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Shattering the One-Way Mirror: Discovery in Immigration Court

Geoffrey Heeren
University of Idaho College of Law, gheeren@uidaho.edu

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DISCOVERY IN IMMIGRATION COURT

Geoffrey Heeren†

INTRODUCTION

Deportation cases culminate in hearings that are like trials, up to a point. There is a judge and a prosecutor; more often than not, the respondent has an attorney too.[1] There are direct and cross examinations, closing statements, and sometimes openings.[2] But in at least one regard, these "individual calendar hearings" are more like *The Trial* by Franz Kafka than a modern trial.[3] Although the respondent typically submits a witness list and pre-hearing statement and discloses all the evidence she will use in advance of the hearing, the prosecutor, called a Trial Attorney (TA), does not usually do so. This is not for lack of evidence; the TA has at her disposal a massive file containing all the information the

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† Assistant Professor, Valparaiso University Law School. In writing this article, I benefited from the thoughtful comments of Angela M. Banks, Emily Cauble, Robert H. Knowles, Andrew F. Moore, Rex Chen, Philip G. Schrag, D.A. Jeremy Telman, and the participants at the Emerging Immigration Law Scholars Conference at the University of California, Irvine, the Chicago Junior Faculty Workshop at DePaul University College of Law, and a faculty workshop at Loyola University at Chicago School of Law.

[1] U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICAL YEAR BOOK G1 (2013) [hereinafter 2012 YEAR BOOK] (56% of respondents were represented in removal cases in FY 2012).

[2] DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL, § 4.16 (2013), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited May 20, 2013) [hereinafter IMMIGRATION COURT PRACTICE MANUAL].

[3] Kafka states:

> K. must not overlook the fact that the proceedings are not public, they can be made public if the court considers it necessary, but the Law does not insist upon it. As a result, the court records, and above all the writ of indictment, are not available to the accused and his defense lawyers, so that in general it's not known, or not known precisely, what the first petition should be directed against, and for that reason it can only be by chance that it contains something of importance to the case.

FRANZ KAFKA, THE TRIAL 113 (Breon Mitchell ed. & trans., Schocken Books 1998).

government has gathered on the non-citizen[4] over the course of her lifetime in the United States. But the TA does not share this evidence; instead she waits to see what statements the respondent will make at the hearing, and then selectively chooses documents to enter into the record for impeachment purposes. In these hearings where the non-citizen often faces permanent exile, the TA has the advantage of surprise.

Discovery developed in the early twentieth century to eliminate these sorts of surprises. Proponents of discovery believed that unequal access to information was distorting the truth-finding function of tribunals.[5] Discovery was seen as a way to equalize informational disparities between parties, thereby making trials fairer and more efficient.[6]

When it comes to gathering information in immigration cases, the Department of Homeland Security (DHS) enjoys an extraordinary advantage. DHS was created in the wake of the September 11 tragedy to specialize in information collection.[7] Moreover, DHS's powers are at their peak when dealing with non-citizens, who have tenuous status and pliable constitutional rights.[8] From the moment a non-citizen enters the United States, DHS begins assembling information about her. Non-citizens are required to fill out visa applications, register their whereabouts, repeatedly have their photographs and fingerprints taken, and are interrogated in connection with benefit applications. DHS maintains an "alien file" or "A-file" on every non-citizen in the United States, filled with application forms, notes, and interview transcripts.[9] New information technologies and a web

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[4] This article uses the term "non-citizen" to refer to respondents in removal proceedings, but it is important to note that many persons charged with removal actually have strong citizenship claims. See, for example, *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2010), where the court found that the government had violated the petitioner's due process rights by deporting him without turning over evidence that would have supported his claim to United States citizenship.

[5] Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228-29 (1964).

[6] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 556 (2010).

[7] Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1442 (2011).

[8] *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 84-100 (2001); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1726 (2010).

[9] *See* Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755, 1757 (Jan. 16, 2007):

> The hardcopy paper A-File (which, prior to 1940, was called Citizenship File (C-File)) contains all the individual's official record material such as:

of relationships with private, local, state, and other federal agencies allow DHS to harvest ever greater amounts of information about non-citizens, whose diminished constitutional rights facilitate DHS surveillance. When DHS's enforcement arm, Immigration and Customs Enforcement (ICE), encounters unauthorized immigrants or non-citizens with criminal convictions, it has the power to apprehend and question them—typically without advising them of their right to an attorney.

In contrast to DHS's formidable information-gathering powers, non-citizens in removal cases have few discovery options. The Immigration and Nationality Act of 1952 (INA) was enacted during the early days of discovery, and as a result, contained very limited discovery rights.[10] Today immigration discovery is more or less as it was in 1952. There is technically a right to seek depositions and subpoenas from an immigration judge (IJ),[11] but this right is rarely used[12] and is extremely difficult to enforce.[13] Although non-citizens have a statutory right to view the unclassified evidence against them,[14] in practice they cannot get a copy of their immigration file without filing a Freedom of Information Act (FOIA) request with the prosecutor in the case, DHS.[15] This initiates a cumbersome bureaucratic process that is collateral to the immigration court case. It often is not quick enough to help non-citizens, and results in disclosures that are so heavily

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> naturalization certificates; various forms and attachments (*e.g.*, photographs); applications and petitions for benefits under the immigration and nationality laws; reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom DHS has created a record under the Immigration and Nationality Act.

Id.

[10] *See* 8 U.S.C. § 1252(b)(3) (1952) (a non-citizen must "have a reasonable opportunity to examine the evidence against him. . . ."); 8 C.F.R. § 242.53(a)(2), (4) (1952) (allowing special inquiry officers to issue subpoenas and "[t]ake or cause depositions to be taken").

[11] 8 U.S.C. § 1229a(b)(1) (2012) (subpoenas); 8 C.F.R. §§ 1003.35 (depositions and subpoenas), 1287.4(a)(2)(ii) (2014) (subpoenas); IMMIGRATION COURT PRACTICE MANUAL, *supra* note 2, at § 4.20 (subpoenas), Append. N (subpoena form).

[12] *See infra* Part II.

[13] The governing regulation provides that if a witness fails to appear, the IJ may refer the matter to the United States Attorney to seek the aid of the district court in requiring the witness to appear. 8 C.F.R. §§ 1003.35(b)(6), 1287.4(d) (2014).

[14] 8 U.S.C. § 1229a(b)(4)(B) (providing that non-citizens in removal proceedings are entitled to "a reasonable opportunity to examine the evidence against" them); *see also id.*§ 1229a(c)(2) (non-citizens "shall have access to [their] visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to . . . admission or presence in the United States.").

[15] APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 25 (2009).

redacted as to be useless.[16] Moreover, DHS's A-file does not always contain all the documents that a non-citizen in a removal proceeding needs to defend herself.

While immigration discovery has fossilized, most other administrative courts have changed with the times.[17] For example, when an employer is subject to Department of Justice (DOJ) sanctions for knowingly hiring an unauthorized non-citizen worker, the employer is entitled to discovery comparable to that under the Federal Rules of Civil Procedure.[18] Employers may demand documents in the possession of the prosecutor, compel responses to interrogatories and requests to admit, and depose witnesses. Yet such employers are facing at most a fine, not permanent separation from friends, home, and family, let alone the persecution and torture that many asylum applicants risk if returned to their country of origin.[19]

Non-citizens in removal proceedings need discovery at least as much as the employers in these cases. Removal cases often raise complicated factual and legal questions, such as whether the government can prove that the respondent is a removable non-citizen, and if so, whether she should be granted asylum or some other immigration benefit. Respondents in removal cases must prepare themselves for lengthy direct and cross-examination. Yet every year, immigration courts churn through hundreds of thousands of cases without any discovery process. In fiscal year 2012, immigration courts conducted 317,930 proceedings, of which 289,934 were completed.[20] Tens of thousands of those respondents were detained while their cases were pending, causing additional cost to taxpayers and hardship to respondents' family members.[21] As a result of these proceedings, IJs ordered 131,050 persons removed from the United States,[22] often inflicting serious economic, emotional, and other hardship on United States citizens and lawful permanent resident family members.[23] Conversely, 30,192 respondents were granted relief in their immigration court

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[16] *See infra* Part II.C.

[17] *See infra* Part I.

[18] *See* 28 C.F.R. §§ 68.1, 68.18–25 (2014).

[19] *See* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 15-18 (2012).

[20] 2012 YEAR BOOK, *supra* note 1, at B7.

[21] *Id.* at O1.

[22] *Id.* at D2.

[23] *See* KANSTROOM, *supra* note 19 at 135-45.

cases—many of them becoming new legal residents and future citizens of the United States.[24]

Immigration courts may be the most massive and massively influential courts to lack discovery in this country. They offer DHS a one-way mirror onto the lives of hundreds of thousands of non-citizens. On one side is a non-citizen who cannot even get basic documents from her own immigration file without pursuing a cumbersome FOIA process. On the other side is DHS, which was designed to be an information behemoth. To remedy this informational asymmetry, this article contends that immigration courts should adopt a modest discovery process. Most importantly, DHS should be required to produce certain documents in all cases where there is a viable defense. Indeed, this sort of discovery may be constitutionally required in many immigration court cases.

Part I outlines the gradual growth of discovery in the American legal system. Part II contrasts this evolution toward more discovery outside of the immigration court context with the development of a collateral and highly bureaucratic system for obtaining discovery via FOIA in immigration courts. Part III argues for expanding discovery in immigration court, drawing from the principles that led to the growth of limited discovery rights in the criminal context. Part IV discusses reform options for immigration courts, arguing that the most important reform should be to shift discovery from a collateral process managed by distant bureaucrats to one that is managed by IJs. Integrating discovery into immigration court is necessary to mitigate the government's informational advantage.

I. THE GROWTH OF DISCOVERY

Discovery is largely a twentieth century innovation. Up until then, social, cultural, and technological factors weighed against pre-trial discovery. In addition, travel was difficult and jurors were typically community members who were familiar with the facts of the case. Religious and cultural views also played a part: "Discovery did not make sense in a world of ordeal, battle and oath-takers."[25]

By the turn of the century, this system had started to seem quaint. In 1906, Roscoe Pound famously urged that

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[24] 2012 YEAR BOOK, *supra* note 1, at D2.

[25] Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694-95 (1998).

lawyers give up their "sporting theory of justice" and that society turn to scientific legal experts to help solve the complicated problems of the new century.[26] A system for uncovering and clarifying disputed issues of fact before trial made sense under this new, more rational view of adjudication.[27]

Discovery processes developed first in the civil context and gradually migrated to criminal and administrative courts. By 1932, some states permitted interrogatories and depositions in civil cases, and, in 1938, the U.S. Supreme Court adopted the Federal Rules of Civil Procedure, containing Rule 26, concerning discovery.[28] Initially, federal courts remained somewhat wary of discovery, and it was not until the 1946 amendments to the Federal Rules of Civil Procedure that discovery became widespread.[29]

By mid-century, federal courts had come to wholeheartedly embrace civil discovery, which "make[s] a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[30] The modern theory of discovery was that it made litigation fairer and more efficient by eliminating surprises and narrowing and clarifying the issues.[31] In the years since, discovery has been criticized as merely one more battleground in combative civil cases.[32] However, there is consensus that the discovery goal of transparency is a good one, and recent proposals suggest reforming, not abolishing, liberal discovery practices.[33]

A. Criminal Cases

In the early twentieth century, courts resisted granting discovery to criminal defendants. Courts believed that defendants already enjoyed significant procedural advantages over the prosecution, which was required to meet strict, highly

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[26] *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. ANN. MEETING A.B.A 395 (1906).

[27] *See* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 266 (1932) (arguing that discovery would be a means to improve the efficiency and rationality of the litigation process).

[28] Beisner, *supra* note 6, at 555-56.

[29] *Id.* at 559.

[30] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (citations omitted).

[31] *See* RAGLAND, *supra* note 27, at 266.

[32] *See* Beisner, *supra* note 6, at 549; Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303-15 (1978); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 713-16 (1989).

[33] *See* Beisner, *supra* note 6, at 584-94.

formalistic pleading requirements.[34] Judge Learned Hand summed up the consensus view: "While the prosecution is held rigidly to the charge, [the accused] need not disclose the barest outline of his defense."[35] The opponents of criminal discovery argued that the defendant's privilege against self-incrimination would make discovery a one-way street and that discovery would help the defendant to commit perjury and intimidate prosecution witnesses.[36]

In the 1960s, commentators began to argue against these points.[37] They contended that the privilege against self-incrimination provided less protection in practice than in theory, because defendants who failed to testify at trial were unlikely to prevail and the prosecution often had the defendant's pre-trial statement, taken by the police.[38] Prosecutorial pleading requirements had weakened, and, at the same time, the defense had come to be subject to its own pleading requirements, such as the requirement that notice be given of alibi and insanity defenses before trial.[39] The concern with perjury and intimidation of witnesses seemed applicable to civil cases, too, but had not proven much of a problem in that context.[40] Moreover, a great deal of the evidence that might be disclosed through discovery would be immune from tampering, such as physical evidence and expert reports.[41]

Commentators also took issue with the claim that defendants enjoyed a procedural advantage over the prosecution. Rather, they noted the various investigative and informational advantages that the prosecution enjoyed over the defense: the prosecution could search the person and property of the defendant; interrogate him up to the point of coercion; and compel him to provide blood, urine, fingerprints, and photographs, and participate in a line-up.[42] It could use its

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[34] Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1173-77 (1960).

[35] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

[36] Barry Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. REV. 437, 437-38 (1972).

[37] *See id.*; William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L.Q. 279, 291 (1963) [hereinafter Brennan, *Criminal Prosecution*]; Goldstein, *supra* note 34, at 1150; Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 871-81 (1968); Traynor, *supra* note 5, at 250.

[38] Goldstein, *supra* note 34, at 1186.

[39] *Id.* The Supreme Court upheld Florida's notice of alibi provision in Williams v. Florida, 399 U.S. 78 (1970).

[40] Brennan, *Criminal Prosecution*, *supra* note 37, at 291.

[41] Nakell, *supra* note 36, at 444-45.

[42] *Id.* at 439-42; Goldstein, *supra* note 34, at 1186.

police or grand jury powers to question and search other witnesses, yet it was not even required to turn over its witness statements to the defendant.[43] The modern police force could tap telephone conversations, use undercover agents, and access vast amounts of information in government files.[44] In this brave new world, the "archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime"[45] no longer seemed such a concern.[46]

Gradually, the resistance to criminal discovery dissolved. In 1963, the Supreme Court decided *Brady v. Maryland*,[47] in which the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[48] In 1966, the Court amended the Federal Rules of Criminal Procedure to create new discovery procedures, including a right, for the first time, for the government to obtain limited discovery under certain circumstances.[49] That year, a unanimous Supreme Court spoke of "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice," and referred to "the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice."[50]

This trend has continued in the years since. Although there is no constitutional right to discovery in criminal proceedings,[51] the Court has consistently emphasized both the mutual value of discovery and the importance that discovery be reciprocal.[52] The Court has rejected challenges to discovery

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[43] Nakell, *supra* note 36, at 439-42.

[44] Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972).

[45] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

[46] *See* Adams v. Illinois, 405 U.S. 278, 291 (1972) (Douglas, J., dissenting) ("The State's access to superior investigative resources and its ability to keep its case secret until trial normally puts the defendant at a clear disadvantage.").

[47] Brady v. Maryland, 373 U.S. 83 (1963). Even before *Brady*, several state appellate courts had ordered discovery in criminal cases. *See* Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 297 (1960).

[48] *Brady v. Maryland*, 373 U.S. at 87.

[49] FED. R. CRIM. P. 16 (1966).

[50] Dennis v. United States, 384 U.S. 855, 870-71 (1966); *see also* Nakell, *supra* note 36, at 438 ("In every way in which a trend in the development of a new legal procedure can manifest itself, it has done so in connection with discovery in favor of a criminal defendant.").

