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## COMBATING TERRORISM WITH THE ALIEN TERRORIST REMOVAL COURT

Jonathan H. Yu<sup>1</sup>

### INTRODUCTION

The Alien Terrorist Removal Court (“ATRC”), the United States’ terrorism court, was created in 1996 through congressional legislation.<sup>2</sup> Although the statutes do not refer to the ATRC by this name, the Court’s own rules do, and numerous authorities have used this name frequently.<sup>3</sup> The legislation makes an alien deportation forum available where the government can safely use classified evidence against suspected terrorists without exposing national security information.<sup>4</sup> Congress structured the ATRC to balance national security needs with fundamental notions of due process.<sup>5</sup> By most measures, the ATRC’s statutory scheme is a legislative success. Even so, the ATRC has never heard a case.<sup>6</sup>

Scholars link the ATRC’s nonuse to questions of constitutionality.<sup>7</sup> This article does not address the ATRC’s constitutional status, nor does this article speculate on why the ATRC remains dormant. Instead, this article begins with the presumption that terrorist acts have occurred in the last two decades, which justify U.S. counterterrorism efforts.<sup>8</sup> Based on that presumption, this article

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The views expressed herein are presented in the author's personal capacity and are the author's alone and do not necessarily represent the views of the Executive Office for Immigration Review or the United States Department of Justice.

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2 See 8 U.S.C. §§ 1531–37 (2012).

3 See Alien Terrorist Removal Court (“ATRC”) Rule 1 (2012).

4 See Stephanie Cooper Blum, “Use It and Lose It”: An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies, 16 LEWIS & CLARK L. REV. 677, 682 (2012).

5 See *id.* at 681; see also 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, 291 (1995).

6 See Blum, *supra* note 3, at 703.

7 Blum, *supra* note 3, at 710 (“[T]he fact that many academics and lawmakers believe that [the ATRC’s] provisions deprive aliens of fundamental due process protections may be one reason for its non-use. Other commentators have recognized that regardless of whether the ATRC is unconstitutional, the perception of its unconstitutionality has resulted in its non-use . . . . ‘[I]t may be that constitutional doubts about . . . special court are why the government has never used it.’ One scholar goes so far as to suggest that the Attorney General’s failure to invoke the ATRC might indicate an effort to avoid an adverse constitutional ruling.”).

8 E.g., *FBI 100, First Strike: Global Terror America*, FED. BUREAU OF INVESTIGATION (Feb. 26, 2008), [http://www.fbi.gov/news/stories/2008/february/tradebom\\_022608](http://www.fbi.gov/news/stories/2008/february/tradebom_022608) (explaining that on February 26, 1993, Middle Eastern terrorists exploded a bomb at the World Trade Center in New York. Six people were killed. More than a thousand people were hurt in some way, some badly, with crushed limbs); e.g., *The War on Terrorism Remembering the Losses of*

explores how, with its current make-up, the ATRC is useful for counterterrorism. Furthermore, this article examines the ATRC's robust statutory framework and concludes that the Court provides the government with powerful tools against terrorist suspects that are unavailable in any other domestic forum. Moreover, due to unique challenges in terrorism prosecutions, scholars have posited separate court with special rules should be created for prosecuting terrorist suspects.<sup>9</sup> This article contends that creating an entirely new court for prosecuting terrorists is unnecessary because the ATRC is available to take on that role.

Part I of this article gives an overview of the circumstances leading to the ATRC's creation and parses through its statutory framework.<sup>10</sup> Part II explores the ATRC's usefulness as a counterterrorism tool.<sup>11</sup> Part III discusses difficulties that occur during terrorism prosecutions in criminal courts and explains how the ATRC framework solves those problems.<sup>12</sup> Finally, Part IV proposes necessary changes to the ATRC's statutory framework to transform the ATRC into a comprehensive terrorist prosecution forum.<sup>13</sup>

## I. BACKGROUND

### A. ORIGINS OF THE ATRC

The ATRC was born out of frustration during the Reagan Administration (hereinafter

