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THE FORGOTTEN FISA COURT: EXPLORING THE INACTIVITY OF THE ATRC

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The Alien Terrorist Removal Court was established in 1996 after immense political pressure from the Reagan, Bush, and Clinton administrations and wide bipartisan support to serve as a forum to prosecute the most complex and difficult national security immigration removal cases while protecting vital classified information from public disclosure. Yet, after twenty-three years, this Article III court has not heard a single case.

This article provides a fresh and critical inquiry into this veritable zombie court that has fallen from the public consciousness, yet still exists with a standing cadre of designated judges. It fills a significant gap in the conjunction of national security and immigration literature as the most comprehensive scholarly inquiry that has been done on the ATRC. Our novel conclusions include the reasons why the court has not ever heard a case and an analysis into its continued legitimacy despite subsequent War on Terror-era enactments that streamline the removal of most classes of noncitizen national security threats. We uniquely establish that the ATRC was dead on arrival due to its unworkable, yet legislatively remediable procedural flaws. We examine the dynamic history of this forgotten court, analyze its structure, and propose commonsense legislative revision that would render this important national security law enforcement tool viable.

I. INTRODUCTION

After twenty-three years and despite an always-ready cadre of five federal judges, the Alien Terrorist Removal Court (“ATRC”) has not heard a single case.³ The ATRC is an Article III body⁴—distinct from the administrative immigration

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³ Not only has the ATRC never heard a case, it has also never received or considered an *ex parte*, sealed application from the Department of Justice to initiate proceedings. FED. JUDICIAL CTR., ALIEN TERRORIST REMOVAL COURT, 1996-PRESENT, <https://www.fjc.gov/history/courts/alien-terrorist-removal-court-1996-present> (last visited April 11, 2019) (“As of 2018, the removal court had never received an application from the Attorney General for the removal of an alien terrorist, and had therefore conducted no proceedings.”).

⁴ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982) (quoting U.S. CONST. art. III, § 1) (Brennan, J. with whom Marshall, Blackmun, and Stevens, JJ. joined; Rehnquist, J. concurring in the judgment, with whom O’Connor, J., joined) (describing the necessary attributes for the exercise of the judicial power of the

courts—that exists to adjudicate civilly prosecuted alien⁵ deportation hearings within which the government can use classified evidence against alleged terrorists without exposing national security information to the defendant or to the public.⁶ Established by the Antiterrorism and Effective Death Penalty Act of 1996, and with a design that was heavily influenced by the Foreign Intelligence Surveillance Court to the degree that it was intended to be populated by the same judges,⁷ the court’s statutory predicate was championed at the request of President Clinton by then-Senators Joe Biden and Bob Dole. This article uniquely establishes that the ATRC was dead on arrival due to its unworkable—yet legislatively remediable—procedural flaws. We will examine the dynamic history of this forgotten court, analyze its structure, justify the continuing need for it in light of substantial intervening legislation, and lastly propose a commonsense legislative revision that would render this important national security law enforcement tool viable.

In particular, there is still a continuing need for an ATRC to remove certain terrorist lawful permanent residents (LPRs). Though intervening statutes, such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁸ and

United States). Though some describe the ATRC as an “Article I court” based on the fact that it was created by Congress, e.g., Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2178 (2006), “given that the court is staffed entirely by Article III judges serving in [an] adjudicative role, it appears likely that the Alien Terrorist Removal Court would be considered an Article III court,” see ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 8, n.64 (2014) (citing *United States v. Cavanagh*, 807 F.2d 787, 792 (9th Cir. 1987)). In a similar fashion to its creation of the ATRC, Congress “relied on its Article III power to ‘ordain and establish’ the lower federal courts when it created the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR)[.]” and “[e]ven though these [the FISC and FISCR] courts sit only to hear a hyper-specialized set of cases, there is no question that they are Article III courts, since they are staffed by Article III judges and exercise ‘the judicial power of the United States.’” STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 647 (6th ed. 2016) (citing *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) (“Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III[.]” (footnote omitted))).

⁵ The Court recently utilized the term “noncitizen” in the place of “alien” to “refer to any person who is not a citizen or national of the United States.” *Pereira v. Sessions*, 138 S. Ct. 2105, 2109-10 n.1 (2018). This article utilizes the term “alien” only when its use is inextricably intertwined with the nuances of the statutory scheme that it examines.

⁶ 8 U.S.C. §§ 1531-1537.

⁷ Lawrence E. Harkenrider, *Due Process or “Summary” Justice?: The Alien Terrorist Removal Provisions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 TULSA J. COMP. & INT’L L. 143, 146 (1996) (“The removal court is modeled after the seven-member secret court set up under the Foreign Intelligence Surveillance Act of 1978 (FISA).”).

⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

the USA PATRIOT Act,⁹ have provided alternative means to criminally prosecute and/or remove noncitizens who otherwise would be theoretical candidates for the ATRC, there is no other law enforcement recourse for certain terrorist LPRs than this specialized national security court. In particular, there is no recourse to remove LPRs against whom the sole evidence of their terrorist identity is FISA-obtained or derived or foreign intelligence information that is not appropriate for declassification or public acknowledgment.

The ATRC statutes, however, are flawed in two dispositive ways. First, the conjunctive findings necessary for the United States to proceed with an ATRC removal proceeding where the court does not approve of the government's proposed unclassified summary of key evidence should be styled in a disjunctive formulation. Under the current scheme, the ATRC must find both that,

(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.¹⁰

The conjunctive provisions situate the government in the same type of “Catch-22” dilemma that justified the ATRC's creation in the first place—the untenable choice between disclosing and risking sources and methods underlying national security information versus the removal of alien terrorists. As evidenced by decades of non-use, the burden placed on the government by this conjunctive provision is too high and renders the ATRC unviable.¹¹

Second, the language that describes the threat posed by the disclosure of the needed classified evidence establishes a problematically unclear level of classification. The ATRC statutes use the phrase “serious and irreparable harm to the national security.”¹² That standard appears to exist somewhere between the standards for classifying evidence as “Secret”—“serious damage” to the national security—and “Top Secret”—“exceptionally grave damage” to the national security). In light of these settled standards for classifying evidence that have existed for more than forty years,¹³ Congress should incorporate this normative formulation of classification to provide clarity to both the Department of Justice and the court regarding what type of classified evidence it contemplates being sufficient for proceeding without a summary.¹⁴

⁹ Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

¹⁰ 8 U.S.C. § 1534(e)(3)(D)(iii).

¹¹ See *infra* § IV.A.

¹² 8 U.S.C. § 1534(e)(3)(D)(iii).

¹³ See Exec. Order No. 12,065, 43 Fed. Reg. 28949 (June 28, 1978) (enumerating the types information that can be classified and the classification levels); see also Exec. Order. No. 8,381, 5 Fed. Reg. 1147 (Mar. 22, 1940) (establishing certain military information as “‘secret, ‘confidential,’ or ‘restricted’”).

¹⁴ See *infra* § IV.B.

Additionally, while making the foregoing critical revisions, Congress should make other minor changes related to the use of classified evidence in ATRC decision-making to clarify its original intent.¹⁵ For example, the ATRC statutes should be revised to clarify that classified evidence submitted to the court for *in camera* and *ex parte* review may be part of the basis for the court's decision, which—despite being the undisputed animating purpose of the ATRC—presently is only implied.¹⁶

This proposal is a precise and narrow solution that would render the ATRC a viable forum for the nation's most difficult national security immigration removal cases, maintaining an irreducible minimum of due process afforded by providing initial and direct Article III judicial involvement and oversight. These solutions, along with the underlying statutes, are designed to be constitutionally compatible, but also minimalist to achieve the court's operability in a non-politicized way. The ATRC was never intended to be a high-volume court used for run-of-the-mill removal cases. It *was* intended to be a viable option for removing noncitizens who posed the greatest threat to the national security without having to compromise national security information and sources to do so.

II. HISTORY & FRAMEWORK OF THE ATRC

A. The Legislative Story of the ATRC

The ATRC was created to address a “recurring problem experienced by the Department of Justice”—the inability to use classified information obtained in the course of antiterrorism investigations in removal proceedings without putting at risk the sources and methods responsible for such information.¹⁷ Famously, in the

¹⁵ See *infra* § IV.C.

¹⁶ 8 U.S.C. § 1534(c)(5).

¹⁷ Steven R. Valentine, *Flaws Undermine Use of Alien Terrorist Removal Court*, 17 LEGAL BACKGROUNDER (Wash. Legal Found., Washington, D.C.), Feb. 22, 2002, at 1, <http://www.wlf.org/upload/022202LBValentine.pdf>. Indeed, the House Conference Report that accompanied the law that ultimately created the ATRC noted, “[t]he removal of alien terrorists from the United States, and the prevention of alien terrorists from entering the U.S. in the first place, present among the most intractable problems of immigration enforcement.” H.R. Rep. No. 104-518, at 115 (1996) (Conf. Rep.). The House Conference Report further stated that:

The stakes in such cases are compelling: protecting the very lives and safety of U.S. residents, and preserving the national security. Yet, alien terrorists, while deportable under section 241(a)(4)(D) of the INA, are able to exploit many of the substantive and procedural provisions available to all deportable aliens in order to delay their removal from the U.S. . . . In several noteworthy cases, the Department of Justice has consumed years of time and hundreds of thousands (if not millions) of dollars seeking to secure the removal of such aliens from the U.S. . . . The need for special procedures to adjudicate deportation charges against alien terrorists is manifest.

Id.

late 1980s, the Justice Department sought to deport a group of noncitizens in Los Angeles “for their activity on behalf of the Popular Front for the Liberation of Palestine (PFLP).”¹⁸ That group came to be known as the “L.A. Eight.”¹⁹ In January 1987, the Immigration and Naturalization Service (INS) arrested them for immigration violations and attempted to detain them pending removal proceedings.²⁰ The INS asserted that it had classified evidence that justified the detention, but an administrative immigration judge refused to consider such evidence and ordered their release.²¹

In 1988, the Ronald Reagan Administration first proposed the creation of a court comprised of federal judges that would allow the government to balance the competing priorities of removal, where the defendant could defend against the charges and the government could protect classified information.²²

¹⁸ Stephanie Cooper Blum, “Use It & Lose It”: An Exploration of Unused Counterterrorism Laws & Implications for Future Counterterrorism Policies, 16 LEWIS & CLARK L. REV. 677, 680–81 (2012) (quoting Benjamin Wittes, *Secret Deportation Panel Raises Due Process Issues; Critics Blast New Court Set up by Anti-Terrorism Law*, RECORDER (Cal.), Apr. 25, 1996, at 1).

¹⁹ See Jeanne A. Butterfield, *Do Immigrants Have First Amendment Rights? Revisiting the Los Angeles Eight Case*, 212 MIDDLE EAST REPORT 4, 4 (Fall 1999). The LA Eight were actually comprised of seven Palestinians and one Kenyan spouse. *Id.*; Neil MacFarquhar, *U.S., Stymied 21 Years, Drops Bid to Deport 2 Palestinians*, N.Y. TIMES (Nov. 1, 2007), https://www.nytimes.com/2007/11/01/us/01settle.html?_r=0.

²⁰ See Butterfield, *supra* note 19, at 4.