[51] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[52] Williams v. Florida, 399 U.S. 78, 86-87 (1970).

practices, provided the other side has access to similar measures;[53] on the other hand, the Court has struck down one-sided discovery provisions.[54] Along the way, the Court has repeatedly amended the Federal Rules of Criminal Procedure to broaden discovery in various ways.[55] Although there are distinctions between criminal and civil cases, courts seem to have decided that the underlying justifications for discovery apply equally in both realms.

B. Administrative Cases

The Administrative Procedure Act (APA) was enacted in 1946, before civil discovery was widely accepted.[56] Perhaps as a result, it contained only bare bones provisions related to discovery: Section 6(c) authorized the issuance of subpoenas and 7(b) authorized administrative officers "to take or cause depositions to be taken."[57] At first, most agencies' rules of practice confined the subpoena power to hearings themselves, and did not allow parties (other than hearing officers) to take depositions.[58] It was not long, however, before commentators began to call for a liberal right to discovery in administrative litigation, believing that doing so would increase the efficiency of administrative adjudications.[59]

Over the succeeding decades, support gathered for administrative discovery. In 1963, the Administrative Conference

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[53] *Id.*

[54] Wardius v. Oregon, 412 U.S. 470, 472 (1973).

[55] *See* CHARLES ALAN WRIGHT, ET AL., 2 FED. PRAC. & PROC. CRIM. § 251 (4th ed.). Criminal defendants today can move for disclosure of their own prior statements, information that is material to the defendant's defense or that the government intends to use in its case in chief at trial, or that was obtained from or belonged to the defendant. FED. R. CRIM. P. 16(a). The government must disclose certain reports of examinations or tests, and summaries of expert witness testimony. *Id.* The defendant's request for disclosure triggers the defendant's duty to make similar disclosures to the prosecution. FED. R. CRIM P. 16(b).

[56] Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946).

[57] Seth D. Montgomery, Note, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035, 1041-44 (1964).

[58] *Id.*

[59] *See* Raoul Berger, *Discovery in Administrative Proceedings*, 12 ADMIN. L. BULL. 28, 32 (1959-60); Raoul Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts*, 46 A.B.A. J. 74 (1960); J. Earl Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings*, 12 ADMIN. L. BULL. 51, 55 (1959–60); Bernard J. Gallagher, *Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 ADMIN. L. BULL. 44, 47 (1959-60); J. Irving R. Kaufman, *Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques against Delay?—A Judge's View*, 12 ADMIN. L. BULL. 103, 115 (1959–60).

of the United States officially endorsed discovery.[60] The Federal Trade Commission was one of the earliest discovery innovators. It adopted pre-hearing conferences with built-in discovery features in 1961,[61] and by 1967 had promulgated regulations setting out a compulsory process for discovery in FTC hearings.[62] Other agencies followed suit soon thereafter,[63] and in 1981, the National Conference of Commissioners on Uniform State Laws issued a "Model State Administrative Procedure Act," which provided for liberal discovery.[64]

There is no constitutional right to pre-hearing discovery in administrative proceedings.[65] However, today a large number of administrative agencies have voluntarily come to adopt formal discovery rules—especially those with court-like adjudication processes.[66] Often, agency rules are similar to the

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[60] Administrative Conference of the United States, Final Report, in S. Doc. No. 24, 88th Cong., 1st Sess., Recommendation No. 30 (1963).

[61] *See* Montgomery, *supra* note 57, at 1047-48.

[62] 16 C.F.R. § 3.31 (1968); Joel P. Bennett, *Post-Complaint Discovery in Administrative Proceedings: The FTC as a Case Study*, 1975 Duke L.J. 329, 333 (1975).

[63] *See, e.g.*, 47 C.F.R. §§ 1.311–25 (1969) (allowing for depositions, interrogatories, and the production of documents in Federal Communications Commission hearings).

[64] Model State Administrative Procedure Act § 4-210(a) (1981). The original Model Act authorized hearing officers in adjudicatory proceedings to issue subpoenas, discovery orders, and protective orders in accordance with the state's rules of civil procedure. *Id.* The Model Act was revised in 2010 to provide for mandatory disclosure of party statements and certain other documents. Model State Administrative Procedure Act § 411(b) (2010). In recognition of the variety of administrative proceedings, the 2010 Act also revised the 1981 Act to give states authority to exempt certain agencies from discovery practices if (1) "the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for expedition and informality in that process; and (2) alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings." *Id.* § 411(g).

[65] *See* Kelly v. U.S. E.P.A., 203 F.3d 519, 523 (7th Cir. 2000); Alexander v. Pathfinder, Inc., 189 F.3d 735, 744 (8th Cir. 1999); Nat'l Labor Relations Bd. v. Interboro Contractors, Inc., 432 F.2d 854, 857-58 (2d Cir. 1970); Chafian v. Ala. Bd. of Chiropractic Exam'rs, 647 So. 2d 759, 762 (Ala. Ct. App. 1994); Pet v. Dep't. of Health Servs., 542 A.2d 672, 677 (Conn. 1988); *In re* Herndon, 596 A.2d 592, 595 (D.C. Ct. App. 1991); *In re* Tobin, 628 N.E.2d 1268, 1271 (Mass. 1994); State *ex rel.* Hoover v. Smith, 482 S.E.2d 124, 129 (W. Va. 1997).

[66] *See* 19 U.S.C. § 210.27–34 (2012) (United States International Trade Commission); 10 C.F.R. § 2.705 (2014) (Nuclear Regulatory Commission); 12 C.F.R. § 308.24–27 (2014) (Federal Deposit Insurance Corporation); 14 C.F.R. § 13.220 (2014) (Federal Aviation Administration); 15 C.F.R. § 904.240 (2014) (National Oceanic and Atmospheric Administration); 16 C.F.R. § 1025.31 (2014) (Consumer Product Safety Commission); 16 C.F.R. § 3.31–40 (2014) (Federal Trade Commission); 17 C.F.R. § 12.30 (2014) (Commodity Futures Trading Commission); 18 C.F.R. § 385.401–411 (2014) (Federal Energy Regulatory Commission); 24 C.F.R. § 180.500–545 (2014) (Housing and Urban Development—Civil Rights); 29 C.F.R. § 2200.51–2200.57 (2014) (Occupational Safety and Health Review Commission); 29 C.F.R. § 2570.116 (2014) (Employee Benefits Security Administration); 29 C.F.R. § 2700.56–62 (2014) (Federal Mine Safety and Health Review Commission); 33 C.F.R. § 20.601–609 (2014) (Coast Guard); 46 C.F.R.

Federal Rules of Civil Procedure with respect to the scope of discovery. For example, the U.S. Tax Court allows discovery concerning "any matter not privileged and which is relevant to the subject matter involved in the pending case."[67] Like a host of other agencies and administrative courts, the Tax Court allows discovery through the same means set out in the federal rules: interrogatories, requests to admit, document production, and depositions.[68] Like the federal rules, the Tax Court allows discovery of a party's own prior statements without any special showing.[69]

Some agencies, like the National Labor Relations Board (NLRB), have persisted in applying a more narrow approach to discovery. The NLRB's rationale for doing so is "that its restrictive discovery rules and regulations are necessary to prevent employers and unions from intimidating employees and inhibiting employees from exercising statutory rights under the [National Labor Relations Act (NLRA)] NLRA."[70] The NLRB's approach has become more the exception to the rule for agencies with court-like adjudication processes.[71] Moreover, even the NLRB allows depositions upon good cause as well as the issuance of subpoenas for witnesses or documents.[72] With a few exceptions, the trend in administrative law seems to be toward liberal discovery. One of the most notable exceptions is in the arena of immigration, which has long had one of the least transparent court processes.

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§§ 502.201–.210 (2014) (Federal Maritime Commission Rules); 47 C.F.R. §§ 1.311–25 (2014) (Federal Communications Commission Rules); 49 C.F.R. § 511.31 (2014) (National Highway Traffic Safety Administration); 49 C.F.R. § 1503.633 (2014) (Transportation Security Administration).

[67] *Compare* UNITED STATES TAX COURT, RULES OF PRACTICE AND PROCEDURE [hereinafter TAX COURT RULES], Rule 70(b) *with* FED. R. CIV. P. 26(b) ("discovery regarding any nonprivileged matter that is relevant to any party's claim or defense").

[68] *See* TAX COURT RULES, *supra* note 67, at 71 (interrogatories), 72 (production of documents, electronically stored information, and things), 80-85 (depositions), 90 (requests to admit).

[69] *Compare* TAX COURT RULE 70(d) *with* FED. R. CIV. P. 26(b)(3)(C).

[70] Bruce A. Miller & Ada A. Verloren, *Discovery at the NLRB—Why Not?*, 51 WAYNE L. REV. 107, 126 (2005).

[71] Compare the limited discovery available in NLRB proceedings with the administrative hearings conducted by the DOJ before ALJs in cases involving allegations of unlawful employment of aliens. *See* 28 C.F.R. § 68.18–25 (2014). Like the Tax Court, these DOJ hearings allow discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . ." 28 C.F.R. § 68.18 (2014). Employers can obtain discovery via document production, interrogatories, requests to admit, and depositions. 28 C.F.R. § 68.19 (2014) (interrogatories), § 68.20 (2014) (production of documents, things, and inspection of land), § 68.21 (2014) (requests to admit), § 68.22 (2014) (depositions).

[72] *See* NLRB Rules 102.30 (depositions), 102.31 (subpoenas).

II. DISCOVERY IN IMMIGRATION COURT

Ignatz Mezei lived in the United States for 25 years before taking a trip to Romania in 1948 to visit his dying mother. When he returned in 1950, immigration officers barred him from entering the United States but would not tell him why.[73] He was detained for two years on Ellis Island in New York while the government fruitlessly attempted to find another country to take him. In the meantime, he filed a habeas corpus petition challenging his detention. In federal court, the Attorney General stayed mum about the reasons for Mezei's exclusion and detention, saying that the "information was 'of a confidential nature' so much so that telling any of it or even telling the names of any of his secret informers would jeopardize the safety of the Nation."[74] To this day, we know little about the government's secret evidence against Mezei, despite the fact that the case was litigated all the way to the Supreme Court. The Court affirmed the government's power to detain Mezei, essentially indefinitely, although "the Eisenhower Administration quietly released him in 1954 as [it] was closing down Ellis Island," belying the need for his four-year detention.[75]

One might be tempted to explain away the *Mezei* decision as an excess of the Cold War. But *Mezei* is emblematic of the lack of transparency in immigration court. Although the Immigration and Nationality Act of 1952 (INA) gives non-citizens the right "to examine the evidence against the alien," it specifically exempts "such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter."[76] Cases based on secret evidence are still heard in the immigration courts, most commonly involving today's bugaboo—alleged terrorists, rather than the communists and fellow travelers of the 1940s and '50s. Between 1987 and 2002, Professor David Cole represented 13 non-citizens facing deportation based on secret evidence, and in every single case the non-citizen was eventually released "either because federal courts concluded that reliance

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[73] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216-17 (1953).

[74] *Id.* at 217.

[75] Richard A. Serrano, *Detained, Without Details*, L.A. TIMES (Nov. 01, 2003), http://articles.latimes.com/2003/nov/01/nation/na-ignatz1/3.

[76] 8 U.S.C. § 1229a(b)(4)(B) (2012). The Act also has special Alien Terrorist Removal procedures that allow the government to use classified information to prove its case and provide that the government need not disclose such information to the respondent or public. *Id.* § 1534(d)(5), (e)(3).

on classified evidence was unconstitutional, or because once the government disclosed some of the classified evidence, the alien was able to rebut the charges in immigration court."[77]

For every high profile case involving secret evidence litigated by a famous law professor, there are hundreds of thousands of more mundane cases in which the evidence is not secret but simply out of reach.[78] There are various provisions in the INA that seem to provide limited discovery rights, but, for the most part, they have been interpreted narrowly. Instead, non-citizens must rely on a collateral and problematic FOIA process for discovery.

A. Formal Discovery in Immigration Court

The INA has long contained provisions related to discovery, but these provisions seem rarely to have been used successfully. At the same time that Mezei was litigating his case, Congress was debating a sweeping reform of immigration law. The 1952 Immigration and Nationality Act created a process for deportation hearings before a "special inquiry officer" that included a right for non-citizens to "have a reasonable opportunity to examine the evidence against [them]. . . ."[79] The Act required the U.S. Immigration and Naturalization Service (INS) to issue regulations implementing the statute, and the agency did so, expanding the process to allow special inquiry officers to issue subpoenas and "take or cause depositions to be taken."[80]

In 1973, the INS renamed its special inquiry officers "immigration judges," and, in 1983, the DOJ "established the Executive Office for Immigration Review (EOIR) to separate immigration judges from the INS."[81] In 2002, the Homeland Security Act dissolved the INS, shifting prosecutorial responsibility for immigration court cases to the new agency created by the act, the Department of Homeland Security;

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[77] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1002 (2002).

[78] In Fiscal Year 2012, the United States immigration courts received 410,753 new matters and completed 382,675 matters—all without discovery. *See* 2012 YEAR BOOK, *supra* note 1 at B2.

[79] 8 U.S.C. § 1252(b)(3) (1952). Earlier versions of the immigration act did not specify the procedures for deportation hearings. *See* 8 U.S.C. § 155 (1946) ("deportation of undesirable aliens generally"). However, the INS had promulgated fairly involved procedures for hearings before special inquiry officers, which nonetheless did not provide any right to discovery. *See* 8 C.F.R. Supp. § 150.6 (1941) (setting out the procedures for deportation hearings).

[80] 8 C.F.R. § 242.53(a)(2), (4) (1952).

[81] KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 186 (2009).

adjudicatory functions remained with EOIR within the DOJ.[82] In addition to these organizational changes, numerous rounds of immigration reform from 1952 to the present have substantively altered immigration law from its 1952 state.[83]

Despite all these changes, the regulatory subpoena and deposition provisions in force today remain in essentially the same form; the subpoena provision has even found a place in the statute itself.[84] However, these provisions on their face provide for only a narrow and antiquated form of discovery. The deposition provision seems to only contemplate "evidence depositions" to preserve testimony for a hearing, rather than "discovery depositions" to learn about witnesses before trial.[85] It also presumes that it will be an "official" taking the deposition, rather than the respondent's attorney.[86] The subpoena provision includes an exhaustion requirement that the party seeking a subpoena "show affirmatively that he or she has made diligent effort, without success, to produce" the witness or documents.[87] It also seems to contemplate only that a person appears to testify in court, rather than at a deposition outside of court.[88]

Even these narrow provisions seem rarely to have been used successfully. A search for Board of Immigration Appeals[89] decisions related to depositions and subpoenas reveals virtually no mention of cases where they have been used successfully by

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[82] *Id.* at 181.

[83] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104–208, 110 Stat. 3009-546 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (1986); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-71 (1976); Immigration and Nationality Act of 1965, Pub. L. No. 89-236 (1965).

[84] *See supra* note 11. The regulations require a party applying for a subpoena "as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same." 8 C.F.R. § 1003.35(b)(2) (2014).

[85] *See* 8 C.F.R. § 1003.35(a).

[86] *Id.*

[87] 8 C.F.R. § 1003.35(b)(2).

[88] *See* 8 C.F.R. §§ 1003.35(b)(3) ("The subpoena shall state the title of the proceeding and shall command the person to whom it is directed to attend and to give testimony at a time and place specified."); 1003.35(b)(4) ("If the witness is at a distance of more than 100 miles from the place of the proceeding, the subpoena shall provide for the witness' appearance at the Immigration Court nearest to the witness to respond to oral or written interrogatories, unless there is no objection by any party to the witness' appearance at the proceeding.").

[89] The Board of Immigration Appeals is the appellate body charged with reviewing Immigration Judge decisions and certain other immigration adjudications. *See* 8 C.F.R. § 1003.0. It is within the Executive Office for Immigration Review, which is part of the Department of Justice. *Id.*

non-citizens.[90] In the past 15 years, there are no published Board decisions even addressing the appropriate use of a subpoena or deposition, suggesting that litigants may have tired of making these requests after the Board issued a flurry of decisions in the 1960s and 1970s denying discovery requests.[91] The Board has even explicitly stated that the subpoena power set out in the Act may not be exercised against the DOJ, which, at the time of the statement, contained the INS.[92] It seems that the subpoena and deposition provisions encouraged advocates for a time to seek discovery in immigration court, but there is little evidence that they ever enjoyed much success, and the provisions now seem to have largely fallen out of use.

