can.).

100. Section 7 of the Canadian Charter of Rights and Freedoms provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.)

imum that “a substantial substitute for that information must be found” and that no substitute was afforded under the Immigrant and Refugee Protection Act (IRPA).¹⁰¹ The Supreme Court also concluded that the violation of section 7 could not be justified by the prior doctrinal test that “requires a pressing and substantial objective and proportional means”¹⁰² because less intrusive alternatives—namely the use of special advocates—could be employed to ensure the same result.¹⁰³ The Canadian Parliament amended the IRPA with provisions calling for the use of special advocates to act in the interests of affected individuals.¹⁰⁴

2. Basic Features

The basis of the Special Advocate Model is the use of special counsel to represent the interests of an individual who faces the loss of liberty in contexts where the government seeks to rely on closed materials.¹⁰⁵ However, both the United Kingdom and Canada provide that the relationship between the individual and the special advocate is not “that of solicitor and client”¹⁰⁶ and that the special advocate is not responsible to the individual.¹⁰⁷ As such, the special advocate’s ethical responsibilities are not clearly delineated.¹⁰⁸ In the British and Canadian cases, the appointment of a special advocate occurs in proceedings to determine whether the individual is himself a threat to national security, and must be detained or subject to control orders limiting him to house arrest.¹⁰⁹ The closed materials can make up a substantial portion of the government’s case against an individual.¹¹⁰ Further, as the individual is not subject to criminal proceedings, the standard of

101. [2007] 1 S.C.R. 350, 388 (Can.).

102. *Id.* at 391.

103. *Id.* at 392.

104. IRPA, *supra* note 86, § 85.

105. PTA, *supra* note 86, §§ 4(3)(b), 7; IRPA, *supra* note 86, § 83(b).

106. IRPA, *supra* note 86, § 85.1(3).

107. PTA, *supra* note 86, para. 7(5) (“A person appointed under this paragraph is not to be responsible to the person whose interests he is appointed to represent.”).

108. See Andrew Boon & Susan Nash, *Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems*, 9 LEGAL ETHICS 101 (2006).

109. IRPA, *supra* note 86, §§ 78, 81–82; PTA, *supra* note 86, § 1(4).

110. See Charkaoui v. Canada, [2007] 1 S.C.R. 350 (Can.); MB v. Sec’y of State for the Home Dep’t [2007] UKHL 46, para. 3, [2008] 1 A.C. 440, 467–68.

proof on the government is usually not as demanding as that for criminal conviction, instead requiring the reasonableness of the government's judgment.¹¹¹

The special advocate provides a procedural check against the power of the government in these proceedings, fulfilling two important functions: testing the validity of the closed materials relied on¹¹² and pushing for more extensive disclosure of information by challenging the nature of the public interest at stake.¹¹³ In performing these duties the special advocate can make oral or written submissions to the court and cross-examine witnesses.¹¹⁴ However, he is limited by restrictions on communication with the affected person after the secret evidence has been disclosed.¹¹⁵ In the statutory regimes of Canada, the United Kingdom and New Zealand, special advocates are unable to communicate with the affected person after having received the closed materials unless they gain special permission of the court.¹¹⁶ In practice, after gaining access to closed materials, special advocates often work to find "open sources" of the materials that can be accessed by the person affected and their legal counsel.¹¹⁷

Special advocates strive to gain an acceptable open summary of the closed materials.¹¹⁸ In practice, once the closed ma-

111. IRPA, *supra* note 86, § 81 ("reasonable grounds to believe that the person is a danger to national security"); PTA, *supra* note 86, § 2(1) (reasonable grounds to suspect).

112. IRPA, *supra* note 86, § 85.1(2)(b); Civil Procedure Rules, 1998, S.I. 1998/3132, pt. 76.24 (U.K.) [hereinafter CPR].

113. IRPA, *supra* note 86, § 85.1(2)(a); CPR, *supra* note 112, pt. 76.24; HOUSE OF LORDS, HOUSE OF COMMONS, JOINT COMMITTEE ON HUMAN RIGHTS, COUNTERTERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-7, H.L. 157, H.C. 394, at 51 (U.K.) [hereinafter JOINT COMMITTEE, 28 DAYS].

114. IRPA, *supra* note 86, § 85.2; CPR, *supra* note 112, pt. 76.24.

115. IRPA, *supra* note 86, § 85.4(2); CPR, *supra* note 112, pt. 76.25.

116. IRPA, *supra* note 86, § 85.4(2); CPR, *supra* note 112, pt. 76.25; Immigration Bill 132-2, cl. 238 (2007) (N.Z.).

117. See JOINT COMMITTEE, 28 DAYS, *supra* note 113, at Ev. 13 (testimony of Mr. Blake) ("Much of our work on disclosure is seeing whether there is an open source for materials.").

118. See *Sec'y of State for the Home Dep't v. MB* [2007] UKHL 46, paras. 64-65, [2008] 1 A.C. 440, 488 (Baroness Hale noted that "it is necessary to go further than [appointing a special advocate] and ask whether the use of a special advocate can solve the problem where the Secretary of State wishes to withhold from the controlled person material upon which she wishes to rely in order to establish her case").

terials have been revealed to them, special advocates dedicate a great amount of time in fighting for disclosure to the suspect.¹¹⁹ Pushing for more disclosure can involve both working with the government to formulate an acceptable version of the evidence to be disclosed or finding substitutes for the materials. As one special advocate explained:

Part of our role in trying to secure as much disclosure as possible for the appellant involves trying to suggest to the Secretary of State's side, to the Security Service, gists that might be acceptable. We are constantly trying to formulate gists of closed material which we think might enable the Secretary of State to make something open, perhaps in a slightly different form, concealing the source but at least making the thrust of the point open.¹²⁰

By working for further disclosure, the special advocate challenges the assumptions of the government and the court regarding what must be kept secret. Although in practice the special advocates are not always able to gain further disclosure,¹²¹ they serve as a procedural check on unquestioned governmental authority to determine what can be disclosed.

While the special advocate model can improve the protection afforded to individuals concerned, the inability to communicate with the person affected or his regular counsel following disclosure of the closed evidence limits his effectiveness. In a case where significant portions of the government's case are closed, there may be little that a special advocate can do to prepare to seriously test the evidence. According to one special advocate:

The preclusion of communication frequently limits the essence of the function, because you may have no idea what the real case is until you have gone closed, and therefore there has been nothing provided to you by way of either prior statement, or

119. See JOINT COMMITTEE, 28 DAYS, *supra* note 113, at Ev. 10 (Mr. Blake stating, "I suspect that many of us would feel at the moment that our most important function is on the disclosure front of what, if anything, can go from closed to open").

120. *Id.* at Ev. 15 (testimony of Mr. Chamberlain).

121. *Id.* at 51, para. 195.

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prior meeting or conference with the person concerned.¹²²

While this restriction is maintained as a means to ensure that the closed information remains confidential, there have been suggestions in Canada and the United Kingdom that this risk can be overcome by additional protections, for example by requiring that the special advocate gain permission from the court to speak with the individual affected after the disclosure of secret evidence.¹²³

A further limitation faced by the special advocate, and which the special advocate is in part meant to remedy, is often the lack of any useful open summary of the government's case.¹²⁴ As noted, the special advocate in practice devotes significant time to making an open core of the case available to the person affected, but where this is not successful and where the special advocate cannot communicate with the person affected after disclosure, the special advocate's function is stunted. Indeed, this was the concern of the House of Lords in *Secretary of State of the Home Department v. MB*, which concluded that in some cases, even with the appointment of a special advocate, a judge may be required to rule that a trial has been unfair.¹²⁵ In reaction, the Joint Committee on Human Rights in the United Kingdom has proposed amending the procedures to require, like the Canadian statute requires,¹²⁶ that the government proffer a summary of the closed evidence on which it relies and "on which fairness re-

122. *Id.* at Ev. 14 (testimony of Mr. Blake).