²¹ See *id.* After decades of litigation, including in front of the U.S. Supreme Court, it appears that ultimately none of the L.A. Eight were ordered removed and some have become U.S. citizens. MacFarquhar, *supra* note 19. In December 2006, Aiad Barakat was naturalized in Los Angeles. See *Judge Throws Out Charges in “Los Angeles Eight” Case*, CTR. FOR CONST. RIGHTS (last updated Oct. 23, 2007), <https://ccrjustice.org/home/press-center/press-releases/judge-throws-out-charges-los-angeles-eight-case>. Three other members have been granted lawful permanent residency. *Id.* In October 2007, an immigration judge terminated deportation proceedings against two others, Khader Hamide and Michel Shehadeh, both of whom were lawful permanent residents when arrested and charged. *Id.* At least one scholar has suggested that “if the ATRC statutory framework was available in 1987, the DOJ would have successfully deported the L.A. Eight without revealing to them classified information.” Jonathan H. Yu, *Combating Terrorism with the Alien Terrorist Removal Court*, 5 NAT’L SEC. L. BRIEF 1, 4 (2015).

²² Valentine, *supra* note 17, at 1-2. The Reagan Administration’s proposal was labeled the “Terrorist Alien Removal Act.” Blum, *supra* note 18, at 681; Clarence E. Zachery, Jr., *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy from Within?*, 9 GEO. IMMIGR. L.J. 291, 292 (1995). See also 134 CONG. REC. H3125 (daily ed. May 10, 1988) (noting receipt of “[a] letter from the Acting Assistant Attorney General, transmitting a draft of proposed legislation entitled, ‘Terrorist Alien Removal Act of 1988’; to the Committee on the Judiciary.”), 1988 WL 170924; 134 CONG. REC. S7882 (daily ed. June 15, 1988) (noting receipt of “[a] communication from the Acting Secretary Attorney General, Department of Justice, transmitting a draft of proposed legislation entitled the Terrorist Alien Removal Act; to the Committee on the Judiciary”), 1988 WL 171377.

Congress did not act on President Reagan's proposal²³ with the Democrat-controlled Senate "refus[ing] to hold hearings on the proposal."²⁴ Nor did Congress act on the George H.W. Bush Administration's renewed push for the creation of such a specialized court.²⁵ Although the creation of such a court was "one of the [Justice Department's] top counterterrorism legislative priorities in the mid-1990s"²⁶ and had been pushed by multiple presidential administrations, "Congress failed to pass any of the bills providing for these special procedures to remove alien terrorists" across three presidential terms, from 1989 through 1994.²⁷

In February 1995, then-Senator Joe Biden introduced on behalf of President Bill Clinton a bill that, *inter alia*, sought the creation of the ATRC.²⁸ The bill sought to advance many of the terrorism-related provisions that both Presidents Reagan and Bush had pushed for without success. Two months later, on April 19, 1995, Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring hundreds of others.²⁹ The Oklahoma City bombing captured the country's attention and crystallized the resolve of lawmakers on both sides of the aisle to address terrorism.³⁰

²³ Valentine, *supra* note 17, at 2; Yu, *supra* note 21, at 2-3.

²⁴ Blum, *supra* note 18, at 681; *see also* Zachery, *supra* note 22, at 292.

²⁵ Valentine, *supra* note 17, at 2.

²⁶ THOMAS R. ELDRIDGE ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., STAFF REPORT: 9/11 & TERRORIST TRAVEL at 97 (2004).

²⁷ Zachery, *supra* note 22, at 292 (citing 139 CONG. REC. 15249-01 (1993) (statement of Sen. Smith); 140 CONG. REC. 14534-02 (1994) (statement of Sen. Smith)).

²⁸ S.390, 104th Cong. (1995); *see* 141 CONG. REC. S2502-03 (daily ed. Feb. 10, 1995) (statement of Sen. Biden) (noting "I have introduced this bill at the President's request," but expressing concerns about the ATRC provisions as written); 141 CONG. REC. S2398-99 (daily ed. Feb. 9, 1995) (letter from President Clinton to Congress on the Omnibus Counterterrorism Act of 1995) ("[One] of the most significant provisions of the bill will . . . provide a workable mechanism, utilizing U.S. District Court Judges appointed by the Chief Justice, to deport expeditiously alien terrorists without risking the disclosure of national security information or techniques."); Zachery, *supra* note 22, at 292.

²⁹ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL STATEMENT ON THE EXECUTION OF TIMOTHY MCVEIGH (May 11, 2001),

<https://www.justice.gov/archive/opa/pr/2001/May/218ag.htm>.

³⁰ *See* Carol W. Lewis, *The Terror that Failed: Public Opinion In the Aftermath of the Bombing in Oklahoma City*, 60 PUB. ADMIN. REV. 201 (2000). It bears noting that the February 1993 World Trade Center bombing, which killed six and injured more than 1,000 individuals and which involved foreign nationals committing acts of terrorism on U.S. soil, *see* FED. BUREAU OF INVESTIGATION, FIRST STRIKE: GLOBAL TERROR IN AMERICA (February 26, 2008), https://archives.fbi.gov/archives/news/stories/2008/february/tradebom_022608, also played a significant role in the legislative story of the ATRC, *see* William C. Nagel, Law Enforcement Approach to Combating Terrorism: An Analysis of US Policy at 38 (June 2002) (Master's thesis, Naval Postgraduate School), <https://www.hsdl.org/?view&did=438507>; Yu, *supra* note 21, at 3. It did not, however, crystallize sufficient political will to enact anti-terrorism legislation. Zachery, *supra* note 22, at 292.

One week after the Oklahoma City bombing, Senate Majority Leader Bob Dole introduced the then-labeled “Comprehensive Terrorism Prevention Act of 1995.”³¹ That bill contained language related to the creation of a removal court for alien-terrorists, but with less-comprehensive provisions than the version introduced earlier at President Clinton’s behest.³²

The following week, five Democrat Senators (Joe Biden, Thomas Daschle, Dianne Feinstein, Christopher Dodd, and Herb Kohl) introduced a revamped version of President Clinton’s proposed legislation as Senate Bill 761, adding additional provisions seeking “to give Federal law enforcement additional resources and tools to use in combating domestic and international terrorism on American soil.”³³ Notably, S.761 included more robust language related to the ATRC, including provisions that were not in the Dole bill regarding the possibility that the ATRC might deem inadequate the government’s proposed unclassified summary of evidence showing the alien had engaged in terrorist activity, and the circumstances in which removal proceedings nonetheless would be permitted to press forward without the provision of an adequate summary.³⁴

Thereafter an agreement was reached, in which more robust provisions related to the ATRC—including provisions concerning proceeding without a summary—were included in the Dole bill,³⁵ which was eventually renamed the

³¹ Comprehensive Terrorism Prevention Act of 1995, S.735, 104th Cong. (1995); 141 CONG. REC. S5841 (daily ed. April 27, 1995) (statement of Sen. Dole) (“America will not be intimidated by the madmen who masterminded last week’s vicious and cowardly bomb attack in Oklahoma City”).

³² Senator Biden referred to the Dole-introduced bill as “[t]he Republican substitute bill,” noting that it was “built largely around [the] proposals” in the bill he had introduced earlier in the year on behalf of President Clinton. *See* 141 CONG. REC. S7484 (daily ed. May 25, 1995) (statement of Sen. Biden); *see also* David B. Kopel & Joseph Olson, *Preventing A Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 248 (1996) (discussing “the President’s very broad bill (Clinton bill) and majority leader Dole’s slightly narrower bill (Dole bill)”).

³³ The Omnibus Counterterrorism Act of 1995, S.761, 104th Cong. (1995); *see* 141 CONG. REC. S6202 (daily ed. May 5, 1995) (statement of Sen. Daschle) (“Coupled with the President’s earlier antiterrorism bill directed at international terrorism, this is a sound step to respond to a national threat without throwing overboard the civil rights of law-abiding citizens.”).

³⁴ *Compare* The Omnibus Counterterrorism Act of 1995, S.761, 104th Cong. (1995) (Democrat Bill), *with* Comprehensive Terrorism Prevention Act of 1995, S.735, 104th Cong. (1995) (Republican Bill).

³⁵ S. Amend. 1199 to S.735, 104th Cong. (1995); 141 CONG. REC. S7553 (daily ed. May 25, 1995) (filed on behalf of Senators Dole, Hatch, Nickles, Inhofe, Gramm, and Brown). *See* 104th Cong. S.735 (June 7, 1995) (As Engrossed in the Senate), <https://www.congress.gov/104/bills/s735/BILLS-104s735es.pdf>. “Although Senate Democrats and Senate Republicans introduced competing bills to establish the ATRC’s procedures, they agreed on the court’s basic purpose.” John Dorsett Niles, Note, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1864 (2008) (quoting Jennifer A. Beall, Note, *Are We Only Burning Witches? The*

“Antiterrorism and Effective Death Penalty Act of 1996” (AEDPA). An amendment sponsored by Senator Arlen Specter was then adopted, which added language requiring dismissal of the action if the ATRC deemed inadequate the government’s initial proposed unclassified summary.³⁶

Almost a year to the day after the Oklahoma City bombing, the Senate began debating AEDPA.³⁷ Congress passed AEDPA with broad, bipartisan support,³⁸ and on April 24, 1996, President Clinton signed AEDPA into law, formally creating what would become known as the ATRC.³⁹ In his signing statement, President Clinton lauded the creation of the ATRC as one of “the tough new tools to stop terrorists before they strike.”⁴⁰

The ATRC statutes were revised later in 1996 as part of IIRIRA, and, among other changes, Congress restored the possibility that removal proceedings might proceed even if the ATRC deemed the proposed unclassified summary inadequate, so long as certain criteria related to national security are met.⁴¹

Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism, 73 IND. L.J. 693, 708 (1998)); *see also* Kopel & Olson, *supra* note 32, at 248 (“[A] deal was arranged by which various provisions from the Clinton bill would be added to the Dole bill, in exchange for White House support for the Dole bill’s provisions to sharply curtail *habeas corpus*.”). *Cf.* 147 CONG. REC. S11581-82 (daily ed. Nov. 8, 2001) (statement of Sen. Leahy) (“The Alien Terrorist Removal Court was created . . . largely through the efforts of Senators Hatch and Dole.”), 2001 WL 1386283.

³⁶ Other amendments would have included language that required the dismissal of any action where an unclassified summary was deemed inadequate. *See, e.g.*, S. Amend. 1250 to S. Amend 1199 to S.735, 104th Cong. (1995) (proposed by Senators Specter, Biden, Kennedy, and Simon).

³⁷ *See* 142 CONG. REC. S3352 (daily ed. April 16, 1996) (statement of Senator Hatch) (“This is a particularly relevant time to being this debate because we are fast approaching the 1-year anniversary of the heinous crime that claimed the lives of so many men, women, and children in Oklahoma City, OK. Indeed, this Friday, the 19th, marks the 1-year anniversary of that tragedy.”).

³⁸ AEDPA passed on a vote of 91-8 in the Senate and 293-133 in the House of Representatives. *S. 735 (104th): Antiterrorism and Effective Death Penalty Act of 1996*, GOVTRACK, <https://www.govtrack.us/congress/bills/104/s735/details> (last visited May 19, 2019).