There is another authority for some pre-hearing discovery in immigration court cases: the Immigration Court

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[90] *See In Re* Mohammad J.A. Khalifah, 21 I. & N. Dec. 107, 112 (BIA 1995) (finding no prejudice in the IJ's denial of the respondent's motion for discovery of inculpatory evidence, to subpoena a witness, and for production of documents relating to the respondent in possession of other government agencies); Matter of Duran, 20 I. & N. Dec. 1, 3 (BIA 1989) (the IJ properly denied the respondent's motion to subpoena government records); Matter of Escobar, 16 I. & N. Dec. 52, 53 (BIA 1976) (affirming officer's denial of a motion for discovery); Matter of Gonzalez, 16 I. & N. Dec. 44, 45 (BIA 1976) ("The immigration judge properly refused counsel's request for subpoenas."); Matter of Koden, 15 I. & N. Dec. 739, 750 (BIA 1976) (finding no prejudice by the denial of the respondent's requests to take depositions, subpoena possible witnesses, and to obtain a list of all the Service's witnesses); Matter of Vergara, 15 I. & N. Dec. 388, 390 (BIA 1975) ("The immigration judge's refusal to issue a subpoena requiring respondent's father to testify in conjunction with a claim to United States citizenship" did not result in a denial of due process); Matter of Athanasopoulos, 13 I. & N. Dec. 827, 835 (BIA 1971) ("We find no substance to counsel's claim that the special inquiry officer erred in denying his request to subpoena certain witnesses and to take depositions in Greece."); Matter of Lane, 13 I. & N. Dec. 632, 635 (BIA 1970) (affirming the officer's denial of a request for subpoenas and denying counsel's request to remand the case for the taking of depositions); Matter of Anttalainen, 13 I. & N. Dec. 349, 351 (BIA 1969) (denying respondent's request on appeal for reopening for the issuance of subpoenas to officials of the Department of Labor); Matter of De Lucia, 11 I. & N. Dec. 565, 567 (BIA 1966) (the respondent was not denied a fair hearing by denial of his request to view a government report or subpoena certain government officials); Matter of Bufalino, 11 I. & N. Dec. 351, 362 (BIA 1965) (affirming the denial by the special inquiry officer of the request for subpoenas to assure the presence of various government officials of other agencies but noting that a "request for a deposition has been granted"); Matter of Vardjan, 10 I. & N. Dec. 567, 571-72 (BIA 1964) (affirming denial of request for submission of interrogatories to a Yugoslav consular officer and for examination of government report containing background information on conditions in Yugoslavia); Matter of Torres-Tejeda, 10 I. & N. Dec. 435, 439-40 (BIA 1964) (finding no prejudice in the officer's refusal to subpoena certain witnesses); Matter of C—, 9 I. & N. Dec. 524, 539 (BIA 1962) (finding "no reversible error in the denial for the issuance of a subpoena"); Matter of M—, 6 I. & N. Dec. 415, 421 (BIA 1954) (affirming denial of insufficiently specific request for a subpoena).

[91] In order to come to this conclusion, the author utilized the following search on WestlawNext: "advanced: (subpoena, deposition) & DA(aft 12-31-1998) & CI(I. & N. Dec.)."

[92] Matter of S—, 5 I. & N. Dec. 60, 61 (BIA 1953) ("The issuance of a subpoena by a hearing officer requiring the production of information from records of the Department of Justice (of which the Service is a part) is not authorized by law.").

Practice Manual. The Practice Manual was adopted in 2006, and imposes a host of mostly clerical requirements on the parties to removal proceedings. Substantively, the Manual requires that the parties file a witness list and all proposed exhibits 15 days prior to a merits hearing.[93] Thus, in theory, a non-citizen now must at least be notified prior to a hearing about evidence and witnesses that the government intends to call.[94]

However, the government rarely calls witnesses or submits evidence in removal cases other than conviction records, which it typically presents at the early status hearings called "master calendar" hearings. Although in theory the government has the burden of proof in cases where the non-citizen is charged with deportation,[95] this burden centers on a fact—alienage—that is often difficult to dispute. As a practical matter, the burden shifts in most removal cases to the non-citizen once she concedes some immigration violation and requests discretionary relief.[96] In order to meet this burden, non-citizens regularly submit witness lists and lengthy document submissions but get nothing from the government in return, meaning that the disclosure provisions in the Immigration Court Practice Manual largely function as yet another one-way mirror allowing the government to receive information without sharing any.

B. A Statutory Right to the Alien File

In 2010, the Ninth Circuit Court of Appeals issued a decision suggesting that DHS might have an obligation to turn over the A-file to non-citizens in removal proceedings. In *Dent v. Holder*, the court considered the case of Sazar Dent, who came to the United States from Honduras with his adoptive mother in 1981 when he was 14 years old.[97] The government initiated removal proceedings after he was convicted of criminal escape

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[93] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 2, at §§ 3.3(b)(i)(A), (g), 4.16(b). There was already a regulation in place prior to adoption of the Practice Manual that gave IJs the option to require a pre-hearing statement along the same lines now required by the Practice Manual. *See* 8 C.F.R. § 1003.21(b).

[94] Before the Practice Manual was adopted, the Board found no violation where the government failed to disclose its witnesses in advance of the hearing. *See Koden*, 15 I. & N. Dec. at 750.

[95] *Compare* 8 U.S.C. § 1229a(c)(3) (2012) (burden of proof on the government in cases where the non-citizen is charged with a ground of deportation) *with* 8 U.S.C. § 1229a(c)(2) (burden on non-citizen in cases where she is an "applicant for admission").

[96] 8 C.F.R. § 1240.8(d) (2014).

[97] 627 F.3d 365, 369 (9th Cir. 2010).

and a controlled substance violation.[98] During the removal proceedings, Dent claimed that he was a U.S. citizen, but was unable to produce the documentation the immigration judge requested, and the IJ ordered him removed.[99] Ultimately the Board of Immigration Appeals affirmed the IJ's decision, but neglected to send its notice to Dent's correct address.[100]

In 2008, Dent was arrested for illegal reentry.[101] In the context of that criminal proceeding, Dent's attorney uncovered documents from his A-file that supported his citizenship claim.[102] The illegal reentry case was dismissed based on the Board's failure to send notice of Dent's removal to the correct address. Dent's attorney then successfully petitioned the Board to reissue its prior decision so he could file a timely petition for review.[103] After the Board reissued its decision, Dent sought judicial review in the Ninth Circuit, now aided by student representatives from a University of Nevada legal clinic.[104]

Before the Ninth Circuit, Dent argued that the government's failure to provide him with the helpful records from his A-file denied him due process.[105] The government, in contrast, took the position that FOIA was the sole means for Dent to obtain documents from his A-file.[106] The court agreed with Dent, and applied the doctrine of constitutional avoidance to read a provision of the Immigration and Nationality Act as setting out a general rule entitling non-citizens in removal proceedings to access their A-file absent unusual circumstances.[107]

The provision at issue, 8 U.S.C. § 1229a(c)(2)(B), establishes that non-citizens charged with a ground of inadmissibility have the burden of proof to show that they are admissible.[108] It goes on to state:

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98 *Id.*

99 *Id.*

100 *Id.* Dent initially won a remand to the IJ on a non-substantive ground. *Id.* at 370. On remand, the IJ again ordered Dent removed. *Id.* On his second appeal, the Board affirmed the IJ's decision but failed to send notice to Dent's correct address. *Id.*

101 *Id.*

102 *Id.* at 372.

103 *Id.*

104 *Id.* at 367, 370.

105 *Id.* at 373.

106 *Id.* at 374 (citing 8 C.F.R. § 103.21 (2014)).

107 *Id.* at 374-75 ("We construe the 'shall have access' statute to provide a rule for removal proceedings . . . . We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it.").

108 8 U.S.C. § 1229a(c)(2)(B) (2012).

> In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.[109]

The grounds of inadmissibility in the INA typically apply to non-citizens who are deemed, for various reasons, to be seeking admission to the United States.[110] A separate provision sets out grounds of "deportability" for non-citizens who are in the United States and are not considered to be seeking admission.[111] 8 U.S.C. § 1229a(c)(2)(B) is immediately followed by another provision that establishes that the government bears the burden of proof in deportation cases, and that provision, unlike 8 U.S.C. § 1229a(c)(2)(B), is silent about a right for non-citizens to access documents.[112] Oddly, Dent appears to have been charged with a ground of deportability, not inadmissibility, but the court made no mention of this fact.[113]

Dent has not motivated the government to turn over A-files in all removal cases. To the contrary, the government has decided that it will follow *Dent* only in the Ninth Circuit, and it appears that in many cases it is not even following it there.[114] Moreover, the government takes the position that *Dent* should be narrowly construed as only applying to non-citizens who have a basis to contest a charge of inadmissibility, like persons who raise citizenship claims.[115] Thus, the government

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[109] *Id.*

[110] *See* Cabral v. Holder, 632 F.3d 886, 891 (5th Cir. 2011) (the 212(h) waiver of the grounds of inadmissibility is available to applicants for admission, including both non-citizens outside the United States and applicants for adjustment of status inside the United States, who are assimilated to the position of applicants for admission).

[111] 8 U.S.C. § 1227.

[112] 8 U.S.C. § 1229a(c)(3).

[113] The court noted that Mr. Dent had been charged with having been convicted of an aggravated felony. Dent v. Holder, 627 F.3d 365, 368 (9th Cir. 2010). There is an aggravated felony ground of deportability but no comparable ground of inadmissibility. *Compare* 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony ground of deportability) *with* 8 U.S.C. § 1182 (containing no comparable ground of inadmissibility).

[114] *See* AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY: *DENT V. HOLDER* AND STRATEGIES FOR OBTAINING DOCUMENTS FROM THE GOVERNMENT DURING REMOVAL PROCEEDINGS 4 (June 12, 2012), *available at* http://www.legalactioncenter.org/sites/default/files/dent_practice_advisory_6-8-12.pdf.

[115] Letter from Catrina M. Pavlik-Keenan, FOIA Officer, Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement, to Betty Ginsberg, Immigration Justice Clinic, Brookdale Ctr., Benjamin N. Cardozo School of Law (Jan. 25, 2013) (on file with author). The Letter stated:

> Though your letter references *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), as the basis for your request, that legal authority does not appear to be applicable here. The *Dent* decision is based on an interpretation of INA § 240(c)(2), which only applies when an alien is attempting to meet his burden to show that he is lawfully

apparently refuses to turn over A-files, even in the Ninth Circuit, in cases where persons are charged with deportability (and therefore do not have the burden of proof) or where they are charged with inadmissibility but have conceded that they are present without status.[116] So far, the Board has agreed with DHS's position that *Dent* should be narrowly construed, rejecting all arguments based on *Dent*, even in the Ninth Circuit.[117]

Immigration and Customs Enforcement's position on *Dent* is set out in a January 8, 2013, e-mail from the Director of Field Legal Operations for the ICE Office of the Principal Legal Advisor (OPLA) to OPLA staff: "Although the *Dent* decision turns on an interpretation of section 240(c)(2)(B) of the Immigration and Nationality Act (INA), and hence applies in a relatively narrow range of cases, OPLA policy is to be reasonable in releasing documents requested by respondents."[118] It goes on to state that OPLA attorneys should provide copies of the following documents on request:

> the Record of Deportable or Inadmissible Alien (Form I-213); a copy of any applications for benefit or relief; a copy of the respondent's visa or other entry document, if such is present in the A-file; and, if applicable, a copy of conviction records that relate to offenses implicating grounds of removability or inadmissibility.[119]

> present or is entitled to be admitted. According to the record established thus far in the instant case, your client has acknowledged being present without admission and has made no claim to any legal status.

Id.

[116] *Id.* One problem with the government's analysis is that Dent himself was charged with deportability, meaning that on its face the "mandatory access provision" of 8 U.S.C. § 1229a(c)(2)(B) did not directly apply to his case. The court probably should have noted this fact, but it did state that it was applying the doctrine of constitutional avoidance, which requires reading a statute to avoid constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Dent*, 627 F.3d at 374, n.27. A general rule requiring that the government turn over A-files to non-citizens in removal proceedings does not seem clearly contrary to congressional intent.

[117] *See In re* Julio Cesar Lopez Hernandez, A089-653-692, 2012 WL 5473614, at *1 (BIA Oct. 9, 2012); *In re* Jose Rosario Cuevas, A.K.A. Jesse Prieto Quijada, A095-282-946, 2012 WL 1951058, at *2 (BIA May 7, 2012); *In re* Julio Cesar Mora-Flores, A035-621-725, 2012 WL 1705607, at *1 (BIA Apr. 25, 2012).

[118] Letter from Catrina M. Pavlik-Keenan, FOIA Officer, Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement, to Betty Ginsberg, Immigration Justice Clinic, Brookdale Ctr., Benjamin N. Cardozo School of Law, *supra* note 115.

[119] *Id.* Other than "any applications for benefit or relief," these documents are all routine ones that would be disclosed in the ordinary course of a removal proceeding. Moreover, it is unclear if by "any applications" ICE meant past applications that might actually be useful or just the application filed by the respondent in the court case at issue, which a non-citizen would presumably already have.

Moreover, the guidance states that OPLA attorneys who receive requests for other documents "should be reasonable in accommodating such requests on a case-by-case basis."[120]

Despite this memo, it appears that OPLA is not particularly reasonable in accommodating requests for documents from the A-file. For example, on two occasions, the Valparaiso Immigration Clinic (VIC) has contacted ICE's Chicago Office of Chief Counsel (OCC) to request a copy of the asylum officer's interview notes for removal cases that VIC was handling.[121] Asylum officers take detailed notes during interviews with affirmative asylum applicants, and, when the applicants' cases are referred to immigration court, trial attorneys often use the statements recorded in these notes to impeach applicants who make inconsistent statements during the hearing. Hence, it is a best practice for non-citizens' attorneys to obtain these notes prior to an immigration court hearing in order to be prepared for cross-examination concerning them.

VIC filed FOIA requests for the A-file in two of its cases, but DHS's responses withheld the asylum officers' notes based on a claim of privilege; VIC appealed, and in response DHS released some additional documents, but not the asylum officer notes.[122] In both cases, VIC requested the notes from OCC via multiple e-mails and follow-up calls.[123] In response to VIC's inquiries, an Office of Chief Counsel attorney informed the student representative that OCC would not release the asylum officer notes.[124] In one of the cases, the OCC attorney stated that in her 22 years of practice she has never released portions of an A-file to opposing counsel.[125]

It seems that this experience is not unusual. In the case of *Martins v. U.S. Citizenship & Immigration Services* (USCIS),

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[120] *Id.*

[121] Redacted Journal of Action for Valparaiso Immigration Clinic Case No. H0612-02 [hereinafter H0612-02 Journal of Action] (on file with author); Redacted Journal of Action for VIC Case No. H0612-04 [hereinafter H0612-04 Journal of Action] (on file with author). Affirmatively filed asylum cases go first to an interview before a USCIS officer. 8 C.F.R. § 208.9 (2014). If the officer does not grant asylum, the case is typically "referred" to an IJ for removal proceedings. 8 C.F.R. § 208.14(c).

[122] E-mail from Andrew Voeltz to the Chi. Office of Chief Counsel, Team C (Feb. 19, 2013) (on file with author).

[123] H0612-02 Journal of Action, *supra* note 121; H0612-04 Journal of Action, *supra* note 121; E-mail from Andrew Voeltz, *supra* note 122; E-mail from Andrew Voeltz to the Chi. Office of Chief Counsel, Team C (Mar. 4, 2013) (on file with author); E-mail from Danielle DeWinter to Chi. Office of Chief Counsel, Team C (Oct. 10, 2013) (on file with author).

[124] H0612-02 Journal of Action, *supra* note 121; H0612-04 Journal of Action, *supra* note 121.