123. See HOUSE OF LORDS, HOUSE OF COMMONS, JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (TENTH REPORT): COUNTER-TERRORISM BILL, 2007-8, H.L. 108, H.C. 554, at 36 (U.K.) [hereinafter JOINT COMMITTEE, COUNTERTERRORISM]; accord SPECIAL SENATE COMMITTEE ON THE ANTI-TERRORISM ACT, FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES 35 (Feb. 2007) (Can.) (stating "if the special advocate is able to communicate with the party affected by the proceedings only before receiving the confidential information, his or her role is rendered much less effective, as he or she is unable to meaningfully test the reliability of a specific piece of classified or sensitive information, or the validity of keeping it confidential").

124. The Canadian statute, unlike the U.K. statute, requires that at minimum the individual "is provided with a summary of information and other evidence that enables them to be reasonably informed of the [government's] case." IRPA, *supra* note 86, § 83(1)(e).

125. *Home Sec'y v. MB* [2007] UKHL 46, [2008] 1 A.C. 440, para. 70 (opinion of Baroness Hale).

126. See *infra* notes 134, 139 and accompanying text.

quires the controlled person have an opportunity to comment.”¹²⁷

III. THE INNER RELATIONSHIP AND RELATIVE ADVANTAGES OF THE MODELS

Having described the common baseline approach (the gist requirement) and two models for supplementing it (the judicial management and special advocate mechanisms), how should one compare them or choose among them as elements of possible reform? This Part offers a framework for analysis, considering two sets of questions.

First, the judicial management and special advocate models operate atop the baseline gist requirement—they are intended to supplement it. In practice, do they improve the functioning of the gist requirement, or do they degrade its effectiveness?

Second, these models are instruments of due process and procedural fairness. Which specific aspects of due process do they serve? One goal of procedural due process is individual participation in a manner that demonstrates respect for individual dignity. A second goal is decision-making accuracy. A third goal is systemic regulation of coercive state powers. This Part considers each in turn. It demonstrates that the different regimes applied are inspired by varying emphases on these three goals, and considers how effectively they advance them and some of the trade-offs among them.

A. *Increasing the Gist or Suppressing It?*

As explained above, the two models examined—the judicial-governance model and the special advocate model—were both developed to deal with shortcomings of the partial disclosure of secret evidence to persons who face potential deprivations of liberty. They are intended to serve as solutions to the in-

127. JOINT COMMITTEE, COUNTERTERRORISM, *supra* note 123, at 36.

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fringement flowing from this limited disclosure.

Despite this starting point, experience and commentary among actors within these systems suggests that the models may not only compensate for lack of disclosure, as intended, but sometimes may serve to justify more limited disclosure in such proceedings. Rather than supplement the disclosure of the gist, there is a danger that these additional protections may be used in ways that *undermine* the gist protection. In this sense, their use may not always be a blessing from a fairness perspective.

The British experience illustrates the possibility that the employment of special advocates may in some cases suppress liberal gist disclosure. Because the statutory framework in the United Kingdom, unlike its counterpart in Canada, does not explicitly provide for a requirement that a summary of the evidence be provided to the individual,¹²⁸ the government did not always provide it. In some instances, for example, when the government was unable or unwilling to provide an open gist to an individual faced with a deprivation of liberty, the government argued that the baseline protections of the European Convention on Human Rights were satisfied without requiring a gist at all where special advocates are utilized to compensate.¹²⁹

The use of special advocates may also undermine gist protections by encouraging over-classification of evidence. Special advocates have noted that in practice the government is often overly cautious, sometimes even asserting evidence as classified that is widely available.¹³⁰ Moreover, knowing that special advo-

128. Rule of Civil Procedure 76.28 § 2(c) provides that the Secretary of State must “if he considers it possible to summarise that material without disclosing information contrary to the public interest, [serve on the special advocate] a summary of that material.” CPR, *supra* note 112. The Canadian statute, however, requires that the judge “shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed.” IRPA, *supra* note 86, § 83(1)(e).

129. Sec’y of State for the Home Dep’t v. AF (No. 3) [2008] EWCA (Civ) 1148, [2009] 2 W.L.R. 423 (U.K.).

130. One special advocate noted that the U.K. government was “attempting to keep in closed the particular assertion we wanted in open, and we were able to point to the fact that it had been in the Buckingham Palace section of *The Times* not very long ago! . . . So they do tend, I think, to be very cautious.” HOUSE OF LORDS, HOUSE OF COMMONS, JOINT

cates are there to help protect against government miscarriages of justice, the government may be even less forthcoming in declassifying information. The British Parliament's Joint Committee on Human Rights in its January 2008 report, reacting to this possible tendency toward diluting core disclosure requirements, suggested that the statutory framework be amended to require expressly that the government provide an individual with a gist of the closed materials.¹³¹

Courts have also been mindful of the potential downward pressure on disclosure that may come inadvertently from additional procedural protections. In *MB*, the House of Lords held that the trial court must ensure that the trial has been fair, and members of the House of Lords noted that the use of special advocates might not always be able to remedy the lack of the gist.¹³² The recent decision of the European Court of Human Rights took this notion a step further, insisting that the gist requirement could not be replaced by the use of special advocates:

The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. *However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.*¹³³

COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (EIGHTH REPORT): COUNTER-TERRORISM BILL, 2007-8, H.L. 50, H.C. 199, at Ev. 7 (U.K.) (testimony of Mr. Garnham).

131. *Id.* at 19, para. 48.

132. *Home Sec'y v. MB* [2007] UKHL 46, paras. 66-68, [2008] 1 A.C. 440, 489-90 (Baroness Hale noted, "I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and CPR Pt 76, would be sufficient to comply with article 6 [of the European Convention]"); see also *id.* para. 43, at 482 (Lord Bingham).

133. *A. v. United Kingdom*, Eur. Ct. H.R., para. 220 (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847470&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (emphasis added); see also *AF v. Sec'y of State for the Home Dep't*, [2007] EWHC

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As this indicates, while the existence of special advocates may tempt the government to cut back on other fairness protections, courts are equipped to ensure that the gist is supplanted—and not replaced—by the use of special advocates, especially if courts view them as operating in tandem rather than as possible substitutes. Further, while the employment of special advocates may prompt the government to over-classify, the ability of the special advocate to challenge classification of evidence operates as a counter-weight. In the Canadian context, after the statutory introduction of special advocates was established, the government declassified evidence it previously maintained as classified, perhaps in anticipation that the special advocate would bring these materials into the open anyway.¹³⁴

In a similar manner, the development of the judicial management model may be invoked to justify a very limited disclosure of information to the detainee, based on the rationale that any lack of disclosure can be remedied when a neutral court eventually scrutinizes secret evidence. In this spirit, the Israeli Supreme Court dismissed a broad challenge to the non-disclosure of evidence to detained combatants. Chief Justice Beinisch reasoned:

In view of the fact that there is a judicial review of the detention, and in view of the care with which the court is required to examine the privileged material brought before it *ex parte*, it cannot be said that the arrangement provided in section 5(e) of the law in itself violates the rights of detainees disproportionately.¹³⁵

In other words, the court found that judicial management is an adequate substitute for basic disclosures.

The special advocate model, bolstered by judicial or statutory rules requiring some irreducible minimum disclosures, may be better suited to protect the gist than the judicial management model because the special advocate is charged with the specific adversarial role of promoting declassification. Yet, on the basis

(Admin) 2001 (Q.B.) (U.K.) (applying the European Court of Human Right's decision).

134. For a further discussion of this phenomenon, see Kent Roach, *Charkaoui and Bill C-3*, (2008) 42 S.C.L.R. (2d) 281, 337 (Can.).

135. CrimA 6659/06 A v. Israel [2008], para. 43 (not published).

of the basic features of the models alone, it is not clear that either has a clear advantage in terms of securing the floor of core disclosure. Both were developed in order to add to the core requirement of disclosure, but in practice they may not always function so. It is only when put into operation in a particular jurisdiction that the potential for abuse can be fully examined. One way to help backstop the procedural regime against this contingency is for the legislature to expressly require that the gist be disclosed in all cases.¹³⁶

B. Judicial Management vis-à-vis Special Advocates

In theory, judicial management and special advocates need not be mutually exclusive models. Their simultaneous use is unlikely, however, and for several reasons there has been very little consideration of how they could be combined. First, their common purpose means that the use of one would make the other seem redundant. Second, a choice between them generally reflects a fundamental preference for either an active or a passive role for judges in directly scrutinizing evidence.