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*KENBOM/TANBOM*, FED. BUREAU OF INVESTIGATION (Aug. 6, 2003), [http://www.fbi.gov/news/stories/2003/august/kenbom\\_080603](http://www.fbi.gov/news/stories/2003/august/kenbom_080603) (noting that on August 7, 1998, nearly simultaneous bombs detonated in front of the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Two hundred and twenty-four people died in the blasts, including twelve Americans. More than 4,500 people were wounded.); e.g., *Millennium Plot/Ahmed Ressay*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/millennium-plot-ahmed-ressam> (last visited Apr. 15, 2015) (saying that on December 14, 1999, Ahmed Ressay, a 34-year-old Algerian, was arrested at Port Angeles, Washington attempting to enter the United States with components used to manufacture improvised explosive devices. He subsequently admitted that he planned to bomb Los Angeles International Airport on the eve of the Millennium 2000 celebrations.); e.g., *The USS Cole Bombing*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/uss-cole> (last visited Apr. 15, 2015) (stating that on October 12, 2000, suicide terrorists exploded a small boat alongside the USS Cole, a Navy Destroyer, as it was refueling in the Yemeni port of Aden. The blast ripped a 40-foot-wide hole near the waterline of the Cole, killing seventeen American sailors and injuring many more.); e.g., *9/11 Investigation (PENTTBOM)*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation> (last visited Apr. 15, 2015) (mentioning that on September 11, 2001, hijackers took control of four airliners and crashed into the World Trade Center in New York, the Pentagon, and in Stony Creek Township, Pennsylvania. They were the most lethal terrorist attacks in history, taking the lives of 3,000 Americans and international citizens).

<sup>9</sup> See generally Ashley Inderfurth & Wayne Massey, *Trying Terrorists in Article III Courts, Challenges and Lessons Learned*, A.B.A. STANDING COMMITTEE ON L. AND NATIONAL SECURITY, July 2009, available at [http://www.americanbar.org/content/dam/aba/migrated/natsecurity/trying\\_terrorists\\_artIII\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/natsecurity/trying_terrorists_artIII_report_final.authcheckdam.pdf); see also Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 508-16 (2009) (discussing various national security court proposals); see also Mark R. Shulman, *National Security Courts: Star Chamber or Specialized Justice?*, 15 ILSA J. INT'L & COMP. L. 533, 543 (2009) (noting that "[t]hese proposals suggest that such a system offers benefits in expediency and efficiency and enhanced security for the trial and for its participants and the community in which it is held. They also say that national security courts offer a sensible way of managing the high stakes of releasing someone who should not have been.").

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part VI.

“Administration”), and took a decade to create.<sup>14</sup> In 1987, the Department of Justice (“DOJ”) sought to deport a group of Palestinians, known as the L.A. Eight, for terrorism activities on behalf of the Popular Front for the Liberation of Palestine (“PFLP”).<sup>15</sup> The government possessed classified evidence implicating the group in an international terrorist conspiracy that involved raising funds and distributing literature on behalf of the PFLP.<sup>16</sup> The DOJ had difficulty with the deportation proceedings because at that time, if the government wanted to use classified evidence as the basis for an alien’s deportation, the DOJ was then required to share that information with the alien.<sup>17</sup> Turning over classified information to the L.A. Eight was an untenable prospect: it meant potentially revealing tightly guarded national security sources and methods to likely terrorists.<sup>18</sup>

The notion of deporting the L.A. Eight forced the government to make a difficult decision. On the one hand, the DOJ could pursue the group’s removal and be forced to turn over classified information in the process.<sup>19</sup> On the other hand, the DOJ might risk the security of the country if it chose to protect the classified information by dismissing the charges, allowing suspected terrorists to remain unmonitored in the country.<sup>20</sup>

The Administration realized the choice was unpalatable,<sup>21</sup> and responded by proposing legislation Professor Stephanie Blum dubbed “a balance between . . . protect[ing] classified information and the suspect[s] . . . ability to defend against the accusations.”<sup>22</sup> In 1988, the Administration penned the ATRC’s predecessor,<sup>23</sup> the Terrorist Alien Removal Act.<sup>24</sup> Despite dying without hearings in the Senate,<sup>25</sup> the legislation was given new life seven years later.<sup>26</sup>

The 1993 World Trade Center bombing and murders of two Central Intelligence Agency (“CIA”) employees outside CIA headquarters focused national attention on domestic terrorism,<sup>27</sup> rallying support for the legislation.<sup>28</sup> Senator Joseph Biden headed the push.<sup>29</sup> He rebranded the Terrorist Alien Removal Act as the Alien Terrorism Removal Procedures (“ATRP”), and introduced

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14 Blum, *supra* note 3, at 680-81.

15 *Id.*

16 *Id.*; see 22 U.S.C. § 2378b (2006) (limiting assistance to Hamas controlled Palestinian authority only during a period for which a certification is in effect for terrorism ties).

17 Blum, *supra* note 3, at 680-81.

18 See 141 Cong. Rec. S14,524 (1995) (statement of Senator Orin 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.”); see also *International Terrorism: Threats and Responses: Hearing on H.R. 1710 Before the H. Comm. on the Judiciary*, 104th Cong. 21 (1995) (statement of William O. Studeman) (“Foreign governments simply will not confide in us if we cannot keep their secrets. One goal of [the Terrorism Bill] is to provide a mechanism to do just that by protecting classified information in special removal hearings for alien terrorists.”).