³⁹ The court is not referred to as the ATRC in the original legislation, but formally adopted the name in its rules. Alien Terrorist Removal Court Rule 1, 8 U.S.C. §§ 1531-37.

⁴⁰ William Jefferson Clinton, *Statement on Signing the Antiterrorism & Effective Death Penalty Act of 1996* (Apr. 24, 1996), 1996 WL 203049, at *1, <https://www.govinfo.gov/content/pkg/PPP-1996-book1/pdf/PPP-1996-book1-doc-pg630.pdf>.

⁴¹ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996). The September 1996 amendment also added the provisions in 8 U.S.C. § 1534(e)(3)(E) and (F) related to continuing the hearing without a summary and appointed of a “special” cleared counsel for LPR defendants, and the provisions in labeled “continuation of hearing without summary” § 1535(c) related to appeals in cases where no summary was provided. *See id.*

B. Processes & Standards for Using Classified Evidence

Congress established a detailed process for ATRC removal proceedings.⁴² Removal proceedings under the ATRC may only be pursued when the U.S. Department of Justice files a statutorily-obligated application, including a certification by the Attorney General or Deputy Attorney General, establishing, among other things, probable cause to believe that the proposed defendant is an alien terrorist for whom traditional removal proceedings would pose a risk to the national security of the United States.⁴³ Proceedings are not initiated unless an ATRC judge agrees that the application establishes probable cause on both points.⁴⁴ These preliminary steps are done *ex parte*, *in camera*, and under seal,⁴⁵ and none of the evidence submitted can be considered by the ATRC in determining whether to issue a removal order unless it is resubmitted in the government's case in chief.⁴⁶

In order to use classified evidence in the removal proceeding itself, the government also must submit for the court's review a proposed unclassified summary that could be given to the alien defendant.⁴⁷ The court, in possession of both the classified evidence and the proposed unclassified summary, must determine whether the summary is "sufficient to enable the alien to prepare a defense."⁴⁸ If the court finds the summary adequate, the case proceeds with the classified evidence included as part of the government's case in chief, but without such information being disclosed to the alien defendant other than in the unclassified summary.⁴⁹

If the court finds the proposed summary inadequate, however, "the removal hearing shall be terminated" unless the judge finds both that "the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person," and "the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person."⁵⁰ Where the judge finds that both criteria are met, the removal hearing proceeds, the alien is

⁴² See 8 U.S.C. §§ 1531-36.

⁴³ *Id.* § 1533(a)(1).

⁴⁴ *Id.* § 1533(c)(2). The government may supplement its application with "information, including classified information, presented under oath or affirmation" and testimony at a hearing on the application. *Id.* § 1533(c)(1).

⁴⁵ *Id.* § 1533(a)(2).

⁴⁶ *Id.* § 1534(c)(5).

⁴⁷ *Id.* § 1534(e)(3)(A), (B).

⁴⁸ *Id.* § 1534(e)(3)(C).

⁴⁹ *Id.* § 1534(f), (i), (j). If the alien defendant holds permanent resident status, the ATRC will appoint cleared counsel who can "review[] *in camera* the classified evidence on behalf of the alien" and "challeng[e] through an *in camera* proceeding the veracity of the evidence contained in the classified information." *Id.* § 1534(e)(3)(F). Cleared counsel may not, however, "disclose the [classified] information to the alien or to any other attorney representing the alien." *Id.* § 1534(e)(3)(F)(ii).

⁵⁰ *Id.* § 1534(e)(3)(D)(ii), (iii). The government is also provided one opportunity to revise the unclassified summary in an attempt to "correct the deficiencies identified by the court." *Id.* § 1534(e)(3)(D)(ii).

advised that “no summary is possible,” and the classified information is entered as evidence for the court’s consideration.⁵¹

The removal hearing itself is open to the public and must occur “as expeditiously as practicable.”⁵² The alien defendant has rights to be represented by counsel at government expense,⁵³ and to present evidence,⁵⁴ subpoena witnesses,⁵⁵ and cross-examine the government’s witnesses (except on issues related to classified information).⁵⁶ The alien may not, however, seek to suppress evidence on the basis that it was unlawfully obtained.⁵⁷

Following the hearing, the ATRC must issue a written ruling,⁵⁸ which either party may appeal to the U.S. Court of Appeals for the District of Columbia Circuit.⁵⁹ Notably, if an alien was not provided with an unclassified summary of the classified evidence submitted by the government, appeal is automatic⁶⁰ and findings of fact are reviewed *de novo*.⁶¹ All appeals are to be handled on an expedited basis, with the court of appeals required to issue a decision within sixty days of the ATRC’s decision.⁶²

Notwithstanding this detailed process, the ATRC has not been used in any way since its creation in 1996.⁶³ Although the court has remained continuously constituted by five federal judges, who are selected by the Chief Justice of the

⁵¹ *Id.* § 1534(e)(3)(E).

⁵² *Id.* § 1534(a).

⁵³ *Id.* § 1534(c)(1).

⁵⁴ *Id.* § 1534(c)(2).

⁵⁵ *Id.* § 1534(d).

⁵⁶ *Id.* § 1534(c)(3), (d)(1), (d)(5), and (e)(2).

⁵⁷ *Id.* § 1534(e)(1)(B).

⁵⁸ *Id.* § 1534(j). The court must redact any portion of its written decision “that would reveal the substance or source” of classified information that was submitted *in camera* and *ex parte*. *Id.*

⁵⁹ *Id.* § 1535(c).

⁶⁰ *Id.* § 1535(c)(2).

⁶¹ *Id.* § 1535(c)(4)(D).

⁶² *Id.* § 1535(c)(4).

⁶³ *See supra* note 3.

United States,⁶⁴ the Department of Justice has yet to submit an application for the initiation of proceedings.⁶⁵

III. THE CONTINUING NEED FOR THE ATRC

In light of the ATRC's complete non-use since its genesis and the subsequent enactment of legislation implicating its potential pool of cases, the threshold question of whether such a court is needed must be addressed.⁶⁶ Indeed, subsequent legislative changes to other sections of the Immigration and Nationality Act ("INA") have materially changed the landscape upon which the ATRC was originally designed. Even taking these factors into account, however, we believe there is still a need for the ATRC as a venue for the most difficult removal cases.

The ATRC was intended to be a low-volume court.⁶⁷ Congress created numerous threshold barriers for potential cases before they would reach the ATRC.

⁶⁴ 8 U.S.C. § 1532. The current members of the court are federal district court judges Anne Conway (M.D. Fla.), James Parker Jones (W.D. Va.), Michael Mosman (D. Or.), Thomas Russell (W.D. Ky.), and Rosemary Collyer (D.D.C.), who serves as the court's chief judge. See FED. JUDICIAL CTR., *Alien Terrorist Removal Court: Judges*, <https://www.fjc.gov/history/courts/alien-terrorist-removal-court-judges> (last visited April 10, 2019). All five judges currently serve on the Foreign Intelligence Surveillance Court. Compare *id.*, with FED. JUDICIAL CTR., *Foreign Intelligence Surveillance Court: Judges*, <https://www.fisc.uscourts.gov/sites/default/files/FISC%20FISCR%20Judges%20May%202018.pdf> (last visited April 10, 2019). Congress expressly suggested that this overlap might be a smart decision. See 8 U.S.C. § 1532(a) ("The Chief Justice may, in the Chief Justice's discretion, designate the same judges under this section as are designated pursuant to section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)).").

⁶⁵ See *supra* note 3.

⁶⁶ Notably, the ATRC is not the only zombie federal court to have existed. For example, in 1971, Congress created the Temporary Emergency Court of Appeals (based on the prior Emergency Court of Appeals), which had "exclusive jurisdiction to hear appeals from the decisions of the U.S. district courts in cases arising under the wage and price control program of the Economic Stabilization Act of 1970." FED. JUDICIAL CTR., *Temporary Emergency Court of Appeals, 1971-1992*, <https://www.fjc.gov/history/courts/temporary-emergency-court-appeals-1971-1992> (last visited July 21, 2019). That court was abolished in 1992. *Id.* And in 1973, Congress created the Special Railroad Court, "which facilitated the consolidation and management of several railroads undergoing bankruptcy reorganization." FED. JUDICIAL CTR., *Special Railroad Court, 1974-1997*, <https://www.fjc.gov/history/courts/special-railroad-court-1974-1997> (last visited July 21, 2019). The Special Railroad Court was abolished in 1997. *Id.* The authors are unaware, however, of any other Article III court that, like the ATRC, has never heard a case and has not been abolished. It bears noting, however, that the FISA Review Court heard its first case more than 20 years after its creation. See *In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (noting that this case was the first appeal to the Court of Review since the passage of FISA in 1978). Theoretically, it is possible that the ATRC is simply a once-every-twenty-five-years court and its time for use has not yet come.

⁶⁷ See, e.g., Andrew Becker, *Terrorist Court Unused 16 Years After Creation*, CAL. WATCH: PUBLIC SAFETY—DAILY REPORT (Apr. 12, 2012), <https://archive.ph/v0ga3>

For example, an application seeking to initiate ATRC proceedings must certify that “removal under [conventional administrative removal proceedings before an immigration judge] would pose a risk to the national security of the United States.”⁶⁸ Thus, cases should strictly go through conventional removal proceedings if possible without risking the exposure of national security information.⁶⁹ Congress specified that the ATRC is only to be used where the Attorney General determines that resorting to conventional removal proceedings would jeopardize national security.⁷⁰ Moreover, given the Justice Department’s law enforcement mission⁷¹ and the significant burden the ATRC statutes place on the most senior Department leadership before initiation of an action,⁷² there is strong incentive for the government to pursue criminal charges whenever possible.⁷³

Significant legislative reforms have undeniably narrowed the scope of potential cases necessitating utilization of the ATRC. In September 1996, five months after creating the ATRC, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷⁴ IIRIRA modified the process for removal proceedings to require that a respondent placed in conventional administrative removal proceedings has the initial burden to lawful admission by an immigration officer, or if he cannot prove prior admission to the United States, to prove that he is admissible to the United States.⁷⁵ Only if the individual proves lawful admission does the burden shift to the government to prove removability from the United States.⁷⁶ Notably, the government may introduce and rely on classified information that the immigration court reviews *ex parte* and *in camera* in circumstances where the noncitizen argues that he is admissible at the time of commencement of the conventional removal proceedings rather than some previous

(archived version) (citing DOJ officials as indicating “the court was intended to be low volume, as most suspected foreign terrorists can be removed without the use of classified evidence”).

⁶⁸ 8 U.S.C. § 1533(a)(1)(D)(iii).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ U.S. DEPT. OF JUSTICE, OUR MISSION STATEMENT, <https://www.justice.gov/about> (last visited July 21, 2019).

⁷² 8 U.S.C. § 1533(a)(1)(D)(iii) (requiring “certification by the Attorney General or the Deputy Attorney General”).

⁷³ Notably, however, conviction and removal are not mutually exclusive; an alien convicted of a terrorism offense who serves out his or her criminal sentence is likely removable, *see Id.* §§ 1227(a)(2)(iii) (aggravated felony), (a)(3) (terrorist activity), and 1101(f) (43) (listing aggravated felonies), and presumably, removal proceedings will be initiated against such individuals in most if not all cases, *see, e.g., Meskini v. Att’y Gen.*, No. 4:14-cv-42, 2018 WL 1321576 (M.D. Ga. March 14, 2018) (discussing post-incarceration efforts to remove individual convicted of terrorism-related offenses).