In framing a comparison of their relative merits, this Part examines the competing models against three core values or functions of due process: participation, accuracy and checking coercive state powers.¹³⁷ The first two pertain to individual case

136. The U.K. Joint Committee has made such a suggestion, “[t]o give full effect to the judgment in *MB*, we recommend that the statutory framework be amended to provide that rules of court for control order proceedings ‘must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on.’” JOINT COMMITTEE ON HUMAN RIGHTS, COUNTERTERRORISM POLICY AND HUMAN RIGHTS (EIGHTH REPORT): COUNTER TERRORISM-BILL, 2007-8, H.L. 50, H.C. 199, para. 66.

137. Procedural fairness “may improve the quality of the decision, serve the purpose of promoting human dignity and assist in achieving a sense that justice has both been done and seen to be done; it may promote objectivity and impartiality, or, as just noted, increase the likelihood of an accurate substantive outcome.” LORD WOOLF ET AL., *DE SMITH’S JUDICIAL REVIEW* 318–19 (6th ed. 2007); see also Gus Van Harten, Charkaoui and Secret Evidence, 42 SUP. CT. L. REV. 2d 251, 252 (2008) (Can.) (arguing that “use of evidence threatens to erode the integrity of adjudicative decision-making” in three ways: increasing risk of error; undermining confidence in administration of justice; and diluting effectiveness of checks against abuses of state power). This is not to deny that due process or fairness may serve other values, including public communication of principles and justice.

adjudication: how effectively does an approach assure that an individual has an adequate opportunity to defend himself or how effectively does it generate factual truth? The third pertains to systemic concerns: across cases and over time, how effectively does an approach help regulate government powers?

1. Fairness and Individual Dignity

One fundamental aspect of procedural fairness is the participation of the accused in the outcome of adjudication.¹³⁸ As the U.S. Supreme Court has noted, there are “two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.”¹³⁹ Although individual participation helps to minimize error, it is also an end in itself, promoting individual dignity by allowing those affected the opportunity to explain themselves.¹⁴⁰ Individual participation also promotes legitimacy, validating the exercise of state power.¹⁴¹

In light of these values underlying procedural fairness, as well as the notion that “a party is not to suffer in person or in purse without an opportunity of being heard” is among the oldest established principles in English administrative law,¹⁴² how effectively does each model presented promote participation and enhance an individual’s opportunity to be heard?

It could be argued that the special advocate model has some relative advantages over the judicial management model in effectuating a sense of participation. This model not only creates

138. For an overview of the various models and interpretations of the values underlying due process, see Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B. U. L. REV. 885 (1981); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 237–305 (2004).

139. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

140. For a discussion of instrumental and non-instrumental justifications for due process, see Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 109–19 (1982).

141. For a discussion of participation and legitimacy, see Solum, *supra* note 138, at 273–305.

142. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 224 (3d ed. 1991) (citing *Painter v. Liverpool Gas Co.*, (1836) 11 Eng. Rep. 478, 484 (K.B.)).

another procedural check on the process of detention, independent of the decision-maker, but it also introduces an adversarial element whenever closed evidence is implicated, thereby adding to the sense than an individual has had his day in court.¹⁴³ An individual's special advocate is able to effect the individual's participation as his proxy by offering counter arguments, cross-examining witnesses and challenging the credibility of the evidence. Through the special advocate's mouth, the individual is afforded an opportunity to be heard.¹⁴⁴

Providing a suspect with a means to participate in his hearing—even if indirectly, by proxy—has proven to be a prime motivator in the development of the special advocate model. In *Charkaoui*, the Canadian case that prompted the Canadian Parliament to devise and implement procedures using special advocates, the Canadian Supreme Court's analysis focused on "whether the process is fundamentally unfair to the affected person" rather than whether the outcome of the procedure was accurate.¹⁴⁵ At the same time as *Charkaoui* was being heard, a special committee of the Canadian Parliament noted that in such cases the lack of participation affected the perceived legitimacy of the adjudicatory process and recommended that in immigration proceedings using closed information, "procedural disadvantages should be reduced through the appointment of a special advocate who would test the government's case."¹⁴⁶

Underlying this strong concern for individual advocacy in the development of the special advocate model may be the adversarial tradition, "anchored by a profound loyalty and desire to protect individual rights guaranteed by our constitution coupled with an explicit rejection of inquisitorial tactics."¹⁴⁷ Indeed, no-

143. This is not to imply that the inquisitorial system used in civil law jurisdiction is inferior, only that as all the countries examined follow the adversarial system it may be that courts and parties to this litigation will benefit from a familiar system.

144. The value of special advocates on participation is minimal where the individuals concerned refuse to take part in proceedings at all.

145. *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 372 (Can.).

146. SPECIAL SENATE COMM. ON THE ANTI-TERRORISM ACT, FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES: MAIN REPORT OF THE SPECIAL SENATE COMMITTEE ON THE ANTI-TERRORISM ACT, at 30 (Feb. 2007) (Can.).

147. Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63, 63 (1998).

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tions of party autonomy underlie the adversarial system used in the United States, as well as Canada and the United Kingdom.¹⁴⁸ This emphasis on dignity values inherent in a suspect's participation—as a driver of special advocate policies—is especially clear in Lord Hoffman's opinion in the recent British control orders case:

Ordinarily it is true that fairness requires that an accused person should be informed of all the allegations against him and the material tendered to the tribunal in support. The purpose of the rule is not merely to improve the chances of the tribunal reaching the right decision . . . but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told.¹⁴⁹

There are, of course, severe limits to the special advocate model's ability to effectuate participation values. Because special advocates cannot communicate with their clients on some matters, they do not stand in their clients' shoes in the same way lawyers do in other common law adversarial proceedings. They are not allowed to discuss the evidence with the detained individual after they have been exposed to it. The suspect may not even know what arguments are being pursued on his behalf. To the extent that fairness is about participatory or dignity values, the notion of relying on special advocates outside the suspect's presence or full awareness is a poor substitute for direct suspect involvement in that portion of his own defense. Nevertheless, special advocates offer some adversarial contestation on behalf of the suspect and are ethically independent of government institutions interested in depriving him of liberty or charged with deciding his fate.

Considering all the above, it is very hard to say whether on balance the special advocate model indeed promotes partici-

148. See *Air Canada v. Sec'y of State for Trade* (No. 2), [1983] 2. A.C. 394, 411 (H.L.) (Lord Denning) (“[W]hen we speak of the due administration of justice this does not always mean ascertaining the truth of what happened.”).

149. *Sec'y of State for the Home Dep't v. AF*, [2009] UKHL 28, para. 72 (Lord Hoffman).

pation values. Formally speaking, it does so, but the acceptance of this argument is based on a very shallow understanding of the meaning of participation, and similar arguments could be made about judicial management. There is some prospect that special advocates may seem to be less connected to the state and its apparatus—in comparison to a managerial court—especially if they are not full-time public employees. But even this statement should be viewed skeptically—since special advocate candidates will have to pass a rigorous clearance processes by the security services.

2. Fairness and Accuracy

Another value that underlies procedural fairness and due process is accuracy, or the ability of procedures to protect against error.¹⁵⁰ To what extent do these competing models help generate factual truth?

This is the utilitarian aspect of due process, which focuses on the costs of decision-making and mistakes. The addition of another advocate who challenges the validity of closed evidence arguably increases the accuracy of fact-finding, but a similar argument can be posed with regard a very robust approach by the court. Ultimately this debate tends to be resolved in any given legal system less by empirical study than by its customary faith in inquisitorial versus adversarial examination of disputed facts. That said, one detects a greater priority on accuracy in the jurisprudence of judicial management than in that of special advocate systems, probably flowing from the correspondingly greater priority on dignity or participation values in the latter.