19 See John Dorsett Niles, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1835 (2008).

20 *Id.*

21 Blum, *supra* note 3, at 681.

22 See *id.*; see Niles, *supra* note 18, at 1835-36.

23 See Blum, *supra* note 3, at 681; see Zachery, *supra* note 4, at 292.

24 See 139 Cong. Rec. S15,249-01 (1993); see 140 Cong. Rec. S14,534-02 (1994); see 141 Cong. Rec. S1,454-01 (1995).

25 See Zachery, *supra* note 4, at 292.

26 *Id.*

27 *Id.* at 291.

28 See Blum, *supra* note 3, at 678-89.

29 See *The Administration: Vice-President Joe Biden*, WHITE HOUSE, <http://www.whitehouse.gov/administration/vice-president-biden> (last visited Mar. 16, 2015).

ATRP to Congress under the Omnibus Counterterrorism Act of 1995.<sup>30</sup>

With national sentiment on their side, the government pushed the ATRP quickly through Congress.<sup>31</sup> The Alien Terrorist Removal Court thus materialized in 1996.<sup>32</sup> As of that year, upon a judge's finding that "the continued presence of the alien . . . would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person,"<sup>33</sup> the United States is authorized to seek an alien's deportation using confidential evidence without risk of revealing national security information to the suspected terrorist.<sup>34</sup> Certainly, 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.<sup>35</sup>

When Congress passed the ATRC statute, legislators were confident that the Court would adjudicate important terrorism cases.<sup>36</sup> In a House Report accompanying the ATRC legislation, Congress proclaimed, "The removal of alien terrorists from the U.S., and the prevention of alien terrorists from entering the U.S. in the first place, [are] among the most intractable problems of immigration enforcement."<sup>37</sup> To date, Congress' ambitious legislation has yet to bear fruit. Professor Blum framed the ATRC's actual usage since 1996 succinctly:

"Despite the passionate rhetoric of its supporters and its apparent need to confront a unique and intractable threat compromising national security, the ATRC has never been used, even after the calamities on September 11."<sup>38</sup>

Therefore, the ATRC's statutory scheme remains untested.

#### A. THE ATRC AND ITS STATUTORY FRAMEWORK

The ATRC sits five federal judges for five-year terms, with each appointed by the Chief Justice of the Supreme Court.<sup>39</sup> One designee serves as the Chief Judge.<sup>40</sup> The proceedings mirror

30 S. 390, 104th Cong. (1st Sess. 1995); H.R. 896, 104th Cong. (1st Sess. 1995).

31 Blum, *supra* note 3, at 681; see Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 25 (1996).

32 See ATRC, *supra* note 1 (noting the two pieces of legislation created the ATRC: The Antiterrorism and Effective Death Penalty Act ["AEDPA"] of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act ["IIRIRA"] of 1996).

33 8 U.S.C. § 1534(e)(3)(D)(iii)(I) (2012).

34 See Zachery, *supra* note 4, at 291.

35 See *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 115 (2d Cir. 2008).

(holding that in a criminal case, the Classified Information Procedures Act ["CIPA"] "establishes rules for the management of criminal cases involving classified information."); see Blum, *supra* note 3, at 739 n.9 (comparing the use of classified evidence under the CIPA).

36 See H.R. Rep. No. 104-518, 115 (1996).

37 *Id.*

38 See Blum, *supra* note 3, at 692 (internal quotations omitted).

39 See 8 U.S.C. § 1532(c) (2012); see generally, James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125 (2013) (discussing the constitutionality of such appointments); see *Alien Terrorist Removal Court Members Selected*, U. St. Cts. (Sept. 1996), [http://www.uscourts.gov/news/TheThirdBranch/96-09-01/Alien\\_Terrorist\\_Removal\\_Court\\_Members\\_Selected.aspx](http://www.uscourts.gov/news/TheThirdBranch/96-09-01/Alien_Terrorist_Removal_Court_Members_Selected.aspx); see 8 U.S.C. § 1532(a)-(b) (2012) (stating that judges can be designated, after their initial terms, subject to the staggering rule in subsection [b], and that ATRC judges can contemporaneously serve on the Foreign Intelligence Surveillance Court).