[125] H0612-02 Journal of Action, *supra* note 121.

a San Francisco immigration attorney sued USCIS for its failure to turn over asylum officer notes in 10 of his cases.[126] After the plaintiff prevailed in his preliminary injunction motion, USCIS settled by agreeing to generally turn over asylum officer notes in response to future FOIA requests.[127]

Martins represents a major victory for asylum applicants in removal proceedings, but does not address other parts of the A-file or help non-citizens in removal proceedings other than asylum seekers. *Dent* originally offered a promise that all non-citizens in removal proceedings could obtain their entire A-file from the government attorney in their removal case. However, DHS and the Board have narrowly construed the decision to such an extent that there is little evidence of it being used successfully in immigration court. Rather than follow *Dent*, DHS has stated that it will be "reasonable" in response to specific requests, but the evidence available to this author suggests that individual Trial Attorneys often do not cooperate with reasonable requests.

C. *Collateral Discovery through the Freedom of Information Act*

Although unusually lucky or resourceful attorneys may occasionally obtain discovery from Trial Attorneys or IJs, by and large the only discovery in immigration court cases comes collaterally through the FOIA process. FOIA provides a right to seek government documents,[128] subject to nine statutory

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[126] *Martins v. U.S. Citizenship & Immigration Servs.*, 2013 WL 3361269, No. C 13-00591 LB (N.D. Cal. July 3, 2013) (order granting plaintiff's motion for a preliminary injunction). According to Martins, USCIS regularly produced asylum officer notes up until March 2012 and since then appears to have ceased doing so. *Id.* at *5. In response to Martins' motion for a preliminary injunction, USCIS contended that the notes were protected by the "deliberative process privilege." *Id.* at *8. However, Martins produced asylum officer training materials and interview notes from other cases to show that asylum officer notes are typically a "near-verbatim transcript[] of the interview," without the type of subjective evaluation that would be protected by the deliberative process privilege. *Id.* at *12. The district court granted the plaintiff's motion, ordering the government to produce a *Vaughn* index immediately, so that the Court could confirm its suspicion that the documents were not covered by the deliberative process exemption. *Id.* at *27-32.

[127] Settlement Agreement and [Proposed] Order of Dismissal, *Martins v. U.S. Citizenship & Immigration Servs.*, No. C 13-00591 LB, 2013 WL 3361269, at *2 ("USCIS shall instruct officers, employees, and agents involved in the processing of FOIA requests, including those made by Plaintiff on behalf of his clients, for A-Files or for asylum officer interview notes specifically, that records reflecting information, instructions, and questions asked by officers and responses given by applicants in asylum interviews, consistent with the 'Interviewing Part II-Note Taking' lesson module of the Asylum Officer Basic Training Course, dated August 10, 2009, shall be produced.").

[128] 5 U.S.C. § 552(a)(3) (2012).

exceptions.[129] A person seeking to obtain records via FOIA, or "FOIA records," must file the request directly with the relevant federal agency. Many agencies publish their own FOIA procedures, which sometimes involve nettlesome ministerial requirements like multiple signatures, including a notarized signature or signature under penalty of perjury.[130] This, however, is the least of the problems with FOIA in the immigration context.

1. FOIA Delays

FOIA was enacted in 1966,[131] and from very early on there was evidence of severe agency delay in responding to requests.[132] As a result, in 1974, Congress added a requirement that agencies respond to requests within 10 days absent "exceptional circumstances."[133] However, compliance with FOIA's 10-day rule soon became the exception; perversely, invocation of "exceptional circumstances" became the norm.[134]

In time, there were reports of non-citizens being deported before they could get copies of records they believed would help them defend themselves.[135] As a result, in the 1980s, immigration attorney James Mayock filed a lawsuit in San Francisco federal court challenging the INS's failure to respond to FOIA requests filed by non-citizens in deportation

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[129] The exceptions, in short, are as follows: those records that are (1) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy"; (2) "related solely to the internal personnel rules and practices of an agency"; (3) "specifically exempted from disclosure by statute"; (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; (5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; (6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; (7) "records or information compiled for law enforcement purposes"; (8) "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions"; and (9) "geological and geophysical information and data, including maps, concerning wells." *Id.* § 552(b).

[130] U.S. CITIZENSHIP & IMMIGRATION SERVS., FOIA REQUEST GUIDE 7, *available at* http://www.uscis.gov/USCIS/About%20Us/FOIA/uscisfoiarequestguide(10).pdf (last visited May 30, 2013).

[131] Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

[132] Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 331 (1994).

[133] Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1988)). In 1996, the ten-day time limit was expanded to twenty days. Electronic Freedom of Information Act Amendments, Pub. L. No. 104-231, 110 Stat. 3048, § 8(b) (1996).

[134] Sinrod, *supra* note 132, at 342.

[135] *See* Mayock v. INS, 714 F. Supp. 1558, 1561 (N.D. Cal. 1989), *rev'd and remanded sub nom.* Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991).

and exclusion proceedings.[136] Although he originally filed the case on behalf of his clients, the individual cases all mooted out, and eventually Mayock pursued the suit in his own name as a pattern and practice case.[137] Mayock won summary judgment at the district court level, but the Ninth Circuit found "that material facts remain[ed] in dispute."[138] On remand, the case settled when the INS agreed to create a prioritization program and a multi-track processing system.[139]

Under the terms of the settlement, the INS agreed to "allow[] requesters with urgent need to receive immediate processing of FOIA requests ahead of other requesters."[140] In addition, the INS created a two-track system so that simple FOIA requests that would ordinarily take five days or fewer to process would not be delayed by the processing of "complex requests."[141]

In 1996, Congress adopted a similar model when it passed the Electronic Freedom of Information Act Amendments (EFOIA).[142] EFOIA directed agencies to issue regulations providing for expedited processing of cases in which the requester demonstrates a "compelling need," as well as "other cases determined by the agency."[143] It also authorized agencies to issue regulations allowing for multi-track processing.[144]

In December 2005, President Bush issued an executive order requiring agencies to review their FOIA operations and develop plans for improvement.[145] Afterward, DHS undertook a review of its FOIA processes, and made a number of changes. "In October 2007, USCIS shifted from 50 decentralized FOIA offices to a single centralized office."[146] DHS noted that A-files contained documents generated both by ICE and USCIS, which caused FOIA inefficiencies, because "[w]hen either one of the

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136 *Id.*

137 *Id.* at 1560.

138 Mayock v. Nelson, 938 F.2d 1006, 1008 (9th Cir. 1991).

139 Sinrod, *supra* note 132, at 354.

140 *Id.*

141 *Id.* at 355.

142 Pub. L. 104–231, 110 Stat. 3048 (1996).

143 *Id.* § 8(a). Congress defined "compelling need" to mean that failure to obtain an expedited FOIA response "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or that "a person primarily engaged in disseminating information [has] urgency to inform the public concerning . . . Federal Government activity." *Id.* (codified at 5 U.S.C. § 552(a)(6)(E)(v) (2012)).

144 *Id.* § 7.

145 Exec. Order No. 13392, 70 Fed. Reg. 75373 (Dec. 19, 2005).

146 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-260, REPORT TO CONGRESSIONAL COMMITTEES, FREEDOM OF INFORMATION ACT, DHS HAS TAKEN STEPS TO ENHANCE ITS PROGRAM, BUT OPPORTUNITIES EXIST TO IMPROVE EFFICIENCY AND COST-EFFECTIVENESS 13 (2009) [hereinafter GAO REPORT].

components received a request for the contents of a file, that component had to locate the file and determine whether it should have responsibility for processing the request."[147] As a result, in November 2006, DHS transferred processing of all FOIA requests for A-files to USCIS.[148]

In 2007, USCIS modified the existing two-track system created under *Mayock* to allow for routine expedited processing for persons in removal proceedings.[149] The *Mayock* settlement already created a means for persons to seek prioritized processing, but it was limited to cases where the requestor could demonstrate that "an individual's life or personal safety would be jeopardized" or where "substantial due process rights of the requester would be impaired" if a quick response were not issued.[150] Apparently, USCIS decided to dispense with this required showing in removal cases; it added a new "Track 3" to give expedited service as a routine matter to all persons with pending immigration court cases.[151]

In 2008, Mayock again brought suit against USCIS, asserting that USCIS was still routinely failing to comply with the statutory 20-day time limit for responding to FOIA requests, and arguing that USCIS had breached the *Mayock* settlement agreement.[152] Mayock was joined as a named party in his new lawsuit by a lawful permanent resident named Mirsad Hajro who had been denied expedited processing of his FOIA request; he had sought expedition to prepare for his appeal of USCIS's denial of his naturalization application.[153] Mayock and Hajro submitted evidence related to USCIS's delayed FOIA response in Hajro's case along with "declarations from Mayock and 26 other immigration attorneys attesting to USCIS's repeated delays of months and in some cases years in responding to aliens' requests for their registration files."[154] The court found that the plaintiffs had established that USCIS had

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147 *Id.* at 13-14.

148 *Id.* at 14.

149 By 2007, the original divide of five days between "simple" and "complex" cases had shifted to twenty days. Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017–18 (Feb. 28, 2007).

150 Sinrod, *supra* note 132, at 354.

151 72 Fed. Reg. 9017-18. According to the notice, Track 3 allows "for accelerated access to the Alien-File (A-File) for those individuals who have been served with a charging document and have been scheduled for a hearing before an immigration judge as a result." *Id.*

152 Hajro v. U.S. Citizenship & Immigration Servs., 832 F. Supp. 2d 1095, 1102 (N.D. Cal. 2011).

153 *Id.* at 1102.

154 *Id.* at 1105.

a pattern and practice of failing to timely respond to FOIA requests, and granted summary judgment on the issue. The government appealed.[155]

USCIS's FOIA backlogs have been reduced from a 2006 high of 89,124,[156] but remain significant; at the end of 2012, 10,727 cases were pending.[157] Much of the reduction has occurred in the last couple of years,[158] and it appears possible that USCIS has achieved this reduction through the use of a classic bureaucratic tactic: shifting the workload to other departments.

2. Record Dispersion

There are at least three separate government files that contain documents relevant to a removal case: the A-file maintained by DHS, the EOIR "court file," and the State Department's records related to visa applications. A non-citizen seeking these records must file a FOIA request with each agency to obtain its records. Even the attorney of record in an immigration court case cannot get more than a handful of documents from the *court file* without filing a FOIA with EOIR.[159]

As if it were not enough of a problem to have three major agencies holding immigration documents, there are also multiple sub-agencies within DHS that may have created documents in DHS's A-file, including at least USCIS, ICE, and Customs and Border Protection.[160] Sometimes documents from

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[155] *Id.* at 1108. Interestingly, one of the claims raised by the parties was that USCIS's third track processing policy violated the *Mayock* settlement and the APA, because it was not promulgated after notice and comment. The Court held that the plaintiffs could enforce the *Mayock* agreement and that USCIS had failed to comply with the APA when it issued the third track processing policy without a notice and comment period. *Id.* at 1117-19.

[156] GAO REPORT, *supra* note 146, at 12.

[157] DEP'T OF HOMELAND SEC., PRIVACY OFFICE, 2012 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 20 (2013) [hereinafter DHS 2012 ANNUAL FOIA REPORT].

[158] At the end of 2011 the USCIS FOIA backlog was 35,780, meaning that the agency cut the backlog by more than two-thirds in one year. *Id.*

[159] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 2 at § 12.2(a)(i)(B) (2009). ("As a general rule, parties may only obtain a copy of the record of proceedings by filing a FOIA request. . . . However, in limited instances, Immigration Court staff have the discretion to provide a party with a copy of the record or portion of the record, without a FOIA request."). Some courts allow counsel to copy up to five pages from the file without filing a FOIA. *See* BETSY CAVENDISH & STEVEN SCHULMAN, APPLESEED, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE: TRANSFORMATIVE CHANGE FOR THE IMMIGRATION JUSTICE SYSTEM 64 (2012), *available at* http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.

[160] *See* Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755, 1756 (Jan. 16, 2007); Kirsten Mitchell, *Ensuring Requests*

non-DHS agencies make their way into the A-file, too, such as documents from the State Department, the Defense Department, the Federal Bureau of Investigation (FBI), or the U.S. Marshals Service.[161]

In an apparent reversal of its 2007 decision to centralize FOIA processing for A-file requests, USCIS seems to have recently decided to refer documents generated by DHS's other constituent parts to be processed.[162] USCIS seems to now take the counter-intuitive position that it is not the custodian of these documents, so when it suspects that another sub-agency created a document, it farms it out to the believed originator for FOIA processing.[163] Of course, these agencies will only process the referred documents; they will not turn over other documents related to a non-citizen that they have in their possession. For that, the non-citizen must file a separate FOIA request with that agency rather than with USCIS.

It appears that at least part of this referral process occurs electronically, eliminating the prior problem of the physical A-file being transferred from place to place. For example, when USCIS finds documents in an A-file that it believes originated at ICE, it sends electronic versions of those documents to ICE for processing by downloading them "onto a type of 'tube,' for lack of a better term."[164] ICE "manually" removes these files from the "tube," downloads them, converts them into PDF files, and inputs them into the ICE FOIA database.[165] It is unclear how, if at all, USCIS notifies ICE which of the thousands of referrals waiting in the FOIA tube are Track 3 requests meriting expedited processing.[166]

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for A-Files are A-OK, NATIONAL ARCHIVES, THE FOIA OMBUDSMAN (June 7, 2012), http://blogs.archives.gov/foiablog/ 2012/06/07/ensuring-requests-for-a-files-are-a-ok/.

[161] Mitchell, *supra* note 160.

[162] *Id.* A September 14, 2010 letter from the Department of State to USCIS states that "USCIS recently began to refer records contained in alien files to the Department of State for a decision on their release under the FOIA." *See* Letter from Steven J. Rodriguez, Chief FOIA Officer, U.S. Dep't of State, to Mary Ellen Callahan, Chief FOIA Officer, U.S. Dep't of Homeland Sec. (Sept. 14, 2010), *available at* http://www.governmentattic.org/7docs/MassReferralsCIStoState_2010.pdf.

[163] Telephone Interview with Chris Bentley, Press Secretary, U.S. Citizenship and Immigration Servs. (June 11, 2013) (on file with author). Note that USCIS will process documents from CBP pursuant to an agreement between those two agencies. Mitchell, *supra* note 160.

[164] E-mail from ICE FOIA Officer Korrina L. Smith to Valparaiso Immigration Clinic Student Representative Amy Milton (Nov. 20, 2012) (on file with author).

[165] *Id.*

[166] According to ICE officer Korrina Smith, if USCIS has designated a request as Track 3, ICE will honor it. *Id.* However, in one case in which the Valparaiso Immigration Clinic filed a Track 3 FOIA request with USCIS on October 10, 2012, ICE

This new procedure may have increased the apparent timeliness of USCIS's responses. For fiscal year 2011, USCIS took 52 days on average to close Track 3 FOIA requests; for fiscal year 2012, it took 41 days on average.[167] USCIS posts its response times to FOIA requests on its website, which it updates daily, and as of this writing, the average response time for Track 3 requests is 25 business days.[168] However, the shift to having ICE process a portion of A-file FOIA requests has resulted in an exploding ICE FOIA backlog. ICE went from having a backlog of 18 cases at the end of the 2011 to having a backlog of 2,443 cases at the end of 2012;[169] by June 2013, the backlog had more than doubled again, to 6,699.[170] It is clear that this backlog has primarily been fueled by USCIS's new policy of foisting FOIA processing onto ICE, since 82% of ICE's FOIA docket consists of referrals from other agencies.[171]

USCIS's policy of shifting much FOIA processing to ICE has improved its statistics but has made things worse for those requesting A-files in removal proceedings. A significant part of the A-file for persons in removal proceedings consists of documents generated by ICE, meaning that ICE's processing delays are a serious issue for non-citizens in removal cases. Half or more of ICE's referrals from USCIS have been waiting 458 calendar days or longer when calculated from the date of the request.[172] This means that many respondents in removal proceedings will not have received a FOIA response from ICE before their final removal hearing. Moreover, as the non-citizens' opponent in removal cases, ICE has even more of an incentive than USCIS to withhold and redact documents.