As noted earlier, the judicial management model reflects a more inquisitorial method of decision-making—whereby the judge has a greater responsibility for fact-gathering.¹⁵¹ And in the judicial management model, similar to some inquisitorial systems, this reflects a priority on accuracy. Recall from above Chief

150. For an overview of accuracy in procedural theory, see Solum, *supra* note 138, at 244–52.

151. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985).

Justice Beinisch's concern with "the problems inherent in relying upon administrative evidence," necessitating judicial tools for ensuring "validity and credibility of the administrative evidence."¹⁵² Justice Or, too, highlights reliability of evidence in discussing judicial management.¹⁵³ Without emphasizing the inherent virtue of a suspect's participation in his own defense, Or cautions against "elimination of liberty for extended periods of time, on the basis of *poor and inadequate* material."¹⁵⁴ To solve this problem, "[t]he decisionmaker is active; he uses the informational sources himself. Information does not reach him in the form of two one-sided accounts; he strives to reconstruct the 'whole story' directly."¹⁵⁵ Underlying this model is the inquisitorial notion that a judge must ensure that all relevant facts come to light. In a traditional adversarial system, by contrast, the judge must rule based on the facts presented by the parties, even if they are not the full factual picture.¹⁵⁶

These procedural differences, some have argued,¹⁵⁷ reflect differing notions of truth. The adversarial system's focus on individual rights results in a compromised version of truth, a "pragmatic truth" or relative truth¹⁵⁸ that is a function of the extent to which individual rights were protected.¹⁵⁹ On the other hand, the argument goes, the inquisitorial model aims at discovering the actual truth—by permitting the judge to gain a complete factual accounting of the events in question, even at the ex-

152. See *supra* notes 72–73 and accompanying text.

153. See *supra* note 77 and accompanying text.

154. HCJ 4400/98 Barham v. Justice Colonel Shefi [1998] IsrSC 52(5) 337, 346 (emphasis added).

155. Mirian Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1090 (1975). But see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1283 (1975) (questioning Wigmore's suggestion that the adversarial system "is beyond any doubt the greatest legal engine ever invented for the discovery of truth").

156. See Matthew T. King, *Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 188–89 (2002).

157. See, e.g., Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 10–11 (2004); King, *supra* note 156.

158. Langer, *supra* note 157, at 10.

159. King, *supra* note 156, at 189.

pense of individual rights.¹⁶⁰

This is not to suggest that accuracy interests are absent from a special advocate model.¹⁶¹ Rather, it is to illustrate a different emphasis on how to weigh accuracy and participation, and how the two reinforce each other. Implied in the decisions and commentary discussing fairness in Canada and the United Kingdom, for example, is a legislative and judicial understanding that the special advocate procedures will help bring about more accurate judgments, driven by a belief that truth is mostly likely to emerge through adversarial competition.¹⁶² As noted, the Canadian Parliament considered that one function of the special advocate was to test the government's case¹⁶³—thereby mitigating the risk of false positives.¹⁶⁴

160. *Id.* at 188.

161. Supporters of special advocates would defend their accuracy-enhancing function by referring to faith in adversarial challenge as the best way to reach truth. *See also* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science and the Search for Truth*, 38 SETON HALL L. REV 893, 900 (2008) (“To some commentators, the inquisitorial system is the superior system for finding the truth, because the inquisitorial system places truth as its highest value, while the adversary system, by placing control of the facts and the litigation in the hands of opposing parties . . . primarily values dispute resolution.”). *See also* Sir Anthony Mason, *The Future of Adversarial Justice* (paper presented at the 17th AIJA Annual Conference, Adelaide, Aug. 7, 1999), at 4, available at <http://www.aija.org.au/online/mason.rtf>:

It is a mistake to regard the two systems as static To-day [sic] the European system . . . places more emphasis on procedural fairness The adversarial system, by moving to case management, begins to resemble the European system in expecting the judge to exercise more control over the litigation. Nevertheless, the defining criterion that distinguishes the two systems is the greater emphasis on procedural fairness which is characteristic of the adversarial system.

162. *See* Charkaoui v. Canada, [2007] 1 S.C.R. 350, para. 63 (Can.) (“If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable.”); *see also* Roach, *supra* note 134, at 291–92.

163. *See supra* note 145 and accompanying text.

164. *See also* the discussion of accuracy and the relative risks of false positives and negatives in Lord Hoffman's opinion in *Secretary of State for the Home Department v. AF*, [2009] UKHL 28, para. 74:

There are practical limits to the extent to which one can devise a procedure which carries no risk of a wrong decision. . . . A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately protect the public. Likewise, the fact that in theory there is always some chance that the applicant might have been able to contradict closed evidence is not in my opinion a sufficient

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In countries like the United States, where adversarial tradition runs very deep and judges are not accustomed to performing investigatory roles, transitioning to judicial management to scrutinize secret evidence is difficult. The Supreme Court of Canada in *Charkaoui* noted that:

[Canadian judges] have worked assiduously to overcome the difficulties inherent in the role the IRPA has assigned to them. To their credit, they have adopted a pseudo-inquisitorial role and sought to seriously test the protected documentation and information. But the role remains pseudo-inquisitorial. The judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.¹⁶⁵

In other words, the judicial management approach and its accuracy-enhancing function cannot easily be transplanted to other common law systems without endowing courts with additional powers and, as the following section explores, building judicial expertise.

3. Fairness and Systemic Regulation

Another purpose of procedural fairness, in addition to participation and accuracy in individual cases, is to help regulate the detention system across many cases. That is, procedural safeguards can help check the expansion or abuse of coercive state powers generally, before or after any particular case reaches a courtroom. For example, mechanisms for testing evidence can uncover and deter improper interrogation or surveillance prac-

reason for saying, in effect, that control orders can never be made against dangerous people if the case against them is based “to a decisive degree” upon material which cannot in the public interest be disclosed. This, however, is what we are now obliged to declare to be the law.

165. [2007] 1 S.C.R. 350, para. 51 (emphasis added).

tices or overbroad application of intrusive or extraordinary authorities.¹⁶⁶ This is an especially important function of procedural fairness in the national security context, because secrecy helps insulate government policies and practices from other forms of political scrutiny and accountability.¹⁶⁷

We hypothesize that judges who conduct a close review of detention decisions on a regular basis can contribute not only to the results of the individual process at hand, but also to effective review of the system over time in ways that the special advocate model may be less equipped to do. This could be the most significant advantage, or relative contribution, of the judicial management model, though we explain below some subtle counter-advantages that special advocates may bring and some ways the models might be combined.¹⁶⁸

The ability of the judicial management model to function as an effective form of systemic control is likely dependent on some additional features of the system. Among the most important is that judges conducting the review should be repeat players who gain experience dealing with national security intelligence. This requires that judges participate in the review of many cases over time and acquire perspective, experience and confidence with regard to the practice of the security services in general.¹⁶⁹ The less expertise judges have in intelligence matters, the more dependent they are on government agents appealing to them for secrecy, and the less fervently they are likely to challenge government assertions; greater experience and expertise

166. An example is Guantanamo habeas cases. See, e.g., Carol Rosenberg, *Judge: Free Kuwaiti Engineer at Guantanamo*, MIAMI HERALD, Sept. 17, 2009, available at <http://www.miamiherald.com/news/americas/guantanamo/story/1239065.html> (discussing case of litigation exposing abusive interrogation); Del Quentin & Julie Tate, *Detainee's Lawyers to Get Interrogation Tapes*, WASH. POST, Oct. 6, 2009, at A04 (same).

167. See Gus Van Harten, *Charkaoui and Secret Evidence*, 42 S.C.L.R. (2d) 251, 261 (2008) (Can.) ("Without independent review of specific cases of possible misrepresentation by the executive, it is difficult for those on the outside, including the courts, to know how widespread and how serious the misuse of secrecy powers may be."); Yaroshefsky, *supra* note 55, at 1071 (arguing that reliance on secret evidence undermines checks on coercive state powers).