⁷⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public L. No. 104-208, 110 Stat. 3546 (Sept. 30, 1996).

⁷⁵ 8 U.S.C. § 1229a(c)(2).

⁷⁶ *Id.* § 1229a(c)(3).

admission.⁷⁷ Thus, IIRIRA erected a key threshold barrier for potential ATRC cases by making it easier to use conventional removal proceedings in situations where the respondent was never inspected.⁷⁸ Importantly, however, the IIRIRA amendments did not provide the ability to rely *ex parte* on classified evidence to establish removability of a subclass of noncitizens, lawful permanent residents (LPR).

In 2001, the USA PATRIOT Act expanded the definition of “engage in terrorist activity” under the INA.⁷⁹ The PATRIOT Act amendments further impacted the pool of potential ATRC cases by modifying the lack-of-knowledge defense to ensure that individuals who provided material support to a terrorist organization, regardless of their claimed subjective belief concerning the intended purpose for such support, could be found to have engaged in terrorist activity and be removable.⁸⁰ Thus, a wider range of conduct, some of which might be provable without needing to rely on classified evidence, would support conventional removal proceedings on terrorism-related grounds.

The IIRIRA and PATRIOT Act provided additional law enforcement tools that reduced the pool of potential cases in which the ATRC might be needed.⁸¹ Notwithstanding, we believe there is continuing need for the ATRC in relation to a specific type of case: LPRs for whom the only viable removal charge is based on terrorism activity that can only be proven by reliance on national security information that cannot be declassified.⁸² Indeed, removal of terrorist LPRs was likely the “main impetus of the ATRC.”⁸³

Importantly, LPR defendants—which, at this point, are likely to be the only defendants due to the availability of other criminal and civil enforcement tools—

⁷⁷ *Id.* § 1229a(b)(4)(B) (“ . . . these rights shall not entitle the alien 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”). Notably, the government may rely on classified evidence in all conventional removal proceedings to oppose an alien’s request for forms of discretionary relief from removal. *Id.*

⁷⁸ See ELDRIDGE ET AL., *supra* note 26, at 98 (“A major reason for the lack of use of the ATRC was that new immigration laws permitted the use of classified evidence in traditional deportation hearings, making recourse to a special court unnecessary.”).

⁷⁹ Compare 8 U.S.C. § 1182(a)(3)(B)(iii) (2000) with 8 U.S.C. § 1182(a)(3)(B)(iii) (2002).

⁸⁰ See 8 U.S.C. § 1182(a)(3)(B)(iv).

⁸¹ See, e.g., ELDRIDGE ET AL., *supra* note 26, at 98. We note that it is theoretically possible that the PATRIOT Act’s expanded definition language might qualify *more* cases for ATRC consideration.

⁸² See, e.g., Sarah Lorr, Note, *Reconciling Classified Evidence and A Petitioner’s Right to A “Meaningful Review” at Guantánamo Bay: A Legislative Solution*, 77 FORDHAM L. REV. 2669, 2708 (2009) (noting that, theoretically, “the ATRC could be used to remove residents currently within the country and also permanent residents entering at a border where the government has secret evidence against them”).

⁸³ Blum, *supra* note 18, at 685 (“the main impetus of the ATRC appears to be deporting LPRs who are engaging in terrorist activity . . .”); *id.* at 691 (“Congress presumably created the ATRC to deal with LPRs charged under terrorist grounds of deportability.”).

are entitled to additional procedural protections that are not available to other noncitizens if there is no unclassified summary provided.⁸⁴ These include court-appointed, government-funded cleared counsel who is entitled to review the underlying classified information and challenge it on the merits.⁸⁵ This is similar to the procedural rights afforded by the Classified Information Procedures Act (CIPA) context,⁸⁶ and like the classified information accessed under a CIPA protective order, such attorney is prohibited from disclosing any of the classified information to the defendant.⁸⁷

Moreover, LPR terrorists present a real threat according to data on terrorist attacks by foreign-born individuals.⁸⁸ A 2019 Cato Institute report found that foreign-born terrorists were responsible for at least 86 percent (or 3,037) of the 3,518 murders caused by terrorists on U.S. soil from 1975 through the end of 2017.⁸⁹ The report also found that there were “192 foreign-born terrorists who planned, attempted, or carried out attacks on U.S. soil from 1975 through 2017.”⁹⁰ The most common category of immigration status for the foreign-born terrorists was LPR; indeed “[m]ore terrorists have taken advantage of the LPR category than of any other visa category.”⁹¹ Thus, contrary to what might be expected, “[m]ost foreign-born terrorists often live [in the United States] peacefully for years before concocting their schemes,”⁹² and it is important to have a tool to remove such individuals where the government discovers—and classified evidence shows—that they are engaging in terrorist activity, including planning an attack.

⁸⁴ See, e.g., 8 U.S.C. § 1534.

⁸⁵ *Id.* One scholar has argued that this provision renders the classified evidence “non-secret.” See Niles, *supra* note 35, at 1860 (arguing that where cleared counsel is provided and allowed to review the classified evidence, e.g. where the case involves an LPR, “the evidence is not secret . . . [a]lthough the resident alien does not view the secret evidence personally, for the purposes of cross-examining the evidence the alien may fairly be said to view it constructively through the eyes of the special attorney.”).

⁸⁶ Lorr, *supra* note 82, at 2710 (“As in CIPA, the attorney cannot disclose the classified information to the alien.”).

⁸⁷ 8 U.S.C. § 1534(e)(3)(F)(ii) (ATRC non-disclosure provision); 18 U.S.C. App. 3 § 3 (CIPA non-disclosure provision).

⁸⁸ See Alex Nowrasteh, *Terrorists by Immigration Status & Nationality: A Risk Analysis, 1975–2017*, 866 POLICY ANALYSIS (Cato Institute, Wash., D.C.), May 7, 2019, at 1-2, <https://www.cato.org/publications/policy-analysis/terrorists-immigration-status-nationality-risk-analysis-1975-2017>.

⁸⁹ See *id.* An additional “68 were murdered by unidentified terrorists.” *Id.*

⁹⁰ *Id.* at 3 (notably, the report “counts terrorists who were discovered trying to enter the United States on a forged passport or visa as illegal immigrants”). By contrast, there were “788 native-born terrorists who planned, attempted, or carried out attacks on U.S. soil from 1975 through 2017.” *Id.* That said, there is no method for removing a natural-born terrorist.

⁹¹ *Id.* at 2, 6, 21. The Cato Report notes, however, that the odds of an individual being killed on U.S. soil by a foreign-born terrorist are highest for individuals present in the United States on a tourist visa, because 18 of 19 of the 9/11 hijackers were in that status. *Id.* at 6. Moreover, “[t]errorist with green cards came from 30 different countries.” *Id.* at 21.

⁹² *Id.* at 2.

The ATRC is also necessary to utilize specific types of evidence without compromising the underlying sources. Most notably, the ATRC statutes waive the requirement of notice to a defendant where the government intends to use evidence that is “obtained or derived from an electronic surveillance” under the Foreign Intelligence Surveillance Act (FISA).⁹³ This varies from the general rule requiring such notice, which otherwise applies in every “trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States.”⁹⁴ Similarly, using the ATRC may be necessary for cases involving evidence that was collected by a foreign government, particularly by human intelligence sources, and shared with the United States.⁹⁵ Thus, using such evidence in a criminal case or as part of the case-in-chief in conventional removal proceedings for an LPR would require disclosing its existence, which “can pose an obstacle to future cooperation between the United States and the foreign government.”⁹⁶ Often, evidence obtained via the intelligence of a foreign government is provided to the United States with the caveat that such evidence and cooperation remains secret.⁹⁷ And where the evidence comes from a witness who is a foreign intelligence agent or human source, the foreign government may simply refuse to allow the witness to testify.⁹⁸ Foreign governments do not always follow the same protocols as United States law enforcement when collecting evidence.⁹⁹ Importantly, regardless of how the United States obtained the evidence, the ATRC will not entertain motions by the defendant to suppress the evidence.¹⁰⁰

Finally, maintaining the ATRC is generally a cost neutral proposition.¹⁰¹ The five judges who serve on the ATRC do so as a collateral responsibility and do

⁹³ 8 U.S.C. § 1534(e)(1); *see also* Harkenrider, *supra* note 7, at 150 (“the suspected alien terrorist is not entitled to any information gathered under FISA”). Indeed, the defendant is even prohibited from learning of the source for such information via other discovery. 8 U.S.C. § 1534(e)(1)(C).

⁹⁴ 50 U.S.C. § 1806(c).

⁹⁵ Yu, *supra* note 21, at 14 (noting that “government or foreign personnel—that are clearly not law enforcement—largely gather the evidence in terrorism cases”).

⁹⁶ *Trying Terrorists in Article III Courts Challenges & Lessons Learned*, AM. BAR ASS’N STANDING COMM. ON LAW & NAT’L SEC. at 16 (July 2009), https://www.americanbar.org/content/dam/aba/migrated/natsecurity/trying_terrorists_artII_report_final.authcheckdam.pdf.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 15.

¹⁰⁰ 8 U.S.C. § 1534(e)(1)(B). This elimination of the evidentiary exclusionary rule also covers challenges to chain of custody where essential links in the chain are classified. Yu, *supra* note 21, at 16. Moreover, the Federal Rules of Evidence, including the hearsay rules, do not apply. 8 U.S.C. § 1534(h).

¹⁰¹ Robert Sorrell, *Federal Judge in Abingdon One of 12 to Serve on Never-used Court to Remove Terrorists*, BRISTOL HERALD COURIER (March 17, 2019) (citing a spokesperson for the Administration Office of the U.S. Courts). *But see* Emily C. Kendall, *The Alien Terrorist Removal Court & Other National Security Measures You May Have Never Heard of: The Need for Comprehensive National Security Reform*, 18 TEX. WESLEYAN L. REV. 253, 269–70 (2011) (arguing, without support, that “disbanding the ATRC . . . will

not receive additional compensation.¹⁰² The ATRC has no budget or staff, and “exists without a website or even a physical meeting place.”¹⁰³ The court’s procedures were enacted decades ago and remain in place, waiting for the moment when the court is called into action.¹⁰⁴ To the extent there is any cost, it is substantially outweighed by the “human costs of LPR terrorism” which one estimate totals as \$255 million over a 43 year period ending in 2017.¹⁰⁵

IV. LEGISLATIVE PROPOSALS

A commonly advanced hypothesis to explain the ATRC’s non-utilization is the lack of certainty regarding the constitutionality of the court’s adjudicatory procedures under the Fifth Amendment’s due process guarantee.¹⁰⁶ While debate on that topic is to be expected because the statutory scheme has never been judicially tested, we view such explanation as incomplete because it does not meaningfully consider or examine the type of nuance that we explore in this article.¹⁰⁷ The United States has proven itself willing to test the due process muster of its various national security or immigration enforcement tools.¹⁰⁸ Presumably, a number of circumstances have arisen since the AEDPA’s passage that would justify risking constitutional challenges to the statute or to the court by using it. Indeed, the 9/11 Commission staff report indicates that at least 100 cases had been referred

also save money” because it is an “institution that wastes money, manpower, and resources that could be put to much better use in other facets of homeland security”).