40 8 U.S.C. § 1532(c) (2012).

the Foreign Intelligence Surveillance Court (“FISC”).<sup>41</sup> Congress gave the ATRC specific and detailed authority, jurisdiction, and procedures germane to protecting national security and allowing a terrorist suspect to present a defense.<sup>42</sup>

To help parse through the various authorities, procedures, and protections, this part divides the statutory framework under four headings: (1) Initiating Proceedings, (2) Hearings and Evidence, (3) Alien Protections Under the ATRC, and (4) Resolution of the Case.<sup>43</sup>

### 1. INITIATING PROCEEDINGS

To commence proceedings in the ATRC, a DOJ Attorney prepares an *ex parte* application containing a “probable cause statement” which is then filed under seal.<sup>44</sup> The statement must establish that: (1) the alien is an alien, (2) is physically present in the U.S., and (3) removal under the usual process would pose a risk to the national security of the U.S.<sup>45</sup> A judge decides the merits of the application and is allowed to consider “other information, including classified information,”<sup>46</sup> *ex parte and in camera*. If the judge finds probable cause,<sup>47</sup> he “shall issue an order granting the application.”<sup>48</sup> If the judge denies the application, a written statement of the reasons is required.<sup>49</sup> In contrast, the Attorney General can dismiss the removal case without explanation or appeal any application denial directly to the District of Columbia Circuit.<sup>50</sup>

### 2. HEARINGS AND EVIDENCE

After an application is approved, a hearing “must commence expeditiously.”<sup>51</sup> With few exceptions, the hearings are open to the public.<sup>52</sup> Reasonable notice of the charges detailing the time and place of the hearing must be given to the suspect.<sup>53</sup> Unlike in immigration court,<sup>54</sup> an alien in an ATRC removal proceeding is entitled to counsel at the government’s expense.<sup>55</sup>

Furthermore, the alien is entitled to [limited] discovery, and may introduce evidence at the hearing, examine the evidence against him or her, and/or cross-examine any witness(es).<sup>56</sup>

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41 *Id.* § 1532(d).

42 *See* Zachery, *supra* note 4, at 315 n. 155.

43 *See* 8 U.S.C. §§ 1532-1534 (2012).

44 *See* 8 U.S.C. § 1533(a)(2), (a)(1)(A)-(D) (stating that the application has four requirements: [1] the name of the applying DOJ attorney, [2] a certification by the Deputy or Attorney General seeking removal of an alien that classified information shows is an alien terrorist, [3] the identity of the alien for whom removal authorization is sought, and [4] a statement of facts and circumstances to establish probable cause).

45 *Id.* § 1533(a)(1)(D)(i)-(iii).

46 *Id.* § 1533(c)(1)(A).

47 *See id.* § 1533(c)(2) (stating that the judge must find the alien was correctly identified, is an alien terrorist present in the U.S., and removal under traditional proceedings would pose a risk to the national security).

48 *Id.*

49 *See id.* § 1533(c)(3) (stating that the judge may not disclose any classified information in the written denial).

50 *See* 8 U.S.C. §§ 1533(b), 1535(a) (2012).

51 *See* 8 U.S.C. § 1534(a)(1) (2012).

52 *See id.* § 1534(a)(2).

53 *See id.* § 1534(b).

54 *See* 8 U.S.C. § 1362 (2012) (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented [*at no expense to the Government*] by such counsel, authorized to practice in such proceedings, as he shall choose.”) (emphasis added).

55 8 U.S.C. § 1534(c)(1) (2012).

56 *See id.* § 1534(c)(2)-(3), (e).

The government has the burden to prove, by a preponderance of the evidence, that the alien is a terrorist subject to removal.<sup>57</sup> The Federal Rules of Evidence are inapplicable.<sup>58</sup> The Court may issue subpoenas for either party, but the alien cannot use that power to access classified information.<sup>59</sup>

In contrast to immigration court, an alien's protections are subject to three limitations. First, the government can use the fruit of Foreign Intelligence Surveillance Act ("FISA") authorized surveillance and searches against the alien, but the alien is not permitted to access such fruit.<sup>60</sup> Second, the alien is prohibited from seeking to suppress evidence on the basis that it was unlawfully obtained.<sup>61</sup> Third, the alien cannot learn the source of any evidence if the government determines the following: (1) public disclosure would pose a risk to the national security, (2) the act would disclose classified information, or (3) revealing the source would otherwise threaten the integrity of a pending investigation.<sup>62</sup> In practice, these rules would likely prevent a suspect alien terrorist access to any government surveillance or informant-based information.

### 3. ALIEN PROTECTIONS UNDER THE ATRC

Although an alien's access to classified evidence is limited, s/he is entitled to an unclassified summary of classified information the government seeks to use against him or her.<sup>63</sup> The summary process is unique and meticulous. The government submits the classified evidence *ex parte for in camera* review by the judge.<sup>64</sup> Concurrently, the government tenders an unclassified summary.<sup>65</sup> The judge has fifteen days to rule whether the summary is "sufficient to enable the alien to prepare a defense."<sup>66</sup> If the judge disproves the summary, the government has fifteen days to revise and resubmit or seek interlocutory appeal.<sup>67</sup>

Lawful Permanent Resident ("LPR") aliens get additional protection.<sup>68</sup> First, the judge "shall provide for the designation of a panel of attorneys."<sup>69</sup> Second, the judge is required to assign a panel attorney to review all classified information *in camera* on behalf of the LPR, and that attorney can

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57 See *id.* § 1534(g).