168. See *infra* notes 184–88 and accompanying text.

169. This has been suggested in other contexts in which classified materials play a role, namely immigration review. See Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515 (2002).

that comes from repeat play may help steel judges against these propensities.¹⁷⁰ The justices of the Israeli Supreme Court often mention their accumulated experience and refer to it as a basis for their review of administrative detentions based on privileged evidence disclosed only to the court.¹⁷¹

In this sense, Israel is an interesting example because the review of detention cases is operated by a relatively limited number of judges accustomed to adjudicating such matters. Pursuant to the legislation in this area, the power of review is given only to the presidents of the district courts and then, on appeal, to the justices of the Israeli Supreme Court.¹⁷² The lessons to be drawn from the Israeli case-study are, however, complex, and there exists no thorough empirical research of the decisions of the Israeli Supreme Court in this area. The published decisions of the court demonstrate examples of petitions and appeals that were dismissed, usually after the court has reviewed the classified evidence and was convinced by it. However, it would not be accurate to take this as the only relevant factor for assessing the effectiveness of the role played by the court. Some studies show that, especially in national security cases, many petitions to the Israeli Supreme Court are resolved through compromises that give the petitioner a remedy under the shadow of potential judicial intervention.¹⁷³ In some cases Israeli courts have stated that

170. See Van Harten, *supra* note 167, at 264–70; Americo R. Cinquegrana, Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 983 (1974) (“Compared to his executive counterpart, the judicial officer may indeed be less well-informed in the foreign security context than in the domestic, because the relevant information is likely to be secret, or, if not secret, because it is of a kind with which the judicial officer has had little reason to concern himself.”).

171. See, e.g., HCJ 5897/07 Arug v. Military Judge [July 12, 2007], para. 5(2) (not reported) (Justice Rubinstein stated: “We are fully aware of the limitations on the exposure of privileged intelligence material, and we are not proposing to change the fundamentals of the system. And yet, our opinion is, based on our experience in reviewing privileged material in security-related cases, that the authorities have to make an effort to conduct an investigation that will be substantial and will confront those investigated with as many details as possible from the material against them.”).

172. The Israeli Supreme Court includes, at maximum, fifteen justices. The number of presidents of district courts in Israel reflect the number of courts of this instance—six.

173. See Yoav Dotan, *Government Lawyers as Adjudicators: Pre-Petitions in the High Court of Justice Department 1990-1997*, 35 ISR. L. REV. 453 (2001); Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 LAW & SOC'Y REV. 319 (1999).

they would not approve the prolonging of detention in the absence of new intelligence material provided by the security services.¹⁷⁴

Repeat play by judges has the advantage of building expertise but it creates a corresponding risk of “capture”; these actors may over time favor state security services because of their continuing interaction and dependency on those services for information and effective administration of judicial duties.¹⁷⁵ Much has been written about the tendency of courts to be deferential to executive decisions in times of emergency.¹⁷⁶ This deference can be understood as one particular type of the capture problem (and needless to say that *Korematsu*¹⁷⁷ was, in essence, a security detention case). Secret hearings of any sort mean that courts are unlikely to hear from independent experts, and those they do

174. See, e.g., HCJ 2286/09 *Nashata v. Military Judge* [Mar. 3, 2009] (not published). This is a very short decision which reflects the practice of compromise in the shadow of the judicial power of review. The decision reads as follows:

Following our comments, which came after the review of the classified material, the attorney of respondents 2-3 [the Military Commander of the West Bank and the General Security Services] that in the absence of new material in the matter of the petitioner his detention will not be prolonged for another time. After the announcement was made, the attorney of the petitioner stated that he does not insist on the petition. The petition is thus removed.

This is a good example of judicial involvement that proved to be effective. See also HCJ 5809/08 *Nachla v. The Judge of the Military Court of Appeals* [2008] (not published) (stating that the attorney representing the Military Commander announced that in the absence of new material the decision to prolong the detention will be limited to an additional two months, and the attorney of the petitioner announced that in these circumstances he does not insist on his petition; accordingly, the petition was removed); HCJ 3291/09-B *Joubran v. Military Judge* [2009] (not published) (recording a similar development—this time the attorney of the petitioner updated the court that he was notified that in the absence of new intelligence material the detention will not be prolonged for more than two months; again, the petition was removed).

175. See Gus Van Harten, *Weaknesses of Adjudication in the Face of Secret Evidence*, 13 INT'L J. EVIDENCE & PROOF 1 (2009).

176. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042 (2004) (“[J]udges can display remarkable flexibility for the interim, while covering their tracks with confusing dicta and occasional restrictive holdings”); MATTHEW C. WAXMAN, FOUND. FOR LAW, JUSTICE AND SOC’Y, CAN COURTS BE “TRUSTED” IN NATIONAL SECURITY CRISES? 1 (2009), <http://www.fljs.org/uploads/documents/Waxman.pdf> (“Civil libertarians meanwhile worry that courts are likely to show too much deference to the political branches, at least until the moment of maximum perceived peril passes. Historically, courts have tolerated significant executive liberty infringements during wartime or emergencies . . .”).

177. *Korematsu v. United States*, 323 U.S. 214 (1944).

hear from likely will be former state security officials. Moreover, secret hearings are by their nature shrouded in an atmosphere that already reflects a security priority, and judges must continually rely on the very security services they are overseeing for information.¹⁷⁸ Some critics of the U.S. Foreign Intelligence Surveillance Court (FISC) believe its lack of transparency and reliance on one-sided government presentation of information substantially weaken its ability to reign-in national security agencies,¹⁷⁹ though others argue that FISC oversight provides a substantial check on government intelligence activities, and that until recently the government was too *cautious* in handling issues within the FISC's purview.¹⁸⁰ This risk of capture is not unique to the judicial management model, but that system lacks formal checks against such subtle pull.

The special advocate model has a repeat playing component as well, if it includes (like in the United Kingdom and Canada) a specialized bar of security-cleared advocates, but it is less likely to address systemic issues because special advocates owe a duty to a particular client, not the particular administrative regime as a whole. One of the virtues of special advocates discussed earlier, is their focused attention toward the detained person whom they represent and his case. Special advocates, whose authority derives from the administrative regime, will incline toward tactical decisions based on an individual suspect's best interests.¹⁸¹ In contrast, the judicial management model is

178. *See id.* at 218.

179. Jameel Jaffer, *Balancing Power in the U.S. Response to External Threats: NSA Surveillance and Guantanamo Detention*, 10 N.Y. CITY L. REV. 361, 363 (2007) ("The FISA court meets in secret, allows only the government to appear before it, and does not ordinarily publish its decisions."). The U.S. Government, however, argues that its high success rate before the Foreign Intelligence Surveillance Court is attributable to professional care and scrutiny within the executive branch. *See* Royce Lamberth, *Intelligence on the FISA Court*, LEGAL TIMES, Apr. 14, 1997, at 18.

180. *See* RICHARD POSNER, COUNTERING TERRORISM 201 (Rowman and Littlefield, 2007).

181. It is worth noting here, however, a concern that special advocates might be susceptible to the same sort of capture discussed above in terms of courts. Much less attention has been dedicated in prior studies to the issue of attorney capture than to court or agency capture, so only tentative thoughts can be offered here. However, attorneys can also find themselves in the same trap as courts, especially if they are government lawyers, who fulfill the function of a special advocate only for a limited period of time, and then proceed to other government legal positions. In this regard, attention should be given also to the question of the identity of special advocates and

based on the assumption that courts can fulfill two functions at the same time—both promoting arguments on behalf of the detainee and also considering the overall evidence in a balanced manner.

On the other hand, the special advocate may be less hindered by fidelity to precedent, as tends to be the case in the judicial management model.¹⁸² A special advocate is therefore likely more free to make risky and novel arguments. That is, the special advocates model has better potential for the development of bold or radical arguments on behalf of the detainee in individual cases. Over time, such arguments may be critical to spurring institutional reform.

Although special advocates focus on their case at hand, the model can also provide a system-wide form of oversight by challenging specific evidence.¹⁸³ One particular area in which this phenomenon has arisen is evidence allegedly derived from torture. As Baroness Hale explained in the British context discussed above:

[T]his House has ruled that such evidence is always inadmissible, but has placed the burden of proving this upon the person who wishes to challenge it It is particularly difficult for a person subject to control order proceedings to do this. *Devising a sufficient means of challenging the evidence is an incentive to the authorities to rely on better and more reliable sources of intelligence.*¹⁸⁴

their career path.