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did not respond until January 15, 2014. *See* Letter from Catrina M. Pavlik-Keenan, FOIA Officer, to Andrew Voeltz (Jan. 15, 2014) (on file with author).

[167] Letter from Jill A. Eggleston, Director, FOIA Operations, Dep't of Homeland Sec., U.S. Citizenship and Immigration Servs. (Feb. 25, 2013) [hereinafter Heeren FOIA 1] (response to FOIA Request filed by Geoffrey Heeren) (on file with author). According to the USCIS press secretary, these response times are in business days. Interview with Chris Bentley, *supra* note 163.

[168] CURRENT AVERAGE FOIA REQUEST PROCESSING TIMES, U.S. CITIZENSHIP & IMMIGRATION SERVS., *available at* http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-request (last visited Dec. 15, 2013).

[169] DHS 2012 ANNUAL FOIA REPORT, *supra* note 157, at 19.

[170] POOR ICE FOIA MANAGEMENT HINDERS PUBLIC ACCESS TO IMMIGRATION RECORDS, THE FOIA PROJECT (July 18, 2013), http://foiaproject.org/2013/07/18/poor-management-hinders-public-access-to-immigration-records/.

[171] *Id.*

[172] *Id.*

3. Detainees and FOIA

Ultimately, DHS's multi-track system only goes so far to helping non-citizens in removal cases. First, not all individuals in removal proceedings qualify for Track 3, which does not apply to persons with final orders of removal, with a pending Board appeal, or to persons who failed to appear for a scheduled hearing.[173] Second, Track 3 takes too long to help most detained individuals, whose cases are expedited.

USCIS does not maintain a separate track for detainees, so their best option is Track 3, with an average response time of somewhere between 28 and 41 business days, depending on which report is consulted.[174] In a 2003 Supreme Court case, EOIR represented that, in 85% of the cases in which non-citizens are subject to mandatory detention, "removal proceedings are completed in an average time of 47 days and a median of 30 days."[175] If the average time to complete a detained case is 47 days, this means that FOIA Track 3, with an average response time of 41 days, may be too slow to benefit many non-citizens in detention. The separate "expedited" track would not be helpful, because it appears to take longer for USCIS to respond to an expedited request than for a Track 3 request: in fiscal year 2012, the average number of days it took for USCIS to respond to an expedited request was 46.87.[176]

The length of time it takes USCIS to respond to FOIA requests appears to be deterring many advocates from even filing FOIA requests in cases involving detainees. In February 2013, the author conducted a survey of providers of legal aid to detained immigrants. Fifty-seven percent of the respondents who reported that they do not regularly use FOIA for detained

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[173] Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017, 9018 (Feb. 28, 2007).

[174] *See* Heeren FOIA 1, *supra* note 167, at cover letter and 6.

[175] Demore v. Kim, 538 U.S. 510, 529 (2003). Although the government does not meet this standard in many contested removal cases, detained merits hearings still mostly occur within a few months. In February 2013, the author conducted a survey of organizations representing detained non-citizens. The author obtained the names of organizations that represent immigrant detainees from the Immigration Advocates Network, a clearinghouse for immigrant legal aid organizations. Thirty-two organizations responded to the survey and 63% of the respondents reported that detained removal cases conclude within three to six months. Survey of Organizations that Provide Legal Aid to Detainees in Removal Proceedings [hereinafter FOIA Survey] (on file with author).

[176] DHS 2012 ANNUAL FOIA REPORT, *supra* note 157, at 11.

cases stated that at least part of their rationale for not doing so was that the FOIA process takes too long.[177]

4. Redaction

Another commonly reported problem with the FOIA process is that USCIS frequently withholds or redacts large portions of responses. The author's survey of organizations representing detained immigrants included a general question asking for any information applicable to the FOIA process. In response, a respondent from one of the largest providers of immigrant legal aid in the country volunteered:

> A lot of times the FOIA responses are so redacted they are virtually useless. The pages that we need are often the ones excluded (eg., DHS notes on asylee/refugee interview, copy of the visa used to gain admission etc.). Then, we have to do an appeal. Wait. Get a response that that [sic] the documents will be released, but [we] basically only [receive] the heading.[178]

After receiving this comment, the author conducted a short follow-up survey to determine how many of the other respondents had experienced heavy redaction of their FOIA responses. Thirty-eight percent of the respondents to this follow-up survey indicated that their FOIA responses are frequently "so heavily redacted as to be unhelpful . . . in representing [their] client."[179] Another 38% indicated that responses are occasionally so heavily redacted as to be unhelpful.[180] Thus, more than three-quarters of the respondents noted that heavy redaction was an issue.

There are nine exemptions to FOIA that allow agencies like DHS to withhold or redact documents. Claims of privilege in discovery are evaluated according to criteria specifically designed for litigation. The FOIA exemptions, in contrast, were developed with the needs of government secrecy and individual privacy in mind. As a result, the FOIA exemptions are often inappropriate in immigration court cases. But even when they are appropriate, DHS misapplies them.

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[177] FOIA Survey, *supra* note 175. Twenty-one of the 32 respondents answered this question.

[178] *Id.*

[179] Follow-up Survey of Organizations that Provide Legal Aid to Detainees in Removal Proceedings (on file with author). The number of respondents to this survey was much lower; only eight organizations responded.

[180] *Id.*

One of the exemptions that DHS cites most frequently is under Section (b)(5) of FOIA, for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[181] This exemption encapsulates the traditional discovery exemptions of "attorney-client privilege," "work product," and "deliberative process."[182] Of these three, the most likely candidate for insulating documents like interview notes would be the deliberative process exemption for documents relating to an agency's decision-making process.[183]

In fact, USCIS invoked the deliberative process exemption in both the *Martins* and *Hajro* cases as a basis for withholding the primary documents the plaintiffs had sought through their FOIAs—the officer's notes from asylum and naturalization interviews, respectively. In both cases, the courts found that the agency's analysis might be exempt, but USCIS should have redacted only the analytical portions and disclosed the factual material like the asylum and naturalization applicants' statements during interviews.[184] USCIS's inappropriate withholding of material in these two cases, which collectively relate to the claims of 11 applicants and two experienced immigration attorneys, suggests that USCIS routinely withholds documents that should be disclosed via FOIA.

5. FOIA Appeals

Unfortunately, in most cases where USCIS has incorrectly applied the FOIA exemptions, the applicant's only option is to file an appeal with USCIS's administrative FOIA appeals office.[185] Making an argument on appeal is no easy

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[181] 5 U.S.C. § 552(b)(5) (2012).

[182] *See* Tax Analysts v. I.R.S., 117 F.3d 607, 616 (D.C. Cir. 1997).

[183] The "Attorney Work Product" privilege only applies to "memoranda prepared by an attorney in contemplation of litigation which sets forth the attorney's theory of the case and [her] litigation strategy." N.L.R.B v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975). "The attorney-client privilege protects confidential communications from clients to their attorneys [or from attorneys to their clients] for the purpose of securing legal advice or services." *Tax Analysts v. IRS.*, 117 F.3d at 618; *In re* Six Grand Jury Witnesses, 979 F.2d 939, 943-44 (2d Cir. 1992). Neither of these exemptions would seem to relate to the documents that advocates mention as being important, like prior interview notes or visa applications.

[184] *Martins v. U.S. Citizenship & Immigration Servs.*, 2013 WL 3361269, No. C 13-00591 LB, *15 (Order granting plaintiff's motion for a preliminary injunction) (N.D. Cal. July 3, 2013); Hajro v. U.S. Citizenship & Immigration Servs., 832 F. Supp. 2d 1095, 1114 (N.D. Cal. 2011).

[185] FOIA REQUEST GUIDE, *supra* note 130, at 16.

task, since USCIS does not describe the documents it has withheld or its rationale for withholding them. Moreover, the process often does not yield much; as noted by the survey respondent quoted above, the appeal all too often results in the "disclosure" of pages that are completely blank (redacted) except for the heading. This highlights one of the principal differences between discovery and FOIA: litigants can bring discovery disputes to the trial judge, who acts as a neutral arbiter; FOIA denials are appealed to the same agency that denied the request. Although applicants have a right under FOIA to sue the agency in district court,[186] few applicants have the resources to do so.

As a result, FOIA is the primary and often the only way for litigants to obtain discovery in immigration court cases. Although the "mandatory access," subpoena, and deposition provisions theoretically provide alternatives, in practice they have not proven to be viable avenues for seeking discovery. Yet the FOIA process is cumbersome, sometimes backlogged, and often fails to yield desired results. When problems occur with it, USCIS adopts bureaucratic solutions, such as shifting the workload to other sections of the DHS bureaucracy like ICE, which is even less likely than USCIS to be forthcoming with documents. When DHS officers misapply the FOIA exemptions and withhold documents that ought to be disclosed, non-citizens' only remedies are the slow and rather unhelpful administrative appeals process or filing a resource-intensive lawsuit in federal court. For that matter, the FOIA exemptions are not designed for immigration court and may justify withholding documents that are important to non-citizens' defense in removal proceedings. As a result, it is common in immigration court for litigants to have very little discovery prior to the final hearing.

III. DISCOVERY AND INFORMATIONAL ASYMMETRY

If knowledge is power, then discovery is a way to shift power dynamics. Indeed, courts seem to have been swayed to grant or deny discovery rights based on their perception of the relative powers of litigants. Originally, courts resisted granting discovery in the criminal context because of a perception that defendants already enjoyed procedural advantages; in time, they realized that criminal discovery was a necessary offset to the

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[186] 5 U.S.C. § 552(a)(4)(B).

state's investigative powers. The National Labor Relations Board limits employers' and unions' discovery because they already have disproportionate power relative to employees, and the agency suspects that they would use the additional power of discovery to intimidate employees. In the immigration context, the federal government's power relative to non-citizens is at a peak. If the federal government wants to keep non-citizens powerless to prevent their deportation, keeping them in the dark when it comes to discovery is a good way to do so. On the other hand, courts have recognized that serious stakes merit even-handed procedures. Discovery would be one way to equalize the government's vast informational advantage in removal cases.

A. Informational Reciprocity

Courts adopted discovery rules in civil cases in the early twentieth century as a way to make trials more fair and efficient. From the beginning, they understood that for discovery to achieve these goals, both sides needed to have equal access to it: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other [under the Federal Rules of Civil Procedure] to disgorge whatever facts he has in his possession."[187] Early commentators noted that "it was the mutuality of discovery which was largely responsible for its success."[188]

Originally, courts were leery of discovery in the criminal context.[189] Part of the reason was that courts felt that criminal defendants' privilege against self-incrimination would mean, in practice, that discovery could not be mutual.[190] Over time, the tide shifted, in part because criminal defendants began to have pre-trial disclosure duties. In *Williams v. Florida*, the Court upheld Florida's law requiring defendants to give notice of their alibi defense, which was part of a system that imposed discovery duties on both the prosecution and the defense.[191] Several years later, the Court considered Oregon's notice of alibi provision, which provided no such reciprocal discovery duties on the part of the state toward the defendant.[192] In *Wardius v. Oregon*, the

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[187] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[188] 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 1033 (2d ed., 1950).

[189] *See supra* Part I.

[190] Nakell, *supra* note 36, at 437-38.

[191] Williams v. Florida, 399 U.S. 78, 81 (1970).

[192] Wardius v. Oregon, 412 U.S. 470, 471 (1973).

Court stressed that due process requires a relative "balance of forces between the accused and his accuser,"[193] admonishing that

> in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[194]

To reach this conclusion, the Court drew on a growing body of scholarship concerning criminal discovery.[195] An article by Abraham Goldstein that the Court cited in *Wardius* argued that the state's investigatory powers ought to be offset by a right to discovery for criminal defendants.[196] The Court seemed swayed by this logic of mutuality, holding "that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[197] In other words, there is no constitutional right to discovery, but once established, a discovery system cannot favor one party over the other.

Brady v. Maryland provides an analogous principle: the government must voluntarily disclose information that goes to the core of a criminal case. In *Brady*, the Court considered the case of a man who admitted that he had participated in a killing, but sought to avoid the death penalty on the grounds that he did not actually commit the murder.[198] After he was convicted and sentenced to death, his defense learned that the state had in its possession the actual killer's confession, which it had failed to turn over to Brady upon his attorney's request.[199] The Court held that the prosecution's failure to turn over documents to the defense upon request, that were relevant to his guilt or punishment, violated the defendant's due process rights.[200]

Criminal discovery came in the wake of civil discovery, but *Brady*-type principles have now impacted civil discovery,

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193 *Id.* at 474.

194 *Id.* at 475-76.

195 *Id.* at 473-74 (citing AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL 23-43 (Approved Draft 1970)); Brennan, *Criminal Prosecution*, *supra* note 37; Goldstein, *supra* note 34.

196 Goldstein, *supra* note 34, at 1185-92.

197 *Wardius*, 412 U.S. at 472.

198 Brady v. Maryland, 373 U.S. 83, 84 (1963).

199 *Id.*

200 *Id.* at 87.

leading to a cross-evolution of sorts. In the 1990s, state and federal courts drafted mandatory disclosure rules requiring parties to disclose key evidence without being asked.[201] These mandatory disclosure rules "create for attorneys in private civil cases duties and status akin to that of the criminal prosecutor in criminal matters."[202]

Mandatory disclosure rules capture the spirit of *Brady*, but for the most part, courts have skirted the question of whether *Brady* should apply in civil litigation.[203] *Dent* seems to track with the rationale of *Brady*, although, oddly, the Ninth Circuit's opinion did not even cite the case.[204]

A rare civil *Brady* case is *Demjanjuk v. Petrovsky*, which involved an alleged Nazi war criminal who had been acquitted of charges in Israel after the United States extradited him there.[205] After reopening the habeas case that Demjanjuk had filed prior to his extradition and acquittal, the Sixth Circuit held that "*Brady* should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against."[206] It then found that the United States government had violated Demjanjuk's due process rights by failing to turn over information it had received from the Soviet Union suggesting that a different man was the notorious Nazi prison guard, "Ivan the Terrible," whom Demjanjuk had been alleged to be.[207] In extending *Brady* to the civil contexts of denaturalization and extradition, the Court focused on the similarities of the proceedings to criminal cases:

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[201] *See, e.g.*, FED. R. CIV. P. 26(a)(1)–(3) & advisory committee's note (1993 amendment); Supreme Court of Arizona, Order Amending Rules 4, 6, 16, 26, 26.1, 30, 32, 33, 33.1, 34, 36, and 43, Rules of Civil Procedure, and Rule VI, UNIFORM RULES OF PRACTICE OF THE SUPERIOR COURT, 16 Ariz. LXXXI (Dec. 20, 1991).

[202] Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 646 (2002); *see also* Colin Campbell & John Rea, *Civil Litigation and The Ethics of Mandatory Disclosure: Moving Toward* Brady v. Maryland, 25 ARIZ. ST. L.J. 237, 238-40, 247 (1993); Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 53 (1982).

[203] *See* Pavlik v. United States, 951 F.2d 220, 224 n.5 (9th Cir. 1991) (assuming, without discussion, "that the principle enunciated in *Brady v. Maryland* applies in the context of a NOAA [National Oceanic and Atmospheric Administration] civil penalty proceedings."); Millspaugh v. Cnty. Dep't of Pub. Welfare of Wabash Cnty., 937 F.2d 1172, 1175 n.1 (7th Cir. 1991) ("The approach we take to this case eliminates any need to consider whether the due process clause establishes obligations comparable to *Brady* in civil cases.").

[204] Dent v. Holder, 627 F.3d 365 (9th Cir. 2010).

[205] Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

[206] *Id.* at 353.

[207] *Id.* at 353-54.