¹⁰² Sorrell, *supra* note 101 (citing a spokesperson for the Administration Office of the U.S. Courts); Becker, *supra* note 67.

¹⁰³ *Opinion: Our View: Special Court Has Never Seen a Case. It Never Should*, BRISTOL HERALD COURIER (March 30, 2019).

¹⁰⁴ Alien Terrorist Removal Court Rules, 8 U.S.C. §§ 1531-37.

¹⁰⁵ See Nowrasteh, *supra* note 88, at 22.

¹⁰⁶ See, e.g., STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 856 (4th ed. 2007) (“It may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it.”); Blum, *supra* note 18, at 703 (“Many scholars have argued that the ATRC deprives aliens of procedural due process under the Fifth Amendment; hence, its non-use may reflect a fear that if it was used to remove aliens based on classified evidence, it may be struck down as unconstitutional.”); *id.* at 704-10 (reviewing arguments made against constitutionality of ATRC); Niles, *supra* note 35, at 1837 (“Perhaps out of fear about the ATRC’s constitutionality, the attorney general has never used the court.”).

¹⁰⁷ See ELDRIDGE ET AL., *supra* note 26, at 98 (noting numerous reasons why cases were not pursued, including “procedural complexities that soon overwhelmed these terrorist cases”).

¹⁰⁸ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (concluding that the government’s detention of a U.S. citizen and unlawful enemy combatant violated the Fifth Amendment Due Process Clause); *Demore v. Kim*, 538 U.S. 510, 517-18 (2003) (detention of criminal alien did not violate Fifth Amendment Due Process Clause). *Cf.* Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES MAGAZINE (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html> (discussing killing of United States citizen in Yemen by drone strike).

to and reviewed by the Justice Department for possible ATRC proceedings.¹⁰⁹ The report acknowledges that many of the potential cases were “overwhelmed” by “the procedural complexities,” or “stalled by internal Justice Department deliberations” related to, among other things, the risk to the underlying classified information, which FBI refused to make available for prosecution purposes.¹¹⁰

Accordingly, we conclude that the non-use of the ATRC is due to procedural hurdles erected by the original legislation.¹¹¹ In particular, the dual findings required for the ATRC to authorize the use of classified evidence without an unclassified summary of such evidence impose an unworkably high burden on the government, preventing use of the ATRC for exactly the type of cases that it was intended to hear.¹¹² Additionally, the unique and imprecise standard that describes the threat posed by publicly disclosing necessary classified evidence

¹⁰⁹ See ELDRIDGE ET AL., *supra* note 26, at 97-98 (“by 1998, Justice attorneys in the Terrorism and Violent Crime Section had led a department review of 50 cases for possible application to the ATRC, but they were all rejected. Over the following two years, another 50 cases were rejected.”).

¹¹⁰ See ELDRIDGE ET AL., *supra* note 26, at 98. The 9/11 Commission Staff’s report was based, among other things, on interviews in 2003 with former INS Commissioner Doris Meissner and Dan Cadman and Laura Baxter, who worked for INS’s National Security Unit, which was then responsible for case referrals to the ATRC. *Id.* at 96, 98. Notably, some potential ATRC cases also stalled because of internal deliberations regarding “alien rights and sufficiency of evidence.” *Id.* at 98.

¹¹¹ Cf. David A. Martin, *Prevention Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 328 (2004) (Transcription of David Martin’s testimony before the National Commission on Terrorist Attacks upon the United States, December 8, 2003) (“To date the ATRC has not been used, probably owing to the very narrow range of circumstances that come within its jurisdiction—a statutory restriction that is not well understood.”); Valentine, *supra* note 17, at 1-2 (“the statutory restraints on the [ATRC] make it effectively useless”).

¹¹² 147 CONG. REC. S11577 (daily ed. Nov. 8, 2001) (statement of Sen. Smith) (“I have been informed that the notice requirements and other procedural obstacles that force the Federal Government to disclose classified information just basically renders the ATRC useless.”), 2001 WL 1386283; 147 CONG. REC. S11579 (daily ed. Nov. 8, 2001) (statement of Sen. Smith) (noting that, based on discussions with the U.S. Attorney General, “the Justice Department has used the court, as I said before, not once—not even one time—to deport any alien terrorist or suspected alien terrorist. Again, the reason is because they have to compromise their sources and methods to do it. . . . The intelligence community gets this, and they cannot act on it because to act on it would compromise their own people and their methods of collection. To not act on it means they stay here. So that is where we are. That is why not one case has been brought to court since my legislation created it in 1996.”). *But see* 147 CONG. REC. S11582 (daily ed. Nov. 8, 2001) (statement of Sen. Leahy) (indicating that, based on his discussion with the Department of Justice, the ATRC’s non-use “is not because an unclassified summary has to be provided to the defendant” and he did not understand the Justice Department to be seeking a blanket exception to providing an unclassified summary), 2001 WL 1386283.

severely diminishes the utility of the ATRC statutes as a prosecutorial tool.¹¹³ These barriers should be acknowledged and legislatively corrected to render the ATRC a viable forum for appropriate cases, as originally intended.¹¹⁴

A. The dual findings necessary to utilize classified information where no adequate summary is possible should be alternative options.

The ATRC was created so that the federal government could introduce classified evidence in support of its effort to remove noncitizens engaged in terrorist activity while preserving the classified nature of that evidence and its sources.¹¹⁵ As discussed above, the government can only introduce classified evidence in the ATRC removal proceeding in two circumstances.¹¹⁶ First, classified evidence can be admitted where the ATRC deems the government's proposed unclassified summary to be "sufficient to enable the alien to prepare a defense."¹¹⁷ Second, even where the court finds the proposed summary inadequate, it can nonetheless admit the classified information into evidence if it makes certain findings.¹¹⁸ It is those findings that pose one of the biggest barriers to the use of the ATRC.

By statute, the ATRC can only admit classified information into evidence without the provision of an unclassified summary if it determines that "(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person."¹¹⁹ Because the statute uses the conjunctive "and," the ATRC must find that both (I) and (II) are satisfied.

¹¹³ See Edward T. Pound & Chitra Ragavan, *Finger-Pointing, Fingerprints: The Hunt for Evidence and, Hard On Its Heels, Charges About Who Screwed Up*, U.S. NEWS (Oct. 1, 2001), reprinted in Congressional Record at 147 CONG. REC. S11580 (daily ed. Nov. 8, 2001) ("Former Justice Department officials say the agency couldn't use the [ATRC] because the law requires disclosure of sensitive information to terrorists—evidence, they say, that would compromise intelligence gathering and identify sources."), 2001 WL 1386283.

¹¹⁴ As a threshold point and notwithstanding questions of judicial deference doctrine applicability or the congressional Article III court creation authority, the Justice Department lacks the authority to regulate to remedy some of these and other issues because the ATRC statutes—as they relate to judicial administration and standards—are not organic to the Department. See, e.g., *Nat'l Petroleum Refiners Assn. v. FTC*, 482 F.2d 672, 674-75 (D.C. Cir. 1983), *cert. denied*, 415 U.S. 951 (1974).

¹¹⁵ Beall, *supra* note 35, at 708.

¹¹⁶ 8 U.S.C. § 1534(e)(3). This is specific to the removal hearing itself, as opposed to the application for the initiation of such a proceeding. See *id.* § 1533(c).

¹¹⁷ *Id.* § 1534(e)(3)(C).

¹¹⁸ *Id.* § 1534(e)(3)(D)(ii).

¹¹⁹ *Id.* § 1534(e)(3)(D)(ii), (iii). The government is also provided one opportunity to revise the unclassified summary in an attempt to "correct the deficiencies identified by the court." *Id.* § 1534(e)(3)(D)(ii).

It would be imprudent for the government to begin the ATRC process in precedent-setting circumstances when it is not reasonably confident that it will be able to rely on the very classified evidence that warrants the use of such venue from the start.¹²⁰ It would be rare that the government can rest assured that its proposed summary will be deemed adequate.¹²¹ If such a summary were sufficiently specific, it would risk revealing to the alien or others the government's classified information, sources, and potentially methods of collection.¹²² This results in a Catch-22, which one former high-level Department of Justice official has described:

If the government prepares an unclassified summary of the evidence that is too vague and general, it will not be approved by the Judge. If, on the other hand, the evidence is too clear and specific, the classified evidence itself will be effectively disclosed, thus harming

¹²⁰ Although many aspects of the ATRC process are similar to the Classified Information Procedures Act (CIPA), *see* Blum, *supra* note 18, at 739 n.9, the two are analytical distinct and used for very different purposes. CIPA, which applies only to criminal cases, *see* CIPA, Pub. L. No. 96-456, 94 Stat. 2025, 2025 (1980) (“An Act to provide certain pretrial, trial, and appellate procedures for *criminal* cases involving classified information.”) (emphasis added); *United States v. Sum of \$70,990,605*, No. 12-cv-1905, 2015 WL 1021118, at *5 (D.D.C. Mar. 6, 2015) (“CIPA is reserved for criminal cases”), is intended to allow the government to know what classified information must be produced in discovery and may come in at trial, *id.* (“CIPA provides criminal procedures that permit a trial judge to rule on the relevance or admissibility of classified information in a secure setting”); 18 U.S.C. App. 3 §§ 4, 6, 8. Unlike the ATRC, CIPA does not allow the introduction of evidence in the case in chief to which the Defendant does not personally have access. *Id.* § 6; Lorr, *supra* note 82, at 2712 (“immigration is the only area of the law where absolutely secret evidence is permitted as evidence in an adversarial setting”); *id.* at 2700 (“CIPA does not allow a jury to see any information that the defendant himself cannot see.”).

In 2001, Rep. David Bonior unsuccessfully proposed legislation that would have made CIPA applicable to immigration proceedings, including proceedings in the ATRC. *See* Secret Evidence Repeal Act of 2001, H.R. 1266, 107th Cong. (2001).

¹²¹ Niles, *supra* note 35, at 1857. As Niles notes, the “adequate summary” requirement is “unrealistic” in most cases that would end up at the ATRC. *Id.* Indeed, a case has only made it to that stage after the Attorney General found, and an Article III judge agreed, there is probable cause to believe the defendant is an “alien terrorist” and that conventional removal proceedings would pose a risk to the national security. *Id.*; 8 U.S.C. § 1533; *see also* Beall, *supra* note 35, at 707 (arguing “[i]t is also unclear how detailed the summary must be” as it appears to be left entirely to judicial discretion).

¹²² *See* Niles, *supra* note 35, at 1857; *see also* 147 CONG. REC. S11577 (daily ed. Nov. 8, 2001) (statement of Sen. Smith) (attributing non-use of the ATRC to the statute’s notice provision “that render the court ineffective and useless”: “[The Federal Government and intelligence community] are damned if they do and damned if they don’t because if they provide the information, they compromise their own sources and methods. If they don’t provide it, we can’t deport them.”), 2001 WL 1386283.

national security by compromising sources and methods of intelligence gathering.¹²³

Given this Catch-22 and the very real likelihood that it will be unable to share enough information for the ATRC to deem the summary adequate, before initiating a case, the Department of Justice must determine whether it can satisfy the standard for proceeding without an adequate unclassified summary.¹²⁴ Meeting both prongs of that standard, however, imposes an untenable burden on the government.¹²⁵ The government must show not only that the information is properly classified at a very high level (finding II),¹²⁶ but also that allowing the alien to remain in the United States would cause “serious and irreparable harm” to the national security or grave physical harm to another person (finding I).