182. See Van Harten, *supra* note 175, at 11 (“[U]nlike the individual’s lawyer, the judge must exercise restraint when probing the executive’s evidence and argument in order to protect the court’s neutrality.”); see also Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L., POL’Y & ETHICS J. 81, 81 (2003) (discussing a criminal defendant’s counsel as the only actor in the process whose duty is to focus completely on advocacy for the individual).

183. As one commentator has noted, the lack of adversarial process dealing with classified information in immigration cases has led to mistaken deportation because “government lawyers did not endeavor to ensure the reliability of this evidence before presenting it in court, instead basing their cases on information from prejudiced sources, mistranslations, and rumors.” Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 290 (2008).

184. *M.B. v. Sec’y of State*, [2007] UKHL 46, para. 73, [2008] 1 A.C. 440, 491

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Even before a particular case reaches a court, therefore, the anticipated scrutiny by special advocates may provide the government with greater motivation to police its interrogation practices. As Kent Roach explains:

The provisions which allow special advocates to challenge secret intelligence on the basis that it is irrelevant, unreliable or obtained as a result of torture, cruel, inhumane or degrading treatment have a potential to put the whole process of intelligence gathering on trial. Depending on the receptivity of the judges to such claims, these provisions may have far-reaching and perhaps unintended effects. They could be as important to the security certificate regime as the exclusion of improperly obtained evidence is to the criminal justice system.¹⁸⁵

Note, however, Roach's emphasis on the receptivity of judges to these arguments, bringing us back to the point about the need to build sufficient judicial expertise and confidence over time.

Having begun this section by noting that judicial management and special advocates may naturally seem like opposing models,¹⁸⁶ it is worth considering further how they might be combined to achieve synergies or to better optimize the balance of fairness and intelligence protection. No doubt there are some tradeoffs between them. The use of special advocates may relieve pressure on judges to scrutinize executive claims carefully and slow the accumulation of judicial expertise in national security matters. Alternatively, judicial management might disincentivize courts from relying on special advocates and assuring adequate discovery for them. Perhaps, though, some of these tensions could be relieved by sequencing the roles. For example, special advocates could be relied upon at the discovery stage, especially in aid of protecting the gist, whereas at the merits stage of a detention hearing judges could play a managerial role. Or, vice versa, judges could play a strong managerial role at the discovery phase and based on that assessment could appoint special advocates as deemed necessary.

(emphasis added).

185. Roach, *supra* note 134, at 323.

186. See *supra* Part III.B.

IV. U.S. EXPERIMENTATION AND POSSIBLE REFORM

The United States has not institutionalized nor used widely either of the models discussed. However, the underlying issues have taken on greater practical significance in recent years, especially after *Hamdi v. Rumsfeld*—which called, in the case of a citizen-detainee, for a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”¹⁸⁷—and the Supreme Court’s extension of its principals in *Boumediene v. Bush*—requiring a “meaningful opportunity to demonstrate that [a detainee] is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”¹⁸⁸

As already noted above, U.S. jurisprudence, like that of other common law systems explored in this paper, includes a strong gist baseline.¹⁸⁹ And like the other common law systems, the United States has struggled to design effective supplements to the gist requirement. Recently it experimented with a variety of approaches to handling secret evidence in detention hearings, some of them drawing heavily on elements of these models. This Part applies the insights of Part III to the U.S. case and offers principles to guide its institutional reform in tackling the secret evidence problem.

187. 542 U.S. 507, 533 (2004).

188. 128 S. Ct. 2229, 2266 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

189. The gist baseline in the United States typically takes the form of the notice requirement in an analysis of due process of law. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (stating that due process requires that a deprivation of life, liberty or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case”). See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (noting as a fundamental requirement notice of the grounds for a particular administrative action, and also “the right to know the evidence on which the administrator relies.”). During the Cold War, the Supreme Court repeatedly held that due process required that an individual petitioning for conscientious objector status be furnished with a gist or resume of the evidence the government relied on. See *Simmons v. United States*, 348 U.S. 397 (1955); *Gonzales v. United States*, 348 U.S. 407 (1955) (noting that “if the registrant is to present his case effectively . . . he must be cognizant of all the facts”). More recently, in *Hamdi v. Rumsfeld* the plurality required that the core elements of natural justice not be eroded, holding that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s actual assertions.” 542 U.S. 507, 601 (2004).

A. *Current Practice*

The judicial management approach found in Israel generally runs contrary to the American justice system's reliance on party-driven, adversarial advocacy to develop and question evidence. But the recent Guantanamo detainee habeas cases following *Boumediene*, where the Supreme Court delegated to district courts the task of working out procedures for adjudicating habeas challenges, have put district court judges in the position of developing rules and procedures for handling classified information. "We recognize," wrote the Court, "that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."¹⁹⁰ At the time of this writing, district courts considering Guantanamo habeas cases have developed procedures for allowing security-cleared private counsel to view at the discovery stage information to which the suspect is not allowed access,¹⁹¹ and in some cases, at the merits stage, some parts of hearings have been closed to the detainee, allowing instead his security-cleared counsel to participate.¹⁹² The government may also initially withhold materials it deems protected until counsel requests access to them, acting as a further barrier to information. Although there have not yet been reported instances in which cleared counsel has overtly been denied access to key evidence, given the very nature of secret evidence it is difficult to ascertain whether there have been habeas cases that the detainee would have won but for evidence withheld from him.

As for a formalized special advocate model, the United States has also legislated a form of that approach in a narrow context, though that system has never been used. Following the Oklahoma City bombings, Congress passed the Antiterrorism and

190. See *Boumediene*, 128 S. Ct. at 2276.

191. See, e.g., Case Mgmt. Order, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241, para. I(F) (D.D.C. Nov. 6, 2008).

192. See, e.g., *Boumediene v. Bush*, Civil Case No. 04-1166, slip op. at 9-10 (D.D.C. Nov. 20, 2008) (rejecting classified information relied upon by the government as insufficiently reliable); *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009) (discussing classified portions of the proceeding in which counsel for both parties presented arguments and evidence, without the detainee present).

Effective Death Penalty Act of 1996 which created the Alien Terrorist Removal Court (ATRC).¹⁹³ In removal proceedings where providing an alien suspected of terrorism with unclassified summaries of secret evidence might jeopardize national security, the statute allows the government to conduct ATRC proceedings without providing such a summary.¹⁹⁴ If the resident alien before the ATRC enjoys the status of lawful and permanent resident, the alien may request a special attorney to observe and cross-examine the actual secret evidence on his behalf.¹⁹⁵ The special counsel is granted full access to the secret evidence and participates in any *in camera* procedures where the secret evidence is relied upon, including cross-examination of the government's witnesses.¹⁹⁶

While no consistent approach has been institutionalized, neither is there consistency about the core policy values—participation versus accuracy versus systemic regulation—in American national security and due process jurisprudence. While the jurisprudence relies on language that suggests a focus on accuracy, the underlying logic points to a concern with all three due process objectives, with court holdings reflecting varying emphases among them.

Modern procedural due process doctrine expressly emphasizes accuracy as the primary value to a suspect. As a matter of U.S. constitutional law, the issues in this paper are generally treated as procedural due process questions.¹⁹⁷ The key doctrinal formulation then comes from *Mathews v. Eldridge*, where the Supreme Court held that:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through

193. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 8 U.S.C. §§ 1531-37 (2009)).

194. 8 U.S.C. § 1534(e)(3)(E)(ii), (D)(iii).

195. *Id.* § 1534(e)(3)(E)(i), (F)(i).

196. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 135 (2001).

197. Except, as noted near the outset, in criminal proceedings, which also implicate the Sixth Amendment's Confrontation Clause.