58 See *id.* § 1534(h).

59 See *id.* § 1534(e)(1)(D).

60 See *id.* § 1534(e)(1)(A) (stating that the alien cannot access information "otherwise collected for national security purposes"); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (hereinafter "FISA") (implying that the government can use FISA authorized wiretaps and other data interception to build a case against a suspect alien terrorist, and the alien does not have a right to that evidence).

61 8 U.S.C. § 1534(e)(1)(B); see also 18 U.S.C. § 3504.

62 8 U.S.C. § 1534(e)(1)(C).

63 See *id.* § 1534(e)(3)(C).

64 See *id.* § 1534(e)(3)(A).

65 See *id.* § 1534(e)(3)(B) (stating that the unclassified summary must not pose a risk to national security).

66 See *id.* § 1534(e)(3)(C).

67 See *id.* § 1534(e)(3)(D); see also 8 U.S.C. § 1535(b) (2012) (stating that interlocutory appeal is made to the District of Columbia Circuit, and the ATRC judge is the gatekeeper of classified summary, congruently holding the key to the alien's ability to prepare a defense).

68 See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 108 (2001) (concluding that it is appropriate for the due process claims of lawful permanent residents to rank higher than those of noncitizens even if they subjectively think of the United States as home); see also *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (recognizing that the nature of due process protection may vary depending upon an alien's status and circumstance).

69 See 8 U.S.C. § 1532(e) (stating that the panel attorneys are required to have security clearance that allows access to the classified information, i.e., Congress intended the ATRC be an adversarial proceeding).

challenge the veracity of that classified information.<sup>70</sup> Finally, automatic appeal is available if the government used classified evidence without providing a summary.<sup>71</sup>

#### 4. RESOLUTION OF THE CASE (HEARING, DECISION, AND APPEALS)

After introducing evidence at the hearing, each party has an opportunity to present its arguments “whether the evidence is sufficient to justify the removal of the alien.”<sup>72</sup> Like in immigration court, the government presents its case in chief first.<sup>73</sup> The alien has an opportunity to reply, and then the government may rebut.<sup>74</sup> The judge has discretion to hear any part of arguments pertaining to classified evidence *in camera*.<sup>75</sup> If the government meets its burden, the judge “shall order the alien removed and detained pending removal from the U.S.”<sup>76</sup>

Another departure from immigration court is that all decisions must be in writing and contain “a statement of facts found and conclusions of law.”<sup>77</sup> Any part of the written decision that could reveal the “substance or source” of classified information “shall not” be made public or “*made available to the alien*.”<sup>78</sup>

Finally, although an immigration judge can consider various applications for relief from removal during removal proceedings, an ATRC judge may not consider “ancillary relief.”<sup>79</sup> After a removal decision is made, any party can seek appeal to the District of Columbia Circuit, and after the Circuit, may petition for *certiorari* from the Supreme Court.<sup>80</sup>

The next part of this article explores using the ATRC as a tool in combating terrorism.

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70 See 8 U.S.C. § 1534(e)(3)(F)(i) (2012) (stating that any challenge to the classified evidence is done *in camera* proceeding); see *id.* § 1534(e)(3)(F)(ii) (stating that if the special attorney discloses any classified information to the alien or to any other attorney representing the alien, the special attorney will be subject to a fine, or minimum prison sentence of ten years, or both).

71 See 8 U.S.C. § 1535(c)(2) (2012).

72 See 8 U.S.C. § 1534(f) (2012).

73 *Id.* (adding that the alien generally concedes removability in immigration court, and the burden is shifted to the alien to establish eligibility for relief).

74 *Id.*

75 *Id.*

76 8 U.S.C. § 1534(i).

77 *Id.* § 1534(j).

78 *Id.* (emphasis added).