> The consequences of denaturalization and extradition equal or exceed those of most criminal convictions. In this case, Demjanjuk was extradited for trial on a charge that carried the death penalty. OSI [the Office of Special Investigations] is part of the Criminal Division of the Department of Justice. The OSI attorneys team with local United States Attorneys in seeking denaturalization and extradition, and they approach these cases as prosecutions. In fact, in correspondence and memoranda several of the respondents refer to their role in the Demjanjuk case as prosecutors.[208]

Wardius and *Brady* stand for a principle of informational reciprocity in criminal cases that is informed by and informs the civil context. *Wardius* imported the "level playing field" notion from the civil discovery context; *Brady* articulated a new principle of voluntary disclosure in criminal cases that has partially filtered into civil cases. There is no absolute right to discovery in either the civil or criminal context, but a case raises constitutional concerns when one side enjoys unilateral informational advantages over the other. If a party can establish that she was prejudiced by the one-sided system, she can prevail in a due process challenge.[209]

B. The Government's Informational Advantage in Removal Cases

The idea of the government maintaining a "file" on each person is one that we tend to associate with repressive totalitarian regimes like the former communist government of East Germany. But few would question the government's power to do so within the topsy-turvy constitutional world of immigration law. Indeed, DHS was created specifically to augment the government's capacity to gather and act on information about non-citizens. In the wake of the September 11 terrorist attacks, several themes coalesced: suspicion of non-

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[208] *Id.* at 354.

[209] *See* Strickler v. Greene, 527 U.S. 263, 281-82 (1999) ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."). A showing of prejudice has become a standard component for making out a due process violation in a variety of contexts. *See* Nicholas v. Immigration & Naturalization Serv., 590 F.2d 802, 809 (9th Cir. 1979) ("The alien has been denied the full and fair hearing which due process provides only if the thing complained of causes the alien to suffer some prejudice."); John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1160-65 (2005) (discussing prejudice standards in the context of ineffective assistance of counsel and *Brady* claims).

citizens, anger over the government's intelligence-gathering failures, and paranoia that terror could lurk anywhere. It should be no surprise that that the legal reforms that followed created a massive new domestic intelligence agency charged with many tasks previously unconnected to national security, including immigration adjudication.

The Homeland Security Act of 2002[210] melded the functions of 22 previously existing agencies into a new cabinet-level agency, the Department of Homeland Security.[211] A major purpose of the consolidation was to "[break] down ossified bureaucratic structures that previously impeded intelligence efforts" to identify future threats.[212] In addition to creating a new agency dedicated to gathering, analyzing, and sharing information, the Homeland Security Act contained an explicit mandate for "homeland security information sharing procedures."[213] According to the Act, "all appropriate agencies, including the intelligence community, shall, through information sharing systems, share homeland security information with Federal agencies."[214]

DHS now presides over an "information sharing environment"—a "network, with hubs known as 'fusion centers' whose federal and state analysts gather and share data and intelligence on a wide range of threats."[215] Of course, DHS is also many other more mundane things: airport security provider, customs regulator, emergency manager, and immigration benefit adjudicator. Yet this hybrid quality is exactly what makes it such an effective amasser of information, especially about non-citizens. It can archive the adjudication-related information it receives, conduct its own affirmative investigations, and mine the databases of its many sub-agencies and agency partners.

Non-citizens are particularly susceptible to DHS surveillance because they *have* to provide the government with information. First, they have to fill out visa applications with the Department of State just to get into the country.[216] Once in

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[210] Pub. L. No. 107–296, 116 Stat. 2135 (2002).

[211] Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 676 (2006).

[212] Citron & Pasquale, *supra* note 7, at 1442.

[213] 6 U.S.C. § 482 (2012).

[214] *Id.* § 482(b)(1).

[215] Citron & Pasquale, *supra* note 7, at 1443.

[216] *See* 8 C.F.R. § 222 (2014) (requiring visa applications); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 41.101(a)(1) ("An alien applying for a

the United States, they are required to register, be fingerprinted, and regularly inform the government of their whereabouts.[217] If they wish to apply for a more permanent immigration status, they often must undergo an interview with an immigration officer.[218] To become permanent residents, they must file a lengthy application form and submit financial data, criminal records, a medical report, and undergo an interview with a USCIS officer, who types up his or her notes of the interview for the A-file.[219] Asylum applicants go through especially lengthy interviews that are often tantamount to depositions,[220] because their cases are often referred to immigration court, where Trial Attorneys use the near-verbatim notes to cross-examine them.

This adjudication-related data is combined in the A-file with the results of DHS's investigations. Customs and Border Protection officers can interrogate non-citizens at the border and type up their findings in reports for the A-file. USCIS has a fraud unit to investigate persons applying for benefits under suspicious circumstances, including those believed to have a "green card marriage." DHS even has a forensic laboratory to test the validity of documents that non-citizens submit with their applications. The primary investigative arm of DHS, ICE, uses tactics ranging from factory raids to joint terrorism investigations with the FBI.

Increasingly, ICE enforces immigration law in collaboration with other federal, state, and local agencies. It has entered into 36 "Section 287(g) agreements" to deputize

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nonimmigrant visa shall make application at a consular office having jurisdiction over the alien's place of residence. . . .").

[217] 8 U.S.C. §§ 1302 (2012) (requiring aliens who are in the United States for thirty days or longer to apply for registration and be fingerprinted); 1304 (requiring registration forms to inquire as to: "(1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed."); 1305 (2012) (requiring aliens to notify the government of changes of address).

[218] *See* 8 C.F.R. §§ 204.1(f)(2) (noting that an interview may be required for petitions to establish a family relationship for purposes of adjustment of status applications); 208.9 (interview before an asylum officer); 244.8 (requiring the appearance before an immigration officer of an applicant for temporary protected status in some cases); 335.2 (2014) (requiring the examination of a naturalization applicant).

[219] 8 C.F.R. §§ 245.2 (general requirements for an application for adjustment of status); 245.5 (medical examination); 245.6 (2014) (interview).

[220] 8 C.F.R. § 208.9 (2014); *see also* Martins v. U.S. Citizenship & Immigration Servs., 2013 WL 3361269, No. C 13-00591 LB at *12 (N.D. Cal. July 3, 2013) (order granting plaintiff's motion for a preliminary injunction) (noting that asylum officer notes are typically a near-verbatim transcript of the interview).

state and local agencies to enforce immigration law.[221] ICE's "Secure Communities" program allows it to be immediately informed of any state or local police apprehension of a non-citizen: when police arrest a person, they run a fingerprint check with the FBI, which now forwards information about the request to DHS for it to check the immigration status of the arrestee.[222] If the person is a removable non-citizen, ICE issues a "detainer" for the state or local government to hold the person until ICE can apprehend her.[223] Through Secure Communities and "Section 287(g) agreements," ICE has woven a dense web of shared local, state, and federal information about non-citizens.

When ICE apprehends a suspected non-citizen, it typically interrogates the person and memorializes its findings in a document called an "I-213 (Record of Deportable/Inadmissible Alien)."[224] ICE need not inform non-citizens that they have a right to an attorney during interrogations that take place prior to the filing of the charging document.[225] Moreover, unlike illegal searches in a strictly criminal context, evidence obtained by ICE through searches and seizures that violate the Fourth Amendment can only be excluded from immigration court in egregious cases.[226] Even if an undocumented immigrant can meet this high threshold and show that she was searched in a manner that was not only illegal, but also egregious, it is extraordinarily difficult, as a practical matter, to get a removal case based on illegal evidence terminated. The reason for this is that the IJ will allow the government to proceed with its case so long as it has an independent source for evidence of

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[221] *See* IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, *available at* http://www.ice.gov/news/library/factsheets/ 287g.htm (last visited May 29, 2013).

[222] AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS, THE CHIEF JUSTICE EARL WARREN INSTITUTE OF LAW AND SOCIAL POLICY, UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW 1 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_ Numbers.pdf (last visited June 19, 2013).

[223] *Id.* at 2.

[224] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1035 (1984); Samayoa-Martinez v. Holder, 558 F.3d 897, 898 (9th Cir. 2009).

[225] Matter of E-R-M-F- & A-S-M-, 25 I. & N. Dec. 580, 583 (BIA 2011).

[226] *Lopez-Mendoza*, 468 U.S. at 1051 (non-egregious violations of the Fourth Amendment need not be suppressed in a deportation hearing). For an argument for overturning *Lopez-Mendoza's* holding, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624-27 (2010). For a discussion of the circumstances under which courts have found exceptions to the general holding of *Lopez-Mendoza*, see Jennifer Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803 (2013) [hereinafter KOH, RETHINKING REMOVABILITY].

alienage.[227] That source could be the statement of another person or the non-citizen's own in-court admission.[228]

New technologies have given the government unprecedented power to store, process, and share law enforcement information.[229] In March 2013, DHS established the Office of Biometric Identity Management to collect, store, and analyze biometric data.[230] DHS is in the process of digitizing its A-files,[231] meaning that it will be increasingly easy for it to store, search, share, and receive electronic documents from other federal agencies.

The practical implication of all this is that when Trial Attorneys prepare to cross-examine a non-citizen in an immigration case, they have at their disposal the equivalent of substantial discovery materials. They can review non-citizens' past applications, entry and exit data, medical examinations, tax forms, and written and oral statements. Inconsistencies between these documents and the non-citizen's in-court statements can serve as a basis for impeachment. If a non-citizen calls another non-citizen as a witness, DHS can pull up that person's file and comb through it for cross-examination material as well. It is likely that the future will bring even greater powers for DHS to monitor and archive information about non-citizens.

C. *An Argument for Informational Reciprocity in Removal Cases*

The Supreme Court has long recognized that there is a lot at stake in removal cases. Although it maintains that deportation is not "punishment,"[232] it has acknowledged that

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[227] Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 567 (2011).

[228] Matter of Carrillo, 17 I. & N. Dec. 30, 32 (BIA 1979).

[229] Danielle Keats Citron & David Gray, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262, 270 (2013).

[230] Agency Information Collection Activities: Office of Biometric Identity Management (OBIM) Biometric Data Collection at the Ports of Entry, 78 Fed. Reg. 22274-03, 22275 (Apr. 15, 2013).

[231] Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755-02, 1756 (Jan. 16, 2007).

[232] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

"deportation is a penalty—at times a most serious one."[233] Non-citizens in removal proceedings may be detained throughout the course of their proceedings, which can sometimes last for years.[234] Some individuals in removal cases have lived for many years in the United States, establishing homes, families, property, professional connections, and friends. Their country of origin may be a place they barely know, or it could be a place where they risk persecution or torture. If non-citizens lose their immigration court cases, they may be barred from returning to the United States.[235]

Because of their serious liberty interest, the Court has held that non-citizens in removal proceedings, like criminal defendants, are entitled to due process.[236] The formidable due process interests of non-citizens facing removal could, in some circumstances, give rise to *Brady*-type claims. The logic of *Brady* should apply in cases like *Dent*, where the government has evidence in its possession that either rebuts the government's charges or relates to the immigration court equivalent of mitigation—positive discretion. Discretion comes into play in immigration court when a non-citizen is eligible for a discretionary benefit like asylum, cancellation of removal, or adjustment of status.[237]

Although *Brady* is primarily a tool of criminal law, it has been used in civil cases that resemble criminal ones, like the extradition and denaturalization case *Demjanjuk v. Petrovsky*.[238] In *Demjanjuk*, the court was swayed to apply *Brady* because of the possible criminal penalty that awaited *Demjanjuk* upon extradition to Israel, as well as by the prosecutorial mindset of the Department of Justice Office of Special Investigations attorneys who handled the case.

There are a number of parallels between extradition and denaturalization, and deportation. Like the OSI attorneys in *Demjanjuk*, Trial Attorneys act as prosecutors in removal cases. Just as extradition is a civil process for the purpose of

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233 Bridges v. Wixon, 326 U.S. 135, 154 (1945).

234 *See* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 944 (9th Cir. 2010).

235 8 U.S.C. § 1182(a)(9)(A) (2012).

236 Reno v. Flores, 507 U.S. 292, 306 (1993); Landon v. Plasencia, 459 U.S. 21, 32-33 (1982); Yamataya v. Fisher, 189 U.S. 86, 101 (1903). Of course, a paltry amount of process has at times satisfied the Court; in *Yamataya v. Fisher*, the Court thought hearing proceedings sufficient despite the fact that the respondent could not understand them because she did not speak English. *Yamataya*, 189 U.S. at 101-02.

237 8 U.S.C. §§ 1158 (asylum); § 1229b (cancellation of removal); § 1255 (adjustment of status).

238 10 F.3d 338 (6th Cir. 1993).

facilitating criminal prosecution, there are various ways in which criminal and immigration law overlap.[239] Moreover, the civil penalty of deportation has obvious parallels to extradition and denaturalization. The stakes in all three types of cases are high; although most deported non-citizens will not be prosecuted in their home countries as extradited persons are, they may face persecution or torture, not to mention separation from their homes and families in the United States.[240] Thus, there are good reasons to adopt *Brady* in the quasi-criminal world of removal proceedings.

However, the more common lens for analyzing discovery claims in the civil context is the procedural due process test set out in the post-*Brady* case *Mathews v. Eldridge*.[241] In *Mathews*, the Court created a balancing test for weighing the importance of the individual's and government's interests, together with "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[242] Although the Supreme Court has rejected this test in the criminal context,[243] it is commonly used to assess claims for discovery in civil cases, including administrative ones.[244]

Discovery has become so widespread in other administrative courts that it arguably has become a staple of

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[239] *See* Gabriel J. Chin, *Illegal Entry as Crime, Deportation As Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1292-93 (2010); César Cuauhtémoc Garcia Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[240] *See* Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.").

[241] 424 U.S. 319, 335 (1976).

[242] *Id.*

[243] Medina v. California, 505 U.S. 437, 446, 448 (1992).

[244] *See* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1036 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 840 (2013) (applying the *Mathews* factors to a challenge to the lack of discovery in Veterans Administration hearings and finding no violation); Marroquin-Manriquez v. Immigration & Naturalization Serv., 699 F.2d 129, 134 (3d Cir. 1983) (paraphrasing the *Mathews* test (without citing *Mathews*) and finding that a non-citizen was not denied due process when an immigration judge denied his request for letters rogatory and subpoenas duces tecum); Archuleta v. Santa Fe Police Dep't *ex rel.* City of Santa Fe, 108 P.3d 1019, 1030-32 (N.M. 2005) (applying *Mathews* factors to reject claim for discovery in administrative proceeding for demotion of police lieutenant); State *ex rel.* Hoover v. Smith, 482 S.E.2d 124, 128, 134 (W. Va. 1997) (applying *Mathews* factors to a due process claim for discovery depositions in physician disciplinary proceedings and finding that due process may require discovery in particular cases).

basic due process in that context. However, in immigration cases, just as in criminal cases, a litigant must show prejudice in order to prevail upon a due process challenge.[245] It is partly for this reason that no court has ever held that the Constitution categorically entitles criminal defendants to discovery. In some cases, like *Brady*, prejudice was apparent, but for the most part, discovery yields insights more incremental than a smoking gun. It simply is not possible to show prejudice in every case where criminal defendants are denied discovery, and the same is true in immigration cases.

Nonetheless, a combination of legislative and court reforms and judicial decisions led to the gradual institution of discovery in criminal cases. The logic behind that movement weighs equally in favor of discovery in immigration court cases: the federal government enjoys enormous informational advantages over non-citizens. One way to equalize the balance of power would be through granting non-citizens modest discovery rights.

The *Mathews* framework is a useful way to consider the wisdom of adopting discovery in immigration court—both because it is the lens that courts will likely apply to individual litigation claims for discovery and because it shows that a general adoption of discovery makes good policy. The remainder of this section weighs non-citizens' interest in additional discovery procedures against the government's interest in limiting discovery. Although courts are unlikely to find that discovery is categorically required in immigration court, the *Mathews* factors suggest that it may be constitutionally mandated in many cases.

1. Non-Citizens' Interest in Discovery

Cases like *Dent v. Holder* show that the government will often have documents in its possession that could help non-citizens avoid deportation. A long forgotten petition filed by a relative might give rise to a claim for residency, but without looking at the A-file, this claim might be missed.[246] The A-file frequently contains old applications and forms that establish the

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[245] *See* Estes v. State of Tex., 381 U.S. 532, 542 (1965) ("[I]n most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused."); Nicholas v. Immigration & Naturalization Serv., 590 F.2d 802, 809 (9th Cir. 1979) ("The alien has been denied the full and fair hearing which due process provides only if the thing complained of causes the alien to suffer some prejudice.").