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the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁹⁸

On its face this formula seems purely utilitarian, aimed at reducing the likelihood of error and appreciative of administrative costs to error reduction.¹⁹⁹ In other words, it appears concerned predominantly with accuracy. To the extent that notice of the factual basis upon which liberty deprivation is threatened and an opportunity for rebuttal remain critical elements of basic due process, recent Supreme Court holdings have emphasized their value in promoting accuracy.²⁰⁰

American due process jurisprudence about accuracy tends mostly to focus on a particular type of accuracy, and that is minimization of "false positives," or erroneous deprivations of liberty, as opposed to minimization of both false positives and negatives (erroneous grants of liberty) combined. Consider *Wilkinson v. Austin*, which concerned the procedures employed in Ohio for determining which inmates should be subject to maximum security prisons where "inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact."²⁰¹ The Supreme Court ruled unanimously that the processes Ohio used, which involved a number of checks and opportunities for individual rebuttal, were sufficient. Although the Court recognized that the maximum security prisons were designed to "separate the most predatory and dangerous prisoners from the rest of the . . . general prison population"²⁰² and to deal with "the danger that high-risk inmates pose both to prison officials and to other prisoners,"²⁰³ its analysis of the risk of error and additional safeguards' effectiveness did not consider the potential risk of

198. 424 U.S. 319, 335 (1976).

199. See Mashaw, *supra* note 138, at 895.

200. See *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) ("Our procedural due process cases have consistently observed that [notice and opportunity for rebuttal] are among the most important procedural mechanisms for [the] purposes of avoiding erroneous deprivations.").

201. *Id.* at 214.

202. *Id.*

203. *Id.* at 224.

false negatives.²⁰⁴ Rather, the Court only considered the “significance of the inmate’s interest in avoiding erroneous placement”²⁰⁵ and the value to the inmate of additional procedural safeguards. *Wilkinson* is interesting for another reason, in that it involved a process that relies sometimes on confidential informants whose protection in the prison environment required anonymity.²⁰⁶

The utilitarian nature of American procedural due process analysis has been criticized from many quarters, and in practice it has often turned on conceptions of fairness, drawing upon the dignity concerns that historically underlay due process. Sometimes this is overt, as when courts interpret due process as requiring “fundamental fairness.”²⁰⁷ Other times it seems that issues of fairness are masked as issues of accuracy, and processes seen as fair are simply assumed to be accuracy-enhancing. In his dissent in *Lassiter v. Department of Social Service of Durham*, for example, which held due process did not require counsel assistance at a parental termination hearing, Justice Stevens stressed that “the reasons supporting the conclusion that [due process] entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. *The issue is one of fundamental fairness,*” not of balancing costs and benefits.²⁰⁸

204. To be fair, it is not so surprising in this case that the Court did not comment on the false negative problem, given that no one seemed to doubt that the prison policy at issue was an aggressive one.

205. *Id.* at 225.

206. *Id.* at 227–28. Similarly but in another context, the Court in *Lassiter v. Department of Social Service of Durham*, examining the due process required at a parental termination hearing, focused its analysis on the risk of false positives, even though the Court recognized that the State “shares the parent’s interest in an accurate and just decision” given the “urgent interest in the welfare of the child” involved. 452 U.S. 18, 27 (1981). The *Lassiter* Court phrased the inquiry of error as “the risk that the procedures used will lead to erroneous decisions” rather than erroneous deprivations. *Id.* However, in examining the procedures currently employed by the State, the Court focused on their efficacy in reducing the risk that a parent would be erroneously deprived of their child. *See id.* at 29.

207. The fundamental fairness test was first developed in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and continues to be used in the immigration context. *See* Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 176 (2007).

208. 452 U.S. at 60 (Stevens, J., dissenting) (emphasis added). In *Medina v. California*, 505 U.S. 437 (1992), the Court rejected the use of *Mathews* to determine the

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Those fundamental fairness concerns hearken back to *Joint Anti-Fascist Refugee Committee v. McGrath*.²⁰⁹ In his concurring opinion in that case, Justice Frankfurter emphasized that in the case of “a person in jeopardy of serious loss,” one must be given “notice of the case against him and opportunity to meet it.”²¹⁰

Cases dealing with the use of secret evidence in immigration contexts exhibit a mixture of due process values, lacking clarity of priorities. The most detailed discussion is found in *American-Arab Anti-Discrimination Committee v. Reno*, in which the Ninth Circuit affirmed the district court’s injunction against the Immigration and Naturalization Service’s (INS) use of undisclosed classified information allegedly linking two nonimmigrant and permanent resident aliens to the Popular Front for the Liberation of Palestine.²¹¹ The INS had used this undisclosed classified evidence to deny them legalization. In applying the *Mathews v. Eldridge* balancing test,²¹² the court criticized reliance on secret, undisclosed evidence on both accuracy and fairness grounds.

As for accuracy, the court stated: “There is no direct evidence in the record to show what percentage of decisions utilizing undisclosed classified information result in error; yet, as the district court below stated, ‘One would be hard pressed to design a procedure more likely to result in erroneous deprivations.’”²¹³ It also framed its concerns in broader terms of regulating coercive state powers beyond the case at hand by ensuring careful scrutiny of their application: “Without any opportunity for con-

constitutionality of procedures in the criminal context.

209. 341 U.S. 123 (1951). See *supra* notes 38–39 and accompanying text.

210. *Id.* at 171–72.

211. 70 F.3d 1045 (9th Cir. 1995).

212. 424 U.S. 319, 335 (1976). For an explanation of the balancing test see *supra* note 198 and accompanying text.

213. 70 F.3d. at 1069 (citations omitted); see also *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992) (holding that a lawful permanent resident with alleged ties to the Popular Front for the Liberation of Palestine could not be excluded based on secret evidence because there would be no procedural safeguards against the possibility that the confidential information was erroneous).

frontation, there is no adversarial check on the quality of the information on which the INS relies.”²¹⁴

As for fairness, the court then went on to say that “[a]lthough not all rights of criminal defendants are applicable to the civil context, the procedural due process notice and hearing requirements have ‘ancient roots’ in the rights to confrontation and cross-examination.”²¹⁵ It then quoted the Supreme Court’s statement in *Greene v. McElroy*:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental 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.²¹⁶

“As judges,” the Ninth Circuit continued, “we are necessarily wary of one-sided process: ‘[D]emocracy 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 facts decisive of rights.’”²¹⁷

B. *Lessons for Possible Reforms*

Against this doctrinal backdrop, the U.S. Government is currently weighing anti-terrorism detention law reform options. Immediately after assuming office, President Obama announced

214. 70 F.3d at 1069.

215. *Id.*

216. *Id.* (quoting 360 U.S. 474, 496 (1959)). *Greene* was a Defense Department contractor engineer who lost his security clearance on the basis of secret testimony concerning his ex-wife’s association with Communists. In light of the constitutional concerns raised, the Court held that no administrative action to restrict the scope of due process for national security reasons could be taken without explicit authorization from Congress or the President.

217. *Id.* (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)); *see also* *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (holding, in a case challenging deportation, that “the INS’s reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness.”).

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the formation of an interagency task force to recommend options for future U.S. detention policy and legal reforms.²¹⁸ In his May 2009 address about Guantanamo and national security, the President pledged to work with Congress on appropriate legislation for imperative detention needs, perhaps including prolonged detention without trial for certain terrorism suspects,²¹⁹ though at the time of this writing the Obama administration appears to have backed away from any intention to seek new detention legislation.²²⁰ Meanwhile, district courts considering Guantanamo habeas cases are working through these issues in the course of litigation.²²¹

One of the critical and most sensitive issues the executive branch, the Congress and the courts will confront as part of this reform effort is how to handle protection of classified evidence that cannot be disclosed to terrorism suspects. Many of the reform proposals that scholars or other policy advocates have put forward contain elements of the two models analyzed above. A number of scholars have, for example, proposed a special advocate mechanism for U.S. terrorist detention hearings, perhaps as part of a new “national security court” or to help administer a new preventive or administrative detention statute.²²²

One feature shared by common law democracies is the dynamic interplay between courts, the legislature and the executive in working through these issues. The analysis of the models discussed and the experience accumulated from their operation point to several insights that should guide these legal reform efforts.