79 An immigration judge’s ability to consider ancillary relief is likely a major reason the ATRC has not been utilized. An immigration judge may only receive classified information from the government which is not revealed to the alien when it is considering the forms of “ancillary relief” listed in 8 U.S.C. § 1534(k). If an alien seeks discretionary relief, the government can introduce classified evidence. See 8 U.S.C. §§ 1182(a), 1227(a) (2012). Otherwise, aliens subject to deportation have no right to classified information in immigration court. *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1036 (E.D. Wis. 2007) (citing 8 U.S.C. § 1229a(b)(4)); *Jay v. Boyd*, 351 U.S. 345 (1956); *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007). However, under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1151 (2012), classified evidence is admissible against deportable aliens seeking discretionary relief without sharing that evidence with the alien. See D. Mark Jackson, Exposing Secret Evidence: Eliminating A New Hardship of U.S. Immigration Policy, 19 BUFF. PUB. INT. L.J. 25, 40 (2001); 8 U.S.C. § 1229a(4)(B) (2012); see also 8 C.F.R. 1240.11(a)(3) (2014). The alien applying for discretionary relief will concede deportability. Then the case becomes about whether notwithstanding being removable, the alien warrants relief from removal to remain in the country. See generally, 8 C.F.R. § 1240.11 (2014) (listing various forms for relief from removal). Thus, if an alien hopes to stay in the country based on ancillary relief, the alien rolls the dice on classified evidence submitted by the government opposing relief.

80 See 8 U.S.C. § 1535(c)(1), (d) (2012).

## II. THE ATRC AS A COUNTERTERRORISM TOOL

The ATRC statutory framework is an effective counterterrorism tool because the scheme allows the government to swiftly remove a suspected terrorist from the country or detain a suspected terrorist on immigration charges before he or she can cause harm.<sup>81</sup> Since 9/11, the United States is committed to foiling domestic terrorist attacks and protecting the nation's security.<sup>82</sup> In the spirit of that commitment, the government should consider using the ATRC as a counterterrorism weapon in the "War on Terror."<sup>83</sup> Particularly in situations where criminal grounds for detention are unavailable, the ATRC gives the government the ability to remove a national security threat from within U.S. borders or detain a suspect on an immigration violation pending removal.<sup>84</sup>

The government has acknowledged its willingness to use the "Capone approach,"<sup>85</sup> which involves apprehending individuals linked to terrorist plots on lesser, non-terrorism-related offenses, e.g., immigration violations.<sup>86</sup> The following discussion demonstrates that using the ATRC's statutory framework under the Capone approach is superior to using the immigration courts to deport terror suspects.

### A. THE ATRC REMOVES TERRORISTS EFFICIENTLY

The ATRC's strength is in its simplicity. Adjudication in the ATRC is swift and the ATRC's statutory scheme keeps suspected terrorists off the streets pending removal.<sup>87</sup> By comparison, immigration courts are backlogged and adjudicate a variety of issues throughout a removal case that would delay a terrorist's removal.<sup>88</sup>

Removing an alien through immigration court can be a slow process.<sup>89</sup> An immigration court's jurisdiction begins when an alien is issued a Notice to Appear ("NTA").<sup>90</sup> The NTA contains the date and time of a master calendar hearing and the allegations against the alien.<sup>91</sup> At the master calendar hearing, the alien pleads to the allegations in the NTA and can apply for various forms of

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81 *Id.*

82 *See* Zachery, *supra* note 4.

83 *See* Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 309, 387 (2013) (discussing the term "War on Terror").

84 *See id.*

85 JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41780, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS 18-20 (2013), available at <http://www.fas.org/sgp/crs/terror/R41780.pdf>.

86 *Id.*

87 *Id.*

88 Notably, the ATRC is capable of relieving some of the immigration court backlog as well. The ATRC was intended to handle a small volume of terrorism and national security immigration cases. *See* Andrew Becker, *Terrorism Court Unused 16 Years After Creation*, CAL. WATCH: PUBLIC SAFETY—DAILY REPORT (Apr. 12, 2012), <http://californiawatch.org/dailyreport/terrorism-court-unused-16-years-after-creation-14746> (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;" in fact, the ATRC employs just five federal district judges—all of whom have full-time dockets). *See id.* (quoting Karen Redmond, spokeswoman for the Administrative Office of the U.S. Courts, "[ATRC Judges] are not paid extra for being on the court and carry regular caseloads in their respective districts."). That means the ATRC has the capacity to handle the low volume of national security and terrorism cases that work their way through the immigration courts each year. However few, those cases still contribute to the backlog in the immigration court system.

89 *See* Becker, *supra* note 88.

90 *See* 8 C.F.R. § 1003.15 (2014).

91 *Id.*

relief from removal and seek release on bond.<sup>92</sup> The bond hearing is similar to criminal court bond hearings and allows the Immigration Judge (“IJ”) to determine if the alien can be released from detention during the pendency of his or her removal hearing.<sup>93</sup>

Notably, with the current backlog of more than 400,000 cases,<sup>94</sup> a case filed in some immigration courts in 2014 will not be scheduled for a hearing until 2017.<sup>95</sup> Therefore, if the alien secures bond or is released on recognizance, s/he is free to move about the country for several years before a removal order is issued.