[246] *See* CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE, §§ 31.03 (procedures for acquiring immigrant status); 41.01 (requirements for family-based visa petitions).

key facts necessary to seek affirmative relief in immigration court. For example, a non-citizen may not be able to show that she meets the requirement of seven years of lawful residency for "cancellation of removal" unless she has the government's memo granting her some form of lawful status.[247]

A-files also contain copies of non-citizens' past statements, in the form of application forms, interview notes, and transcripts of statements taken by ICE during its investigations. Credibility is a central issue in most removal proceedings,[248] and TAs often try to chip away at applicants' credibility by scouring these past statements for inconsistencies. In order to prepare for this type of cross-examination, non-citizens need to know what they said (or were thought to have said).

Opponents to discovery might note that much of the information cited above consists of the non-citizens' own documentation. They might argue that the non-citizen should keep her own records, meaning that her interest in getting these documents back is really not so weighty at all. This objection does not seem to have carried the day in other similar contexts, like the Tax Court, where taxpayers can obtain copies of forms and records through discovery that they had a legal obligation to maintain.[249] Even relatively sophisticated non-citizens might not maintain records for the decades that sometimes pass before a person is placed in removal proceedings. In immigration law, events that occurred many years ago often have a heightened significance that non-lawyers rarely grasp.

The government's file may also contain helpful information that the non-citizen could not possibly have. For example, the government may have records showing that it committed investigatory abuses that give rise to a claim for suppression of evidence. Heightened immigration enforcement in recent years has led to many questionable law enforcement practices.[250] As a result, a growing number of non-citizens are challenging their

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[247] *See* 8 U.S.C. § 1229b(a) (2012) (providing that in order to seek cancellation of removal for lawful permanent residents, an LPR must show five years of residence as an LPR and seven years of residence in any lawful status).

[248] *See, e.g.*, Diallo v. INS, 232 F.3d 279, 290 (2d Cir. 2000) (noting the centrality of credibility to asylum adjudications).

[249] *See* TAX COURT RULES, *supra* note 67, at 72 (allowing for production of documents, electronically stored information, and things); INTERNAL REVENUE SERVICE, PUBLICATION 552, RECORDKEEPING FOR INDIVIDUALS (2011) (setting out the types of records that taxpayers should keep).

[250] Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1124-40 (2008).

removability by seeking to suppress evidence of their alienage that the government obtained through unlawful means.[251]

In summary, in many cases non-citizens will have a very strong interest in obtaining some documentary discovery. These include cases where the government has documents that are necessary to prove eligibility for an immigration benefit, where credibility is a central issue so that the government is likely to cross-examine the non-citizen concerning her prior statements that the government has in its possession, or where the government may have committed investigatory abuses that could give rise to a suppression of evidence claim.

2. The Government's Interest in Limiting Discovery

Discovery opponents will argue that the government has several interests that weigh against discovery, including efficiency, preventing perjury, national security, and protecting its law enforcement methods and sources. Consideration of each of these arguments shows them to be insufficient to weigh against discovery.

a. Administrative Efficiency

Administrative hearings often involve summary procedures. In the interest of speed and efficiency, rules of evidence are often relaxed, and timeframes for litigation condensed. Thus, an argument against discovery in immigration court cases could be made based on their administrative character. However, a host of other agencies provide extensive discovery and the language and legislative history of the Administrative Procedure Act support the principle of informational reciprocity outlined above.

As set out in Part I, the trend in agencies seems toward broadening, not restricting, discovery.[252] Even the National Labor Relations Board, which is the most commonly cited example of an agency that restricts discovery rights, provides more discovery than immigration courts.[253] The NLRB's rationale for not granting more liberal discovery is to prevent employers and unions from using it to intimidate employees—a theory that obviously does not apply in the immigration setting, where the power dynamic

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[251] KOH, RETHINKING REMOVABILITY, *supra* note 226.

[252] *Supra* Part I.

[253] *See* NLRB Rule 102.31 (allowing for the issuance of subpoenas without any showing of exhaustion of other remedies, as required under immigration law).

between non-citizens and the government is the opposite of that between employers and employees.

The language and the legislative history of the APA support discovery in the immigration setting because they suggest that Congress was concerned with maintaining parity in administrative litigation between government agencies and private parties. The APA states that "[e]xcept as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons."[254] The Senate Committee Report states that the subpoena provision, Section 6(b), was designed to:

> Assure that private parties as well as agencies shall have a right to such subpoenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purpose.[255]

Commentators have asserted that, when managed appropriately, discovery increases rather than reduces efficiency.[256] It is certainly possible that discovery could slow litigation down, but in some cases slowing a case down in the short term may result in savings over the long term. For example, had the government produced parts of the A-file in the *Dent* case at the immigration court level, it might have averted years of litigation.

Moreover, the current system seems far from efficient. As it stands, every time a non-citizen files a FOIA request in a removal case, the A-file is transferred from the ICE Office of Chief Counsel to USCIS and back. The employees at the centralized FOIA office in Missouri may not understand the case as well as the attorneys and paralegals in a local office, and thus may withhold or redact inappropriate documents or disclose documents that should be protected. File transfers may cause costly delays in the litigation that disadvantage the government as much as the respondent because transfer occurs regardless of whether there is an upcoming court hearing and TAs will not proceed with such a hearing without the A-file. Moreover, under the current system, resources go into the assignment of Track 3 status, whereas if discovery was handled

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[254] 5 U.S.C. § 559 (2012).

[255] S. DOC. NO. 248, at 27. For parallel House Committee statement, see *id.* at 206.

[256] Bernard J. Gallagher, *Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 ADMIN. L. BULL. 44, 47 (1959); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 274 (2006).

by the prosecuting attorneys pursuant to court order, the timing would be automatically synced to the schedule of litigation.

b. Perjury

One of the original arguments against discovery in criminal cases was that defendants would tailor their testimony to the information they obtained. This claim can be made in immigration court cases as well: non-citizens might change their affidavits and in-court testimony to make sure they are consistent with the prior statements contained in their immigration files. They might analyze investigators' or forensic analysts' reports with an eye to thinking up plausible explanations they could give in court. This would allow non-citizens with invented stories to seem more credible than they actually are.

The perjury argument was ultimately debunked in the criminal context. Commentators noted in the criminal discovery debate that the government often has a defendant's statement, which it can use to impeach the defendant if he or she gives a different account in court. Even before discovery became widespread in criminal cases, courts recognized that the government had little interest in withholding this statement from the defendant:

> When a person is attempting to discover his own statements some of the reasons for not allowing discovery are eliminated. There is no danger to government informants; there is no fishing expedition; there is no unfairness in giving the defendant the right to discovery (a right not available to the government because of the Fifth Amendment), when the information sought to be discovered has been obtained by the government with the defendant's cooperation.[257]

The perjury argument seems in tension with the widely acknowledged purpose of discovery: to prevent surprise. It assumes that the government has a right to surprise non-citizens with inconsistencies between their in-court testimony and past statements. This argument has been rejected in every other context in which it has been raised, so if it is to succeed here, it must do so because of factors unique to the immigration setting.

Some might contend that the unique nature of removal proceedings distinguishes them from other types of cases. The government has a vast docket of removal cases, and might

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[257] Loux v. United States, 389 F.2d 911, 922 (9th Cir. 1968); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE § 11-2.1(a)(ii) (3d ed. 1996), and Commentary thereto at 15-19.

argue that it is unable to investigate the claims of every non-citizen. It cannot send an investigator, for example, to China, to inquire whether an asylum applicant was truly a member of a particular church as claimed. Surprising the applicant in court with her past inconsistent statements is the government's one tried and true means of challenging an asylum applicant's credibility. DHS might, for example, confront the Chinese asylum applicant with her past statement to an asylum officer that she belonged to a church with a particular name different than the name she gives in court. Some might argue that tripping applicants up in inconsistencies like this is the only realistic screening tactic the government has at its disposal.

The problem with this theory is that cross-examination is an adversarial technique that can create the impression of inconsistency where there in fact is none. For example, the applicant who gave a different name for her church might be able to explain that either name is an acceptable translation or that both names are used. But in the stress and confusion of cross-examination via an interpreter, she may be unable to articulate these explanations. Although many believe that it is reasonable to expect a person to give a correct answer on cross, asylum applicants face unique challenges, including language difficulties, post-traumatic stress, and the elusive character of painful memories.[258] Given adequate warning, the applicant's attorney could work with her in advance to address a perceived inconsistency. Without warning, the best the attorney might be able to do is file a post-trial motion for reconsideration giving the post-hoc explanation, which might therefore seem less reliable.

The problem of false impressions created by cross-examination is aggravated by the fact that the statements TAs rely on are not fully verbatim; they might contain errors. Even if correctly transcribed, they might reflect translation errors or misstatements made because of language problems. One solution would be for immigration courts to use non-adversarial procedures in removal cases. But as long as hearings are adversarial, non-citizens' must be given access to the tools that go along with the adversarial process, like discovery.

It is also untrue that surprise is the government's only option for defeating false claims. The government has enormous investigatory resources at its disposal, including the State Department's research concerning countries, and diplomatic offices

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[258] *See* Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. HEALTH & BIOMEDICAL L. 37 (2010).

in those countries. TAs rarely take full advantage of the resources at their disposal, but that may be due to the culture in TAs' offices of relying on the tactic of surprise instead of preparation.

Ultimately, the perjury argument should be no more persuasive in the immigration context than it has been in civil and criminal cases, where courts decided that avoiding surprise was precisely the value of discovery.

c. National Security and Law Enforcement

Courts have long cited national security as a justification for treating removal cases differently from other types of litigation. In *Mezei*, the Court upheld the more or less indefinite detention of a non-citizen who had been ordered excluded from the United States based on evidence that supposedly could not be disclosed without hurting national security.[259] The same argument might be made against systematic discovery in removal cases. But the government already has the right under the INA and FOIA to withhold information that would risk national security.[260] A non-citizen's right to increased discovery would not change this.

The same response would apply to other arguments about law enforcement privilege. If the government has a need to protect its law enforcement sources and methods it could raise this as a basis for refusing to disclose or for redacting certain documents. But law enforcement privilege is not a legitimate argument against all disclosure; it is an argument against particular disclosures that could reveal the identity of confidential government informants or undermine ongoing investigations. Courts could assess these claims on a case-by-case basis, as they have done for decades in the civil and criminal discovery contexts.

As the government has grown, so too has its capacity to gather information. The investigative powers that mid-twentieth century commentators pointed to as grounds for increasing criminal discovery rights turned out to be just the

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[259] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208, 215 (1953).

[260] 8 U.S.C. §§ 552(b)(7) (2012) (making exempt from disclosure under FOIA law enforcement records, including information that could reasonably be expected to disclose the identity of a confidential source in "a lawful national security intelligence investigation"); § 1229a(b)(4)(B) (the alien's right under the INA to examine the evidence against her does not entitle her "to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter").

initial steps on the way to a new surveillance state.[261] Technology has created new ways for the government to monitor the affairs of private persons, and, in the name of national security, DHS can subject non-citizens to more aggressive and coercive methods of interrogation and monitoring than it can citizens. Moreover, in its role as benefit adjudicator, DHS can simply demand information from non-citizens, who must comply if they are to remain in the country and improve their legal status. In order to equalize the massive disparity in information gathering power that the government has over non-citizens, there should be increased discovery rights in immigration court. None of the common objections to discovery—efficiency, perjury, law enforcement, or national security—weigh against granting non-citizens discovery rights.

IV. DISCOVERY REFORM

After enactment of the Immigration and Nationality Act in the early 1950s, the discovery available in immigration cases was consistent with general trends in administrative law. At the time, discovery was a relatively new phenomenon in civil cases and had not yet come to be adopted in criminal ones. Enacted in 1946, the Administrative Procedure Act had cautiously adopted minimal discovery provisions allowing for the issuance of subpoenas and for administrative officers to take evidence depositions.[262] The INA and its regulations mirrored this framework.[263]

In the years since, other administrative courts have come to embrace liberal discovery processes similar to those in civil litigation.[264] In contrast, immigration courts have hewed to the 1950s framework, which has been narrowly interpreted at that.[265] If non-citizens in removal proceedings want discovery, they must utilize a collateral and highly bureaucratic FOIA process that is marginally useful for represented respondents who are not in detention and useless for detained and pro se respondents.

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[261] *See* DANIEL J. SOLOVE, THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE 96 (2004), *available at* http://docs.law.gwu.edu/facweb/dsolove/Digital-Person/text.htm. "[T]the growing use and dissemination of personal information creates a Kafkaesque world of bureaucracy, where we are increasingly powerless and vulnerable, where personal information is not only outside our control but also subjected to a bureaucratic process that is itself not adequately controlled." *Id.*

[262] Pub. L. No. 79–404, 60 Stat. 237, §§ 6(c), 7(b) (1946).

[263] 8 C.F.R. § 242.53(a)(2), (4) (1952).

[264] *See supra*, note 65.

[265] *See supra*, note 78 (collecting cases rejecting discovery requests).

It is time for immigration courts to modernize with respect to discovery. The question remains how they should do so. Procedurally, there are three principal routes to reform: legislative action, litigation, and administrative action. Substantively, the following questions must be answered: what documents should be disclosed; when should they be disclosed; who should handle the disclosure; and what discovery beyond document production should exist? This section will consider both the routes to reform and the substantive shape that reform might take.

A. The Process for Reform

In other contexts, discovery has mostly arisen through some combination of court decisions and court or administrative reforms.[266] Congress, however, could also create some discovery process for immigration court if, and when, it again takes up the gauntlet of immigration reform.

1. Legislative Action

In 2013, the U.S. Senate passed a sweeping overhaul of immigration law: Senate Bill 744, or the Border Security, Economic Opportunity, and Immigration Modernization Act. The bill, which stalled in the House, contained a provision requiring DHS to essentially disclose the entirety of the A-file at the beginning of removal proceedings in every single case.[267] Section 3502 of SB 744 would have revised the INA to bar removal proceedings from going forward unless a non-citizen had been provided the A-file and other relevant documents or executed a knowing waiver of her right to those documents.[268]

It exempted from disclosure all "documents protected from disclosure by privilege," but only vaguely defined "privilege."[269] More problematically, Section 3502 gave no indication of whether or how DHS would notify non-citizens

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[266] *See infra*, Part I.

[267] Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Congress § 3502(b) (2013).

[268] *Id.*

[269] *Id.* It defined "protected by privilege" to include (but perhaps not be limited to) "national security information," "law enforcement sensitive information," and "information prohibited from disclosure pursuant to any other provision of law." *Id.* It did not define any of these terms, and a broad reading of them could virtually eviscerate the provision. For example, many of the documents that are most necessary to non-citizens in removal cases could arguably be described as "law enforcement sensitive," such as the statements that ICE takes when it apprehends non-citizens, background check reports, and statements from fraud-investigators or forensic analysts.

that it was withholding documents based on privilege or whether the immigration judge would have a role in evaluating DHS's assertions.

The discovery provision in SB 1070 may have left some important questions unanswered, but it was the first interest Congress has shown in addressing this problem, which is off the radar for most immigration reform advocates and opponents. The immigration policy debate tends to center on two controversial topics: border security and a pathway to citizenship. That is both a good and a bad thing when it comes to the odds of legislative action on immigration court discovery; discovery may not be a particularly controversial topic, but it is also one that will never generate a passionate choir of voices in its favor.