First, the experience of other common law democracies

218. See Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009).

219. See Remarks by the President on National Security at the National Archives, Washington, D.C., (May 21, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

220. See Peter Finn, *Administration Won't Seek New Detention System*, WASH. POST, Sept. 24, 2009, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html>.

221. See Chisun Lee, *Their Own Private Guantanamo*, N.Y. TIMES, July 23, 2009, at A31.

222. See, e.g., Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* (Brookings Inst., Working Paper, Feb. 4, 2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

has been a recent strengthening of the baseline gist requirement. While this may not seem so surprising, it is significant in light of a generally perceived increase in terrorism threat—along with a heightened need to develop and protect sensitive intelligence—during the past decade, which might be expected to call into question or water down this approach. In the recent British case applying the ECHR’s ruling upholding the gist requirement, Lord Hoffman warned that “the decision of the [ECHR] . . . may well destroy the system of control orders which is a significant part of this country’s defences against terrorism,” before acknowledging that “[n]evertheless, I think that your Lordships have no choice to submit” to the ECHR’s ruling.²²³ Lord Hope also remarked:

The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.²²⁴

Often, even those scholars or commentators who propose expansive U.S. government terrorist detention authorities regard the protective floor of a gist requirement as a critical requirement of legitimacy.²²⁵

If the cases and models studied herein point to a strengthening gist requirement—both nationally and in the transnational level—they also point to secondary doctrinal and institutional issues that each system faces. Doctrinally, especially the recent European and British cases reveal the difficulty courts have had in determining where to draw the lines of the gist—what is the bare minimum content of an allegation? Little scholarly attention has been devoted to this issue, and courts have

223. Sec’y of State for the Home Dep’t v. AF [2009] UKHL 28, para. 84.

224. *Id.* para. 79.

225. *See, e.g.,* Goldsmith, *supra* note 222, at 12 (“The *ex parte* approach serves the compelling government interest in preserving the secrecy of sensitive intelligence information, but it seems illegitimate to detain someone without letting him or at least his representative know about and contest the evidence.”).

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tended to address it with largely conclusory statements. Another important issue concerns the need to apply the concept of minimum “gist” disclosure not only to information that justifies the detention decision, but also to information that is beneficial to the detainee and may assist him in rebutting the allegations against him. From a practical perspective, however, it is difficult to enforce this principle, since security services may not come forward with all relevant material, and it is very hard to define the contours of the information relevant for disclosure in a specific case (e.g. should it include information on recruitment practices of a terrorist organization, which may shed light on the case but is not expressly connected to it).

To the extent the gist is defined in terms of helping to rebut an allegation, courts cannot completely divorce analysis of the gist itself from the other institutional mechanisms that operate along with it, including special advocates or inquisitorial scrutiny of evidence by judges. Moreover, those proposing reforms, and courts charged with administering them, must be conscious of and guard against subtle tradeoffs among mechanisms designed to supplement each other. Introducing a mechanism of a special advocate can contribute to reform by bolstering fairness in all of its senses, with some potential contribution to pushing toward more disclosure. However, it is important to protect core disclosure requirements from dilution that may result from perceptions that special advocates obviate their necessity. Those contemplating institutional reform must be mindful of the dynamic interplay of procedural mechanisms and the pressures and incentives facing judges and security services alike.

A further lesson from the above analysis is the need to consider the application of competing models or other reforms in the context of other institutional features, such as the relationship between judicial management and judicial specialization, perhaps acquired through centralizing proceedings in a single court or set of courts. A number of scholars proposing detention law reforms for the United States have emphasized the utility of centralizing judicial review of terrorist detention hearings in one court (perhaps an existing, generalist court such as the D.C. District Court), which would acquire additional expertise in security

and intelligence matters over time.²²⁶ To those who see it as successful, France's counterterrorism effort is sometimes credited in part to its development of a specialized, centralized terrorism court, because it allowed its magistrates to become "the type of expert on the subject of terrorism that is difficult to create within normal judicial institutions."²²⁷ Israel serves as a less extreme model in this regard, since the judges who specialize in judicial review of detentions in Israeli law are part of the regular judicial system. This example may be more relevant to the United States than that of a completely separate specialized court, which is more common within the continental tradition of specialized courts in other substantive areas.

Finally, any effort to craft appropriate institutions and procedures for handling secret evidence must confront the issue of due process values and the relative priority among accuracy, dignity and systemic regulation. Again, mediation of these values and priorities—as in all common law democracies—will often involve dialogue between courts and the political branches. Most of the time, these priorities will align rather than trade off. But the choice among mechanisms for handling secret evidence will

226. See, e.g., Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (Am. Enter. Inst. for Pub. Policy Research, Working Paper No. 156, 2006), available at <http://www.aei.org/docLib/20090820-Chapter6.pdf>; Amos N. Guiora, Quirin to Hamdan: *Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT'L. L. 511 (2007); Goldsmith, *supra* note 222. Other scholars have proposed expanding the jurisdiction of the Foreign Intelligence Surveillance Court to handle detention cases, since it already has judges with expertise in handling sensitive intelligence matters and mechanisms to ensure secrecy. See, e.g., PHILIP B. HEYMANN & JULIETTE N. KAYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 18, 51-52 (MIT Press 2005); STEPHANIE COOPER BLUM, *THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR* (Cambria Press 2008).

227. Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counterterrorism*, 45 SURVIVAL 67, 78 (2003); see also ANTOINE GARAPON, *IS THERE A FRENCH ADVANTAGE IN THE FIGHT AGAINST TERRORISM?* 5-6 (Real Institute Elcano 2005), available at <http://www.realinstitutoelcano.org/analisis/807/Garapon807.pdf>. For a critique of French counter-terrorism laws and courts, see HUMAN RIGHTS WATCH, *PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE* (2008), <http://www.hrw.org/en/reports/2008/07/01/preempting-justice>. The Constitution Project appears to take issue with this view in arguing against national security courts that "unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges." THE CONSTITUTION PROJECT, *A CRITIQUE OF NATIONAL SECURITY COURTS* 3 (2008), http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf.

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likely favor some values more than others and will reflect at least implicit views, which will likely remain beyond empirical testing, about effectiveness in rooting out factual truth.

V. CONCLUSION

The use of secret evidence is seen in different systems as a necessary feature of decisions to limit liberties of terrorism suspects. The main analytic challenge is to transcend the simplistic divide between those who oppose the use of secret evidence under all circumstances and those who would justify non-disclosure in the name of national security in a sweeping manner. This Article has done so by trying to map existing experience in this area into three ideal models—a model based on a disclosure of the “gist” of the evidence (but not more than that), a model based on full disclosure to the court (judicial governance) and a model based on disclosure to special advocates (who are different from the person’s lawyers and are prohibited from communicating the information to the individual involved). Experience shows that, in practice, the models are used in forms that are not always as clear and precise as their ideal prototypes. Yet, we have stressed their ideal forms as analytic tools for thinking about possible reform in this area, especially in the U.S. context.

Reforms in this area can also experiment with new combinations among the various models. In fact, as we have shown, some degree of combination is already part of current practice—the core/gist model serves as a baseline in all the systems we have reviewed, and the question is what additional mechanisms should be added to it: judicial governance or special advocates. At the same time, it is not obvious that all combinations are possible or even desirable. We have pointed out that sometimes additional safeguards serve as justifications for pressing the basic preliminary condition of substantive (albeit partial) disclosure to the individual himself, which we accept for the purposes of this analysis as a first priority. Similarly, a proposal to combine the special advocate model and the judicial governance model (a combination that may seem desirable at first glance to augment protections) should not be considered a simple solution—

especially remembering that part of the justification for the judicial governance model in the first place has traditionally been lack of other protections. It is possible that judges will lose legitimacy if they aspire to play an active role in reviewing secret evidence in a system in which special advocates are in place.

In the end, any effort to craft appropriate institutions and procedures for handling secret evidence must confront the issue of prioritizing the multiple values underlying due process and craft mechanisms that harmonize with the other features of national court systems.