In contrast, the ATRC jurisdiction begins with an *ex parte* application.<sup>96</sup> If the ATRC judge determines there is probable cause, the alien is taken into custody and adjudication begins expeditiously.<sup>97</sup> The ATRC has no backlog for calendaring a removal hearing, and suspects are unable to apply for ancillary relief.<sup>98</sup> Without ancillary relief, the removal proceeding addresses just the merits of the alien’s removability.<sup>99</sup> Although available in the ATRC, release pending removal is not available to non-LPR suspects.<sup>100</sup> Therefore, at least for non-LPRs terrorist suspects, the ATRC prevents terrorist suspects from being released in the country pending removal.<sup>101</sup>

The ATRC’s appeals process is also more streamlined than that of immigration courts. In immigration court, if a party wants to appeal a decision, the party must first appeal to the Board of Immigration Appeals (“BIA”).<sup>102</sup> After the BIA, a federal circuit court can review the BIA decision.<sup>103</sup> Only after the case survives scrutiny at those two levels may the parties seek review by the Supreme Court.<sup>104</sup> Considering the current backlog and three levels of prior review, a removal case originating from an immigration court can take a decade to clear all the levels of review. If bond is granted, a suspected terrorist is allowed to remain out of custody that entire time.

Appeal exhaustion with ATRC cases takes considerably less time.<sup>105</sup> After the ATRC removal

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92 See 8 C.F.R. §§ 1003.19, 1003.47 (2014).

93 See generally 8 C.F.R. § 1003.19 (2014) (noting also that terrorism allegations could prevent bond).

94 The Transactional Records Access Clearinghouse (“TRAC”) at Syracuse University keeps records detailing the backlog in the U.S. Immigration Courts. TRAC also tracks various categories of cases that the immigration courts presided over on year-to-year bases. Some of the number as of March 2015 include: 431,468 pending immigration cases; 594 days nationwide average wait time for a hearing; and 23,995 cases involving criminal violations, national security, or terrorism. In fiscal year 2013, there were 192,736 deportation proceedings in immigration courts. Just fifty of those cases had a nexus to national security or terrorism. The rest of the proceedings involved immigration issues. See also *Immigration Court Backlog Tool Pending Cases and Length of Wait in Immigration Courts*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, [http://trac.syr.edu/phptools/immigration/court\\_backlog](http://trac.syr.edu/phptools/immigration/court_backlog) (last visited Apr. 16, 2015).

95 See Amy Taxin, *Shutdown Delayed More Than 37,000 Immigration Court Dates By Months Overburdened System Has No Slack For Rescheduling*, THE COLUMBIAN (Feb. 22, 2014), <http://www.columbian.com/news/2014/feb/22/shutdown-delayed-immigration-court-dates-by-months> (citing Hon. Dana Leigh Marks of San Francisco’s immigration court as not having an opening on her calendar for merit hearings until June 2017).

96 See 8 U.S.C. § 1536(b)(2) (2012).

97 *Id.*

98 *Id.*

99 See 8 U.S.C. § 1534(e) (2012).

100 See 8 U.S.C. § 1536(b)(2) (2012).

101 *Id.*

102 See 8 C.F.R. § 1003.38(a) (2014); 8 C.F.R. § 1003.1 (2014).

103 See generally 8 U.S.C. § 1252 (b)(2) (2012) (“The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”).

104 See generally *Kucana v. Holder*, 130 S.Ct. 827 (2010).

105 See 8 U.S.C. § 1534(a)(1) (2012).

decision, there is no appeal to the BIA;<sup>106</sup> instead, any appeal goes to the D.C. Circuit.<sup>107</sup> From there, the Supreme Court may be petitioned, and, even if the Supreme Court reviews the case, the Court only has two lower court decisions with zero ancillary relief issues to look at.<sup>108</sup> As such, an ATRC case can exhaust all levels of appeal in less than one year.

In short, the ATRC statutory framework makes it possible to deport a suspected terrorist in a short amount of time and keep suspected terrorists off the streets pending their removal.

The next section uses an actual terrorism plot to demonstrate the ATRC's counterterrorism utility.

## B. THE MEZER CASE

To illustrate the ATRC counterterrorism prowess, consider the case of Ghazi Ibrahim Abu Mezer ("Mezer").<sup>109</sup> Mezer and his cohort Lafi Khalil ("Khalil") were arrested in their Brooklyn apartment on July 31, 1997, for planning to bomb the New York City subway system.<sup>110</sup> After Mezer's arrest, authorities learned Mezer and Khalil were Palestinians, and were illegally present in the U.S.<sup>111</sup> Authorities also discovered Mezer was already in deportation proceedings in immigration court, and was out on bond while the proceedings were pending.<sup>112</sup>