Consider two illustrative hypothetical fact patterns of possible ATRC candidate cases that would ultimately fail due to the conjunctive finding requirement:

Hypothetical Case 1

Suppose the government had FISA-obtained information classified at the Top Secret level—utilized only where disclosure of the information would result in exceptionally grave damage to the national security—indicating that the alien defendant was raising funds for a new terrorist organization that has stated its intention to attack U.S. citizens abroad, and has what appears to be a viable plan for doing so, but whose immediate capabilities are non-existent or seriously in

¹²³ Valentine, *supra* note 17, at 1-2. From 1988 to 1993, Valentine served in the Reagan and George H.W. Bush Administrations as the Deputy Assistant Attorney General in charge of the Justice Department’s Office of Immigration Litigation. *See id.*

¹²⁴ Kendall, *supra* note 101, at 269 (noting that the ATRC was designed to allow the government to avoid having “to choose between allowing the alien’s continued stay in the U.S., which threatens national security, or to disclose its reasons for initiating the alien’s deportation, a disclosure which in itself could endanger the country.”).

¹²⁵ *See* Proposed Amendment 2114 to Senate Bill 1428, 147 CONG. REC. S11630-31 (daily ed. Nov. 8, 2001) (proposing amendment to the ATRC statutes to allow for use of classified information without any requirement for an unclassified summary, concluding “[t]he [ATRC] has never been used because the United States is required to submit for judicial approval an unclassified summary of the classified evidence against the alien. If too general, this summary will be disapproved by the Judge. If too specific, this summary will compromise the underlying classified information.”); 147 CONG. REC. S11577 (daily ed. Nov. 8, 2001) (statement by Sen. Smith) (“The reason for [the ATRC’s non-use] is we are required under the law to submit to the terrorists a summary of the intelligence we gathered on him and how we got it. Obviously, if the terrorist gets that information, then the people who provided that information are going to be killed or their lives will be at risk.”), 2001 WL 1386283; 147 CONG. REC. S11631 (daily ed. Nov. 8, 2001), 2001 WL 1386320.

¹²⁶ *See infra* Section IV.B discussing the lack of clarity regarding the level of classification required.

question.¹²⁷ Such information would likely satisfy required finding II because of the damage that would likely be caused by revealing the classified information or source, but it might not establish that the alien's *continued presence* in the United States "would likely" result in serious and irreparable damage to the United States or an individual (required finding I).

Hypothetical Case 2

Conversely, suppose the government had information obtained other than from a human source and classified at the Secret level—utilized where disclosure of the information would result in serious damage to the national security—indicating that the alien defendant was intending to physically attack a senior official at a foreign country's mission to the United Nations in New York City.¹²⁸ Such information would likely satisfy required finding I because of the danger to the individual, but arguably not required finding II because the classification level of the evidence would indicate that disclosure of such information is not expected to rise to the level of "serious and irreparable" damage.

Both hypotheticals assume that the dispositive evidence cannot not be declassified and that traditional administrative removal proceedings are not viable, and thus, present as the type of cases that the ATRC was created to handle. It seems inappropriate to force the government to make a Hobson's choice between (a) allowing such individuals to remain in the United States and dedicating substantial law enforcement resources to monitor their activity or (b) disclosing the classified information (and perhaps burning the underlying methods or sources) in order to seek the terrorist-alien's removal.¹²⁹

To render the ATRC workable, Congress should revise 8 U.S.C. § 1354(e)(3)(D)(iii) so that either finding would allow the removal hearing to move forward without a summary. Replacing the conjunctive "and" with the disjunctive "or" would increase the likelihood that the Department of Justice will utilize the ATRC for the most serious removal cases. Such change would make the above hypothetical cases viable cases for ATRC consideration as a statutory and practical administration matter.

Moreover, changing the statute to the disjunctive comports with the version of the bills originally introduced by President Clinton and several senior Democrat

¹²⁷ This would likely constitute "terrorist activity" under 8 U.S.C. § 1182(a)(3)(B)(iv)(IV).

¹²⁸ This would likely constitute "terrorist activity" under 8 U.S.C. § 1182(a)(3)(B)(iii)(III) given the employee's status as an "internationally protected person." See 18 U.S.C. § 1116(b)(4).

¹²⁹ Cf. 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Senator Orrin Hatch) ("[The] success of our counter-terrorism efforts depends on the effective use of classified information used to infiltrate foreign terrorist groups. We cannot afford to turn over these secrets in open court, jeopardizing both the future success of these programs and the lives of those who carry them out."), 1995 WL 317140.

Senators.¹³⁰ Both of those bills provided that the removal hearing could proceed without a summary if the ATRC found:

- (A) the continued presence of the alien in the United States, *or*
- (B) the provision of the required summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.¹³¹

Thus, the original proposals by the Democrat Senators required the ATRC to make either Finding I or Finding II, not both.

The legislative history is unclear how the findings ended up being written in the conjunctive, which appears to have occurred when Republican leadership incorporated a more robust version of the ATRC provisions into the bill originally proposed by Senator Dole one week after the Oklahoma City bombing.

Regardless of whether the findings were required in the conjunctive by way of a drafting error or intentionally, revising them to be disjunctive alternatives would be a serious step toward addressing “the Catch-22 situation that has crippled the Alien Terrorist Removal Court.”¹³²

B. The classification level for evidence deemed sufficient to proceed without a summary is unclear and should be revised.

As shown above, in most if not all cases, the ATRC will be required to determine whether the government has made the showing required to proceed without an unclassified summary. In addition to imposing too heavy of a burden on the government, *see supra* Part II.A, the current statutory scheme uses language that has no clear legal analogue to describe the risk to the national security posed by the release of specific evidence.

Specifically, § 1534(e)(3)(D)(iii) uses the phrase “serious and irreparable harm to the national security,” a novel phrase in the United States Code that does not appear in any court decision.¹³³ Utilization of such an untethered standard

¹³⁰ See S.390, 104th Cong. § 502(e)(2) (introduced on behalf of President Clinton) (using disjunctive “or”); 141 CONG. REC. S2508 (daily ed. Feb. 10, 1995) (section-by-section analysis) (using disjunctive “or”); S.761, 104th Cong. § 502(e)(2) (introduced by five Democratic Senators) (using disjunctive “or”); 141 CONG. REC. S6206 (daily ed. May 5, 1995) (section-by-section analysis) (using disjunctive “or”). The Reagan Administration-sponsored bill that originally sought to create a special alien-terrorist court likewise allowed for proof in the disjunctive. See 137 CONG. REC. S1187 (daily ed. Jan. 24, 1991) (“if necessary to prevent serious harm to the national security *or* death or serious bodily injury to any person, a statement informing the alien that no such summary is possible.”) (emphasis added), 1991 WL 6968, 88.

¹³¹ See S.390, 104th Cong. § 502(e)(2) (emphasis added); S.761, 104th Cong. § 502(e)(2) (emphasis added).

¹³² Valentine, *supra* note 17, at 3.

¹³³ The only other context in which we have located this phrase is in U.S. Department of Justice Assistant Attorney General Rex Lee’s testimony to the U.S. House of Representatives Select Committee on Intelligence in 1975 regarding the committee’s release of classified information. *U.S. Intelligence Agencies & Activities: Performance of the Intelligence Community Hearing Before the H. Select Committee on Intelligence*, 94th

creates a framework that lacks clarity for both the Department of Justice and the ATRC, and further impairs the viability of the court. To remedy this situation and render the ATRC a viable venue, Congress should revise the statute to utilize its preferred classification level.

“Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity.”¹³⁴ In 1951, President Harry S. Truman extended the classification system from the military to civilian departments and agencies of the federal government, and created the familiar classification levels of “top secret,” “secret,” and “confidential.”¹³⁵ And since at least 1978, the United States has used the same standards for classifying evidence at each of those levels.¹³⁶ Given the durability and consistency of their use, the standards are now well-established in both executive branch operations and in case law. This familiarity renders workable executive determinations on classification, and judicial review of such determinations.

In direct contrast to the well-established standards for classification levels, the ATRC statutes utilize the phrase “serious and irreparable harm to the national security.”¹³⁷ This combination of words has only been used in the ATRC statute.¹³⁸ Though standing alone, the “serious and irreparable harm” standard aligns with the equitable standard for issuing a preliminary injunction,¹³⁹ its application to the more

Cong. at 679 (1975),

<https://babel.hathitrust.org/cgi/pt?id=pst.000012936663;view=1up;seq=55> (statement of Asst. Att’y Gen. Rex E. Lee, Civil Div., Dep’t of Justice) (“In addition, the release of classified information such as the Committee has done, and has stated it will continue to do, causes serious and irreparable harm to the national security and foreign relations of the United States.”). This statement did not require judicial application of the standard.

¹³⁴ *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (citing *Developments in the Law: The National Security Interest & Civil Liberties – III. Information Security: Classification of Government Documents*, 85 HARV. L. REV. 1189, 1193-94 (1972)).

¹³⁵ See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951); *Developments in the Law: The National Security Interest & Civil Liberties – III. Information Security: Classification of Government Documents*, 85 HARV. L. REV. 1189, 1194 (1972).

¹³⁶ See Exec. Order No. 12,065, 43 Fed. Reg. 28949 (June 28, 1978); Exec. Order No. 12,356, 47 Fed. Reg. 14874 (Apr. 2, 1982); Exec. Order No. 12,958, 60 Fed. Reg. 19825 (Apr. 17, 1995); Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

¹³⁷ 8 U.S.C. § 1534(e)(3)(D)(iii).

¹³⁸ The closest phrasing the authors located in a statutory or Article III context was a line in a brief filed on behalf of the Secretary of the Navy. See Brief of Federal Defendants-Appellants at 18, *Nat. Resources Def. Council, Inc. v. Winter*, 508 F.3d 885 (9th Cir. 2007) (No. 07-56157), 2007 WL 3069208 (“The district court then dismissed in a single sentence the evidence showing that a preliminary injunction would cause serious and irreparable harm to the Navy and national security.”).

¹³⁹ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

nebulous concept of “national security” is less clear than its application to a specific organization or individual.¹⁴⁰

Moreover, the language used to describe the harm to the national security is also in direct contrast to the utilization of a well-established standard with regard to the harm that would be caused to an individual. The ATRC statutes allow for the use of classified evidence without a summary if the court determines that both the “continued presence of the alien in the United States” and “the provision of [an adequate] summary would likely cause . . . death or serious bodily injury to any person.”¹⁴¹ The “death or serious bodily injury” standard is relatively simple to apply. “Death,” of course, is self-explanatory. And “serious bodily injury” is a term that is defined elsewhere in federal statutes,¹⁴² and in the U.S. Sentencing Guidelines.¹⁴³ It is a familiar, discernible standard that can be applied to determine whether the government has adduced sufficient evidence to satisfy the ATRC standards with regard to the risk posed to an individual.