2. Litigation

As discussed above, there are several litigation angles that non-citizens could use to challenge a denial of discovery. First, they might argue that the quasi-criminal nature of removal proceedings supports extension of *Brady* to removal cases where the government has evidence in its possession that either rebuts removability or is relevant to the immigration law equivalent of mitigation: positive discretion. The Sixth Circuit's *Demjanjuk* case stands out as an example of a court applying *Brady* where there are enough parallels between a civil case and a criminal one.[270] The Ninth Circuit's *Dent* case seems to follow the logic of *Brady* in finding a due process right to the A-file, although the Court did not discuss *Brady*.[271]

The *Mathews* factors also support modest discovery rights like disclosure of non-privileged parts of the A-file.[272] The powerful trend in favor of agency court discovery shows that non-citizens have a strong interest in discovery and the government has a limited interest in opposing it. The Administrative Conference of the United States has favored agency court discovery since 1963,[273] the FTC and FCC have had generous discovery regulations since the late 1960s,[274] the Model State Administrative Procedure Act has contained

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[270] Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

[271] Dent v. Holder, 627 F.3d 365, 374-75 (9th Cir. 2010).

[272] *See supra* Part III.C.

[273] Admin. Conf. of the United States, Final Report, in S. Doc. No. 24, 88th Cong., 1st Sess., Recommendation No. 30 (1963).

[274] 16 C.F.R. § 3.31 (1968) (Federal Trade Commission); 47 C.F.R. § 1.311-1.325 (1969) (Federal Communications Commission).

liberal discovery provisions since 1981,[275] and a host of federal agencies today allow discovery that mirrors, in most respects, the Federal Rules of Civil Procedure.[276] This trend reflects an emerging consensus that discovery may be required in agency court cases as a matter of due process.

There are doctrinal impediments to achieving a comprehensive right to discovery via litigation, like the requirement that a due process claimant show that she has suffered prejudice.[277] However, litigation could lead to incremental gains and provide impetus for more comprehensive administrative reforms.

3. Administrative Action

The government could and should reform the current system without waiting to be sued. The INA contains provisions that would support administrative discovery reforms: it includes a right for non-citizens to view the government's evidence[278] and to request subpoenas.[279] In the 1950s, the former Immigration and Naturalization Service adopted a regulation for taking evidence depositions,[280] and there is nothing stopping DOJ and DHS now now from instituting rulemaking to adopt a modern and comprehensive discovery system. The large number of other federal agencies that have done so provide additional support for DOJ and DHS to undertake discovery rulemaking. The next sections consider some of the issues the government should consider with respect to these reforms.

B. Recommendations for Reform

In order to make discovery work in immigration court, it needs to be incorporated into the litigation process. That means that effective reforms should center on shifting discovery from a collateral process to one that is managed by the IJ. To limit the administrative burden of discovery, it should not occur in every case, but only in those where the non-citizen has a prima facie defense to removal. Most discovery will likely involve document

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[275] Model State Administrative Procedure Act § 4-210(a) (1981).

[276] *See supra* note 66.

[277] *See* Nicholas v. Immigration & Naturalization Serv., 590 F.2d 802, 809 (9th Cir. 1979).

[278] 8 U.S.C. § 1229a(b)(4)(B) (2012).

[279] *Id.* § 1229a(b)(1).

[280] 8 C.F.R. § 242.53(a)(4) (1952).

production, but when there is good cause for doing so, the parties ought to also be able to move for interrogatories or depositions.

1. Integrated Discovery

It is essential that non-citizens' discovery requests be addressed by their opposing counsel, and not the USCIS FOIA unit. As discussed above, there are many problems with the collateral FOIA process. In the past, USCIS's FOIA unit appeared overwhelmed by requests, leading to lengthy delays. While it has improved its response time of late, it appears to have done so by shifting a major part of its workload to ICE, which has not been forthcoming with responses.[281] Assigning new discovery responsibilities to the FOIA unit would represent a considerable increase in the unit's workload, which would slow down the FOIA requests of persons who are not in removal proceedings, but who still have a pressing need for a copy of their A-file.

If USCIS is in charge of document disclosures, it will be difficult for IJs to control the timing and scope of discovery. IJs lack authority to order USCIS to do anything, let alone do something fast. While an IJ could arguably order the ICE Trial Attorney to turn over documents, TAs will likely insist that they do not have the file, because it has been sent to Missouri for the FOIA unit to handle disclosures. This problem might be solved in time with A-file digitization, but it is easy to envision most IJs deferring to the administrative structure that DHS has carved out for disclosure, and being reluctant to order TAs to turn over documents.

To make discovery work in immigration court, it must be integrated into the court process. This is, after all, the way that discovery works in every context except for immigration. Every criminal or civil state and federal court system authorizes judges to manage discovery and sanction parties for noncompliance.[282] Undoubtedly, this is the state of affairs because it is the only way to give discovery requirements teeth. If one had to appeal discovery violations to a distant non-judicial decision-maker, there would be little incentive on either party to comply with discovery requirements. Thus, the first and most important aspect to discovery reform must be to integrate discovery into immigration court procedures.

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[281] *See supra* Part II.C.2-3.

[282] *See, e.g.*, FED. R. CIV. P. 37 (discovery sanctions).

2. Scope of Disclosure

There are three major categories of documents that non-citizens will likely want in immigration court hearings: (1) copies of the non-citizen's prior statements; (2) documents related to the non-citizen's immigration status; and (3) the evidence that DHS will rely on for its case in chief at the hearing. A discovery rule for immigration court should require disclosure of these categories of documents in appropriate cases. Non-citizens ought to be able to demand production of relevant documents in the government's possession, regardless of whether or not they are in the A-file or whether the alleged custodian is an agency other than DHS.

a. The Non-Citizen's Prior Statements

The government must prove alienage in all cases,[283] and it has the ultimate burden in cases involving non-citizens charged as "deportable."[284] Because alienage is rarely contested, in the majority of immigration hearings the respondent testifies and presents a large amount of evidence, but the government often submits nothing and relies instead on cross-examination.

One of DHS attorneys' favorite cross-examination tactics is to ask the respondent about her prior statements on applications, in interviews, and on prior affidavits with an eye to highlighting inconsistencies. Often, as in asylum cases, the file contains virtually verbatim notes of prior USCIS interviews, meaning that DHS essentially has the benefit of a deposition transcript to rely on at the hearing.[285] Both civil and criminal disclosure rules require that a party turn over the adverse party's own prior statements of this type.[286] Therefore, a disclosure rule should require disclosure of any transcript or summary of the respondent's own prior statements, including interview notes, visa applications, and past affidavits.

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[283] 8 C.F.R. § 1240.8(c) (2014).

[284] *See* 8 U.S.C. § 1229a(c)(3) (burden of proof on the government in cases where the non-citizen is charged with a ground of deportation); Woodby v. INS, 385 U.S. 276, 277 (1966) (deportability must be established by evidence which is "clear, unequivocal, and convincing"). In contrast, non-citizens who are considered "applicants for admission" bear the burden of proof. *See* 8 U.S.C. § 1229a(c)(2). Non-citizens also bear the burden of proving eligibility for affirmative relief like asylum or cancellation of removal. 8 C.F.R. § 1240.8(d).

[285] *See supra* note 220.

[286] FED. R. CIV. P. 26(b)(3)(C); FED. R. CRIM. P. 16(a)(1)(A).

b. Documents Related to the Non-Citizen's Immigration Status

There are many types of immigration benefits that non-citizens can seek in immigration court. Some of the most common include: asylum, cancellation of removal, and adjustment of status. Asylum requires proof of a well-founded fear of future persecution.[287] There are two forms of cancellation of removal. One is available to unauthorized immigrants who have resided in the United States for 10 years and who have a United States citizen or lawful permanent resident family member who would experience "exceptional and extremely unusual hardship" if the non-citizen were deported.[288] Another is typically sought by lawful permanent residents with criminal convictions that would make them deportable, and is available to persons who have resided in the United States for five years as lawful permanent residents and seven years in any lawful status.[289] Adjustment of status is available to non-citizens who meet various complicated requirements, including an approved visa petition filed by an employer or relative.[290]

In order for a non-citizen to prove that she is eligible for these forms of relief, she often needs documents from her A-file. For example, she might need a copy of the memorandum of creation of lawful permanent residency to prove that she has been a lawful permanent resident for the five years necessary to apply for cancellation of removal. To apply for adjustment of status, she may need proof that a relative's visa petition has been approved. For asylum, she might need the file-stamped version of the asylum application she mailed to USCIS in order to prove that the application was received and filed within the one year required by statute. Therefore, a disclosure rule should require that DHS turn over past applications, decisions, memoranda, and other documents related to the non-citizen's immigration status.

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[287] 8 U.S.C. §§ 1101(a)(42)(A) (defining "refugee"); 1158(b) (providing for a grant of asylum to a "refugee").

[288] *Id.* § 1229b(b)(1)(D).

[289] *Id.* § 1229b(a)(2).

[290] *Id.* § 1255.

c. Documents That DHS Will Rely On

The government may submit evidence in immigration court. For example, when DHS alleges that a non-citizen has entered the United States or tried to obtain an immigration benefit through fraud, it may call its investigators to testify. In some asylum cases, DHS will assert that the non-citizen's supporting documents are fraudulent, and call one of its forensic analysts to testify. In cases where the respondent has not conceded alienage, DHS might call an ICE agent to testify concerning admissions of alienage that a non-citizen made. In rare national security cases, DHS might call a government agent to testify about a non-citizen's ties to a terrorist organization. In these cases, DHS should have to submit copies of its investigative reports and memoranda, as well as any evidence it will rely on for its case in chief at trial.

3. Timing of Disclosure

In many cases non-citizens stipulate to removal or request voluntary departure early in the case.[291] While it is certainly true that some non-citizens who should have been eligible for relief may have been pressured into this decision,[292] the reality is that many non-citizens do not have a defense to removal. Even assuming that lack of representation and the pressure of immigration detention have skewed the statistics somewhat, they still overwhelmingly suggest that persons in removal cases tend to be removed. Fiscal year 2012 saw a marked decline in removals, and there were still more than twice as many removals or voluntary departure orders than grants of relief or termination.[293]

This suggests that the costs and rigors of discovery should be reserved for cases where the non-citizen has a viable defense. One way to do so would be to make disclosure optional, as in criminal cases, and to time it so that it occurs after the first master calendar hearing, when many cases are resolved by agreement or by the IJ's finding that the non-citizen does not qualify for any relief from removal. If the non-citizen can

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[291] Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 479 (2013).

[292] *See id.* at 514.

[293] In 24,963 cases, the cases were terminated; in 30,192 cases, the IJ granted relief; in 131,050 cases, the IJ ordered the respondent removed or granted voluntary departure. 2012 YEAR BOOK, *supra* note 1, at D2.

articulate a colorable defense to removal or explain how she might be eligible for some immigration benefit, she could invoke her right to disclosure, and the IJ could set a discovery schedule. In many cases, the non-citizen will need documents from the government's file to prove her case, so the threshold showing at the master calendar stage must necessarily be less than proof of eligibility for relief; a reasonable possibility that she is eligible ought to be enough.

If the non-citizen does invoke her right to disclosure, then it follows that she, too, should have disclosure responsibilities.[294] However, this should not require much change from the current status quo, because non-citizens are already required to file their application forms at master calendar hearings and to supplement them with all the additional evidence that they intend to present at least fifteen days prior to the final hearing.

4. The Availability of Other Discovery

Discovery depositions serve an important role in clarifying the issues in civil litigation,[295] and they might occasionally serve a similar function in immigration cases. Most administrative courts that have adopted comprehensive discovery provisions have mirrored the civil rules in allowing depositions, as well as interrogatories and requests to admit.[296] The immigration regulations already allow the taking of evidence depositions to preserve testimony, although they seem to require that depositions be taken by an "official" rather than an attorney.[297] Federal courts do not allow depositions, interrogatories, or requests to admit in criminal cases, and most states follow suit.[298] The primary objections to depositions in criminal cases seem to be cost and abuse of witnesses.[299]

These objections have minimal force in removal cases. First, the cost of allowing depositions for good cause is likely to be relatively low for the simple reason that the government

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[294] This is the approach used by the Federal Rules of Criminal Procedure, under which the defendant's discovery obligations are triggered by her request for disclosures from the prosecution. FED. R. CRIM. P. 16(b)(1)(A).

[295] William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 12 (1990).

[296] *See supra* note 66.

[297] 8 C.F.R. § 1003.35(a) (2014).

[298] Iowa, Missouri, New Hampshire, Florida, North Dakota, Vermont, Texas, and Arizona allow the taking of discovery depositions in criminal cases. *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 608 (2006).

[299] *Id.* at 613.

rarely calls witnesses in removal cases. If the government does not call a witness, there should be no basis for the non-citizen to request a discovery deposition. Moreover, the type of witnesses that the government calls are not likely to be intimidated by defense depositions, because they will most likely be government employees like ICE officers or forensic examiners.

If non-citizens can move for depositions, then it follows that DHS attorneys should be able to do so too. As a practical matter, the overworked DHS attorneys may not often have the time to take depositions, but it might not be a bad thing if they did. All too often, DHS cross-examinations resemble the lengthy and amorphous questioning common in depositions more than the short and tightly controlled cross-examinations that effective trial lawyers prefer. If TAs had a chance before a final hearing to question an applicant about her case, more cases might settle before the final hearing, conserving judicial resources.

Interrogatories also are likely to be useful in a fairly small subset of immigration cases. Many immigration cases do not involve disputed facts; the non-citizen often concedes to charges that she is present without admission, has overstayed a visa, or has been convicted of a criminal offense. The cases where interrogatories would seem most useful are the ones where the government has alleged fraud, misrepresentation, illegal voting, alien smuggling, terrorism, or some other affirmative misconduct. The government's charging document, called a "Notice to Appear,"[300] is typically sparse, so it may be helpful to have a written explanation of the government's theory in cases like these. Courts could control the time and expense associated with interrogatories by limiting the number and restricting them to cases where the respondent can show good cause for them.

The overuse of discovery might bog down removal cases, but the judicious use of pre-hearing disclosures, interrogatories, and depositions could increase efficiency. The collateral and bureaucratic FOIA process requires no input from TAs, meaning that they have no obligation to familiarize themselves with removal cases until days before the hearing. If TAs had to respond to discovery requests, they would learn about cases earlier. At a minimum, the parties could narrow and clarify the issues, and in some strong cases DHS might even be moved to settle, eliminating the need for a final hearing.

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[300] DHS institutes removal cases by filing a "Notice to Appear" with the Office of the Immigration Judge. *See* 8 U.S.C. § 1229(a) (2012).

CONCLUSION

Because there is little real discovery in immigration court cases, non-citizens often go to the final hearing with no idea of what to expect. It is difficult for non-citizens to even obtain copies of their own past statements before the hearing, because the FOIA process is slow and often results in disclosures that are so heavily redacted as to be useless. TAs seem to have little time to prepare for hearings, and their preparation appears to center on reviewing precisely the documents that non-citizens are unable to get through FOIA. When TAs find inconsistencies in these documents, they submit them as impeachment evidence. Essentially, TAs compensate for their lack of preparation time by relying on the tactic of surprise.

This sort of gamesmanship was common in nineteenth century litigation, but it has long since fallen out of practice in other courts. First in civil, then in criminal cases, courts came to embrace liberal pre-trial discovery. Courts overcame their initial wariness of discovery in criminal cases when it became obvious that the state's investigative powers gave it a considerable informational advantage over defendants. DHS's informational advantage is, if anything, more significant than that enjoyed by prosecutors and the police. Its A-file is a compendium of biographic, criminal, medical, financial, and immigration information gleaned through a network of cooperating federal, state, and local agencies.

If DHS attorneys have a one-way view into non-citizens' lives, there is a real danger that the credibility determinations and factual findings of IJs will be distorted. The truth-finding capacity of adversarial hearings depends on the parties having relatively equal resources at their disposal. Some non-citizens' representatives make up for the informational disparity in immigration cases by working far harder on the case than any DHS attorney is able to, given the size of the average TA's docket and other responsibilities. But justice of this sort cannot be systematically sustainable. The majority of non-citizens will always either be unrepresented or represented by private attorneys who charge too much for non-citizens to afford extraordinary efforts. A rational adversarial system does not reward surprise or attrition tactics, and it requires that both sides know all the facts before a hearing. Truth-finding needs a clear window, not a one-way mirror.