Legislative revision would bring similar predictability and uniformity to ATRC’s standard for the type of harm posed to the national security. In light of the well-established classification level standards and the nature of the court, Congress would be well served to utilize the language that has become so ingrained in the national security framework. The application of these standards would permit the Department of Justice sufficient predictability in assessing whether the classified information in support of removing the potential defendant is of the type intended by Congress to justify proceeding without an unclassified summary.¹⁴⁴

As noted above, the ATRC statutes use the phrase “serious and irreparable harm to the national security.”¹⁴⁵ That standard appears to exist somewhere

¹⁴⁰ “National security” is statutorily defined within the ATRC statutes to broadly mean “the national defense and foreign relations of the United States,” a definition incorporated from the Classified Information Protection Act. 8 U.S.C. § 1531 (incorporating 18 U.S.C. App. 3 § 1). *Cf.* AMOS A. JORDAN ET AL., AMERICAN NATIONAL SECURITY 4 (6th ed. 2009) (noting the multiple principles covered by the term “national security” and stating that “[p]reserving the national security of the United States requires safeguarding individual freedoms and other U.S. values, as well as the laws and institutions established to protect them”).

¹⁴¹ 8 U.S.C. § 1534(e)(3)(D)(iii).

¹⁴² *See, e.g.*, 18 U.S.C. § 1365 (“(3) the term ‘serious bodily injury’ means bodily injury which involves--(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty”); 21 U.S.C. § 802 (“(25) The term “serious bodily injury” means bodily injury which involves--(A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”). Notably, the definition of 18 U.S.C. § 1365 is expressly incorporated elsewhere into at least one other section of Title 8. *See* 8 U.S.C. § 1324(a)(1)(B)(iii).

¹⁴³ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(M).

¹⁴⁴ The United States always retains the ability to declassify evidence, where appropriate, if it decides that removal is important and the evidence does not rise to the level for proceeding without an unclassified summary. 8 U.S.C. § 1534(e)(3)(A).

¹⁴⁵ *Id.* § 1534(e)(3)(D)(iii).

between the standards for classifying evidence as “Secret” (“serious damage”) and “Top Secret” (“exceptionally grave damage”).¹⁴⁶ In light of Congress’ original drafting choice, we suggest that the classification standard for Secret be used. This would facilitate the United States’ non-disclosure of information that would pose serious damage to the national security to the public and to a defendant for whom the Attorney General and an Article III judge on the ATRC have already found probable cause to believe is an alien terrorist.¹⁴⁷ This is a functional solution, particularly in light of the fact that the alien defendant may be entitled to government-financed, cleared counsel who will be able to review the classified evidence against the defendant,¹⁴⁸ and automatic expedited appeal under a *de novo* standard of review.¹⁴⁹

C. Other revisions to better-enumerate Congress’s intent.

While making the foregoing critical changes to the ATRC statutes, Congress should also utilize the opportunity to clarify its original intent with certain clarifications.

- i. *Clarifying that classified evidence is appropriate for consideration on the merits.*

The ATRC statutes should be modified to make clear that classified evidence submitted to the court for *in camera* and *ex parte* review is properly part of the basis for the court’s removal decision.¹⁵⁰ The ability to introduce classified evidence in support of removal is the ATRC’s *raison d’être*.¹⁵¹ As currently

¹⁴⁶ See Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

¹⁴⁷ 8 U.S.C. § 1533.

¹⁴⁸ *Id.* § 1534(c)(1), (e)(3)(F).

¹⁴⁹ *Id.* § 1535(c)(2), (4)(D).

¹⁵⁰ *Id.* § 1534(c)(5).

¹⁵¹ See *Effective Immigration Controls to Deter Terrorism, Hearing Before the Subcomm. on Immigration of the S. Committee on the Judiciary*, 107th Cong. 47 (2001), <https://www.hsdl.org/?abstract&did=2388> (statement of Jeanne A. Butterfield, American Immigration Lawyers Association on Oct. 17, 2001) (“[T]he new Alien Terrorist Removal Procedures. . . were designed to allow the government to conduct deportation hearings with the use of secret evidence.”); ELDRIDGE ET AL., *supra* note 26, at 97 (“the Alien Terrorist Removal Court [was] expressly designed to remove alien terrorists by using classified evidence to support a terrorist allegation and by staffed by counsel possessing the security clearances necessary to review classified evidence”); *Alien Terrorist Removal Court*, 45 U.S. ATTORNEYS’ BULLETIN 55 (Sept. 1997), <https://www.justice.gov/sites/default/files/usao/legacy/2007/01/11/usab4505.pdf> (“[The] ATRC is designed to allow the United States to deport alien terrorists on the basis of classified information without having to disclose that information to the alien or the public.”); Martin, *supra* note 111, at 316 (“Only since 1996 has the government been authorized to use confidential information as part of the case in chief supporting removability of an admitted alien, and only in the context of unique proceedings before a special tribunal known as the Alien Terrorist Removal Court”).

drafted, however, the court's reliance upon such information seems intended but is unclear; providing only that "[t]he decision of the judge regarding removal shall be based only on the evidence introduced at the removal hearing.¹⁵² Notably that "removal hearing" is "open to public."¹⁵³ But Congress provided elsewhere that the ATRC's written "decision as to whether the alien shall be removed" should be only be made publicly available after appropriate redactions have been made.¹⁵⁴ Thus, Congress contemplated that the court would receive classified evidence in support of removal *in camera* and *ex parte*, and be able to rely on such information in making its removal determination.¹⁵⁵ Accordingly, we propose the inclusion of similar language to clarify that consideration of such information is proper. Specifically, Congress should include the phrase "and all classified evidence submitted to the court for *in camera* and *ex parte* review" at the end of the subparagraph delineating the evidence that can be relied upon in making the removal decision.¹⁵⁶

- ii. *Clarifying that the ATRC should be evaluating the risk posted by disclosure of an "adequate summary," which would include disclosure of classified information.*

The reference to "summary" in the subsection establishing the standard for when the government can proceed without the provision of an unclassified summary should be clarified.¹⁵⁷ It refers to "the summary," which is unclear because the subsection applies only in the context where the government has proposed an *unclassified* summary (i.e. one which would not pose such a risk)¹⁵⁸ which the ATRC has determined to be inadequate.¹⁵⁹ The language should be revised to say "an adequate summary" to capture Congress's intent that the ATRC

¹⁵² 8 U.S.C. § 1534(c)(5). This is in contrast to the provision allowing the ATRC to base its initial probable cause determination on such evidence. *Id.* § 1533(a)(1) ("In determining whether to grant an application under this section, a single judge of the removal court may consider, *ex parte* and *in camera*, in addition to the information contained in the application—(A) other information, including classified information . . .").

¹⁵³ *Id.* § 1534(a)(2).

¹⁵⁴ *Id.* § 1534(j) ("Any portion of the order that would reveal the substance or source of information received *in camera* and *ex parte* pursuant to subsection (e) shall not be made available to the alien or the public.").

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 1534(c)(5).

¹⁵⁷ *Id.* § 1534(e)(3)(D)(iii)(II) ("The findings described in this clause are, with respect to an alien, that— . . . (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.").

¹⁵⁸ *Id.* § 1534(e)(3)(B) ("With respect to such information, the Government shall submit to the removal court an unclassified summary of the specific evidence that does not pose that risk.").

¹⁵⁹ *See generally id.* § 1534(e)(3)(D).

evaluate the risk posed to the national security by producing a summary that would be adequate (*i.e.*, one that would likely contain classified information).

iii. *Correcting clerical errors in statutory language and cross references.*

Any legislation to address the issues discussed in this article should also include provisions to correct several errors of a clerical nature. Specifically, the cross-reference in § 1535(c)(4)(D) providing for *de novo* review of factual findings where a defendant was not provided with a summary of the classified evidence should be corrected so that it refers to the section of § 1534 that actually addresses that possibility.¹⁶⁰ Likewise, § 1534 should be revised to use the singular “proceeding” rather than the plural form, and to maintain uniformity in how it refers to forms of ancillary relief that are unavailable in ATRC proceedings.¹⁶¹

D. This legislative proposal for changes to the ATRC is likely constitutional.

The only actual determinant of constitutionality of the ATRC would be judicial review—which would likely culminate with Supreme Court review—of an as-applied challenge to ATRC proceedings. Much of the literature that examines the ATRC concludes that the court may be susceptible to Fifth Amendment Due Process Clause vulnerability.¹⁶² Unsurprisingly, it is difficult to guarantee whether a novel specialty court that *literally* considers “secret” (or “top secret”) evidence *ex parte* is constitutional.¹⁶³ However, there are strong arguments in favor of the

¹⁶⁰ See 8 U.S.C. § 1535(c)(4)(D). Compare *id.* § 1534(c)(3) (addressing a defendant’s “[r]ights in hearing”) with *id.* § 1534(e)(3) (addressing “[t]reatment of classified information” and situations in which case can proceed without summary).

¹⁶¹ See *id.* § 1534(e)(1)(A) (using plural “proceedings” where sentence structure calls for singular “proceeding”), (k) (including adverb “by” in context where it makes no logical sense and is inconsistent with other disjunctive subsections).

¹⁶² See, e.g., DYCUS ET AL., *supra* note 106, at 856 (“It may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it.”); Blum, *supra* note 18, at 703 (“Many scholars have argued that the ATRC deprives aliens of procedural due process under the Fifth Amendment; hence, its non-use may reflect a fear that if it was used to remove aliens based on classified evidence, it may be struck down as unconstitutional.”); *id.* at 704-10 (reviewing arguments made against constitutionality of ATRC); Niles, *supra* note 35, at 1837 (“Perhaps out of fear about the ATRC’s constitutionality, the attorney general has never used the court.”). Cf. Zachery, *supra* note 22, at 294 (“The [ATRC] is an amalgamation of statutes which are independently constitutional . . . select[ing] constitutionally valid provision from each statute. The result is legislation that is within the letter of the law but is arguably not within the spirit of our democracy[.]”).

¹⁶³ We do not examine the constitutionality of the detention provisions in the ATRC statutes, 8 U.S.C. §§ 1534(i) & 1536(a)(2)(A), due to the high variability of their potential use and the fact that there is ample detention authority contained elsewhere in the INA under 8 U.S.C. §§ 1226, 1231.

ATRC's ability to withstand Fifth Amendment due process scrutiny that are not adversely affected by our proposal, especially as it applies to LPRs, the principal class of noncitizen terrorists for which we think the ATRC is still required following the passage of IIRIRA and the PATRIOT Act.¹⁶⁴ As described below, the ATRC statutes provide LPRs with important procedural protections that are superior to protections in conventional administrative removal proceedings. Accounting for the possibility of a court identifying heightened due process rights for an LPR in ATRC proceedings,¹⁶⁵ a due process analysis that contemplates an LPR defendant where an unclassified summary is not provided is not only the most likely scenario for the court's use, but also the scenario that triggers the most procedural protections available to the defendant.

Congress carefully considered the constitutionality and the due process implications of the ATRC statutes at the time of AEDPA's enactment.¹⁶⁶ Congress intentionally engaged in due process balancing, designing what it believed would be "an effective means of removing terrorist noncitizens from our shores, while protecting due process concerns."¹⁶⁷ Moreover, the statutorily compliant utilization of the ATRC by senior Justice Department leadership would squarely implicate plenary powers doctrinal considerations that could weigh in the Executive Branch's favor on judicial review.¹⁶⁸

Due process protections are a central feature to the counter-majoritarian protections contained in the Bill of Rights, and the adjudication of a due process

¹⁶⁴ See *supra* § III.

¹⁶⁵ See *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) (contemplating possible variable due process protection for "an alien subject to a final order of deportation" depending on "status and circumstance").

¹⁶⁶ 142 CONG. REC. S3352 (daily ed. April 16, 1996) (statement of Sen. Hatch); see also 141 CONG. REC. S6202, S6206 (daily ed. May 5, 1995) (section-by-section analysis) ("[The ATRC provisions are] a carefully measured response to the menace posed by alien terrorists and fully comports with and exceeds all constitutional requirements applicable to aliens."); 141 CONG. REC. S7484, S7487 (daily ed. May 25, 1995) (remarks of Sen. Biden) (criticizing the ATRC proposals as creating a "kind of Star Chamber proceeding" predicated on the use of classified evidence); Yu, *supra* note 21, at 1 ("Congress structured the ATRC to balance national security needs with fundamental notions of due process.").

¹⁶⁷ 142 CONG. REC. S3352, S3354 (daily ed. April 16, 1996).

¹⁶⁸ See *U.S. ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *The Chinese Exclusion Case*, 130 U.S. 581, 602-03 (1889) (deferring to Congress or the agencies on the question of national security and immigration); but see *Zadvydas*, 533 U.S. at 695 (acknowledging that such deference is subject to the Constitution in a case that involved a claim of unconstitutional prolonged immigration detention—the judiciary "must defer to the Executive and Legislative Branch" on immigration questions, but the congressional "plenary power" on setting immigration policy is "subject to constitutional limitations."). See also Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 23 (2015) (describing one scholar's observation that the Supreme Court has deferred to Congress on procedural due process questions less over time).

claim is an individualized determination.¹⁶⁹ The Supreme Court has traditionally relied on the three-part balancing test in *Mathews v. Eldridge* to adjudicate Fifth Amendment procedural due process claims.¹⁷⁰ In a prospective as-applied challenge to the revised ATRC—one that is based on legislative revision that aligns with the recommendations of this article—a court would first need to consider the varying private interest particulars of the case including any limitations on access to classified evidentiary materials, the nature of the unclassified summary to the extent one is provided, the fullness of notice related to the allegations of fact, the judgment of the ATRC on questions of both fact and law, and potentially other considerations.

The court then would likely weigh the foregoing against the government’s national security and INA enforcement interests against alleged noncitizen terrorists, along with the panoply of pro-defendant and pro-transparency procedures, especially in comparison with *administrative* removal proceedings, to determine “the risk of erroneous deprivation” of the defendant’s protected interest(s) and the “probable value, if any, of additional or substitute procedural safeguards.”¹⁷¹ In some respects, the pro-defendant procedures of the ATRC exceed those that were afforded by the Supreme Court in its maximalist opinion regarding a welfare recipient in *Goldberg v. Kelly*¹⁷² and in comparison to procedures that exist in conventional administrative removal proceedings.

In particular and unlike administrative removal proceedings, there is direct political accountability for the initiation of ATRC cases, vested in the Attorney General or the Deputy Attorney General.¹⁷³ There is also Article III accountability

¹⁶⁹ U.S. CONST. amend. V.

¹⁷⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (observing that the *Mathews* test applies to property and liberty interests):

Mathews dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process [. . .]. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute procedural safeguards.”

¹⁷¹ *Mathews*, 424 U.S. at 335.

¹⁷² *Goldberg v. Kelly*, 397 U.S. 254, 268-71 (1970). Notably, limitation of access to classified information can implicate the particularized notice, cross-examination capability, and breadth of the written decision following the adjudication procedures that the welfare recipient in *Goldberg* was entitled.

¹⁷³ Compare 8 U.S.C. § 1229 (administrative removal proceedings are initiated by the lodging of a “Notice to Appear,” which flows from delegable authority) *with id.* § 1533(a)(1) (requiring non-delegable authorization).

for such case initiation with a weighty probable cause standard.¹⁷⁴ Unlike administrative removal proceedings that reserve Article III review until the completion of a two-stage administrative adjudicatory process, there is Article III administration of all stages of an ATRC case from initiation through final judgment and appeal.¹⁷⁵ Unlike administrative removal proceedings, there is a statutory requirement for speedy proceedings in ATRC cases¹⁷⁶ and the ATRC statutes enumerate a right to government-financed counsel.¹⁷⁷

Moreover, LPRs who were not provided a written summary of classified information earlier in proceedings are entitled to government funded, cleared “special” counsel to access and challenge the veracity of classified information,¹⁷⁸ as well as appellate *de novo* review of ATRC factual findings.¹⁷⁹ Such defendants are also entitled to a “release hearing” before an ATRC judge upon the Justice Department’s filing of a case-initiating application to the court.¹⁸⁰ On appeal, there are number of unique defendant-centric advantages in ATRC proceedings that weigh favorably for the government in a *Mathews* inquiry.¹⁸¹ There is an automatic stay of a removal order during the pendency of appeal.¹⁸² There is automatic appeal of certain decisions,¹⁸³ and there is a requirement for expedited appeal.¹⁸⁴

Given the numerous procedures that Congress mandated to make the ATRC less Star Chamber-like, a visual reference is helpful to convey the superior procedural protections that LPR noncitizens are afforded in an ATRC proceeding.

Comparison of Relative Procedures for ATRC and EOIR Proceeding for LPRs

Procedure	ATRC proceedings	EOIR proceedings	Process advantage
Article II political accountability to	Yes; 8 U.S.C. § 1533(a)(1)	No	ATRC defendant

¹⁷⁴ *Id.* § 1533(c)(2). The government may supplement its application with “information, including classified information, presented under oath or affirmation” and testimony at a hearing on the application. *Id.* § 1533(c)(1)

¹⁷⁵ Compare *id.* § 1252(a)(5), (b) (describing a petition for review process for administratively final orders of removal) with *id.* §§ 1531-1537 (contemplating the Article III function at all stages of adjudication). The government may supplement its application with “information, including classified information, presented under oath or affirmation” and testimony at a hearing on the application. *Id.* § 1533(c)(1)

¹⁷⁶ 8 U.S.C. § 1534(a)(1) (“a removal hearing shall be conducted under this section as expeditiously as practicable”). Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html> (examining the consequences of an immigration court backlog in excess of 800,000 cases).

¹⁷⁷ 8 U.S.C. § 1534(c)(1).

¹⁷⁸ *Id.* § 1534(e)(3)(E), (F).

¹⁷⁹ *Id.* § 1535(c)(4)(D).

¹⁸⁰ *Id.* § 1536(a)(2)(A).

¹⁸¹ *Mathews*, 424 U.S. at 335.

¹⁸² 8 U.S.C. § 1535(c)(1).

¹⁸³ *Id.* § 1535(c)(2)(A).

¹⁸⁴ *Id.* § 1535(c)(4).

initiate and prosecute removal?			
Article III probable cause threshold determination required to initiate proceeding?	Yes; 8 U.S.C. § 1533(c)(2)	No	ATRC defendant
Classified evidence availability without disclosure to LPR, incl. FISA and foreign intelligence evidence?	Yes; e.g., 8 U.S.C. § 1534(c)(2), (d)(5), (e)(1), (e)(3)	No, limited classified info. in limited situations; 8 U.S.C. § 1229a(b)(4)(B)	EOIR respondent
Right to (potentially cleared) counsel at government expense?	Yes; 8 U.S.C. § 1534(c)(1), (e)(3)(F)	No	ATRC defendant
Article III removal hearing and adjudication?	Yes; e.g., 8 U.S.C. § 1534(i)	No	ATRC defendant
Applicability of Fed. Rules of Evidence?	No; 8 U.S.C. § 1534(h)	No; <i>see</i> 8 U.S.C. § 1229a(c)(3)	N/A
Availability of nationwide subpoena power to summon witnesses, incl. gov't funded attendance and fees?	Yes; 8 U.S.C. § 1534(d)(1)-(4)	No	ATRC defendant
Expedited hearing?	Yes; 8 U.S.C. § 1534(a)(1)	No	ATRC defendant (for detention purposes)
Immediate and potentially automatic expedited Art. III appeal availability?	Yes; 8 U.S.C. § 1535(c)	No; administrative exhaustion is required, 8 U.S.C. § 1252(d)	ATRC defendant

Accordingly, there are ample procedures that could lead Article III jurists to conclude that the ATRC passes due process muster under a *Mathews* analysis, but the ultimate test will come in an as-applied challenge if and when the court is used, and then predicated principally on how persuasively primary and cleared counsel argue that the withholding of certain classified evidence creates an unacceptably high probability of judicial error.

V. CONCLUSION

Though the ATRC currently presents as a zombie court, it was created for the discrete and important purpose of reconciling the congressional imperatives of protecting national security information and removing noncitizen terrorists while maintaining fidelity to the Constitution and providing due process. It took three successive presidential administrations to enact its statutory framework and it has existed for nearly a quarter century without hearing a single case. The IIRIRA and PARTIOT Act have since provided alternative mechanisms to hold accountable and remove non-LPRs noncitizens. Even so, the importance of the ATRC remains static for the few terrorist LPRs who cannot otherwise be removed from the United

States. To the extent Congress enacts the commonsense and narrow reforms to the statutes that we propose in this article, it is likely the ATRC will finally be rendered functional and therefore able to fulfill its important function to provide an avenue for the removal of the most serious LPR threats to national security. Indeed, because of the ATRC's procedural impediments, such individuals may very well currently be present in the United States for want of prosecutorial tools to remove them without compromising critical national security sources and information.

APPENDIX A: PROPOSED LEGISLATIVE LANGUAGE

A BILL

To amend the provision in Title 8, United States Code, related to the Alien Terrorist Removal Court (8 U.S.C. §§ 1531-1537) to clarify the standards for utilization of the ATRC.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. UPDATING THE ALIEN TERRORIST REMOVAL COURT

- 1) Title 8, United States Code, Subchapter V (8 U.S.C. 1531-1537), is amended:
 - a) by striking the period after “hearing” in section 1534(c)(5) and inserting the following language at the end: “and all classified evidence submitted to the court for in camera and ex parte review.”;
 - b) by striking “proceedings” in section 1534(e)(1)(A) and replacing with “proceeding”;
 - c) by striking “person, and” in section 1534(e)(3)(D)(iii)(I) and replacing with “person, or”;
 - d) by striking “serious and irreparable harm” in section 1534(e)(3)(D)(iii)(I) and replacing with “serious damage”;
 - e) by striking “serious and irreparable harm” in section 1534(e)(3)(D)(iii)(II) and replacing with “serious damage”;
 - f) by striking “the summary” in section 1534(e)(3)(D)(iii)(II) and replacing with “an adequate summary”; and
 - g) by striking the cross-reference to “1534(c)(3)” in section 1535(c)(4)(D) and replacing with “1534(e)(3)”.