While out on bond, Mezer filed a political asylum application, i.e., ancillary relief, with the immigration court.<sup>113</sup> In the application, he claimed to fear persecution if returned to Israeli authorities because they believed he was a member of the terrorist organization Hamas.<sup>114</sup> Mezer submitted the asylum claim three months before his arrest,<sup>115</sup> and managed to delay the asylum hearing by moving for a change of venue to New York (the target city for his bombing plot).<sup>116</sup>

Based on these facts, all the requirements for ATRC jurisdiction were present. First, Mezer was clearly an alien because he was placed in removal proceedings.<sup>117</sup> Second, Mezer's ties to the terrorist organization Hamas establish the requisite national security justification.<sup>118</sup> Third, the government likely either had or could have reached out to Israeli counterparts for classified information about Mezer.<sup>119</sup> Therefore, the ATRC could have been invoked for Mezer's deportation.

106 See generally 8 U.S.C. § 1535 (2012).

107 This is an interesting prospect, because, currently, the D.C. Circuit does not review BIA decisions or have a body of immigration case law. This is because the Arlington Immigration Court handles immigration cases that originated in the District of Columbia, and the Arlington Immigration Court sits geographically in the Fourth Circuit. See § 1252(b) (2).

108 See 8 U.S.C. § 1534(k)(1) (2012).

109 See *Bombs in Brooklyn: How the Two Illegal Aliens Arrested for Plotting to Bomb the New York Subway Entered and Remained in the United States*, U.S. DEP'T OF JUSTICE (Mar. 1998), <http://www.justice.gov/oig/special/9803>.

110 *Id.*

111 See *id.* (explaining that Mezer had been arrested three times in the previous thirteen months attempting to enter the United States illegally from Canada—the first two times he returned voluntarily to Canada).

112 *Id.*

113 See *id.*

114 See *id.* (adding that Khalil was also in the United States illegally, having entered on a tourist visa but having remained here after the visa expired).

115 *Id.*

116 *Id.*

117 *Id.*

118 See *id.* (describing several instances where the government failed to identify Mezer's terrorist connections, but those failures are beyond the scope of this article).

119 See generally *id.* (noting that the State Department normally does not perform specific checks on an individual's associations with terrorism absent a request to do so).

Had the case originated in the ATRC, the government could have removed Mezer from the country several months before his arrest date.<sup>120</sup> The ATRC proceeding would have been fast and efficient for several reasons. First, Mezer was not an LPR and was thus ineligible for bond while his case was pending in the ATRC,<sup>121</sup> meaning that Mezer would have been detained from the time he was placed in removal proceedings until he was ultimately deported.<sup>122</sup> Second, his political asylum claim is not an option in the ATRC.<sup>123</sup> As such, Mezer could not delay his removal by forcing the court to hold a merits hearing on an ancillary issue.<sup>124</sup> Finally, Mezer could not have changed venues, because there is only one ATRC court.<sup>125</sup> Therefore, ATRC rules would have prevented Mezer from both relocating to New York and carrying out his bombing plot.

Consistent with the Capone approach, if Mezer's removal case had been brought in the ATRC rather than the immigration court, the government would have prevented a planned subway bombing.<sup>126</sup> Moreover, the ATRC framework would have allowed the government to detain Mezer for an indeterminate detention if no country was willing to accept him.<sup>127</sup> Therefore, the ATRC's utility as a counterterrorism device is twofold: first, as a speedy and efficient process to remove alien terrorists from the U.S., and second, as a means of detaining a suspected terrorist on an immigration charge thereby preventing possible harm to the country and its citizens. Put simply, the government should use the ATRC as a counterterrorism tool.<sup>128</sup>

The next part discusses the ATRC's usefulness beyond being a counterterrorism tool.

### III. CRIMINAL PROSECUTION OF TERRORISTS

Prosecuting terrorists is important for many reasons. Two reasons relevant to this discussion are as follows: (1) under a system that respects the rule of law, crimes committed must be punished; and (2) successful terrorist prosecution can prevent future terrorist acts and harms to U.S. nationals. Nonetheless, the U.S. criminal justice system did not develop to prosecute terrorists; it developed to prosecute crimes committed domestically.

Because the U.S. criminal justice system primarily prosecutes cases against its own nationals, the U.S. system has developed rules and procedures that protect defendants based on the Constitution. Some well-known protections include, but are not limited to, the following: the right to confront witnesses, the exclusion of hearsay evidence and evidence obtained through coercion, the right to self-representation, the right to a trial by a jury of one's peers, and the right to be represented by an attorney.<sup>129</sup> Moreover, defendants are entitled to discover any exculpatory evidence in the government's possession.<sup>130</sup> Once a government witness testifies on direct examination, statements or reports about the witness or prospective witness must be turned over to the

120 See 8 U.S.C. § 1534(k)(1) (2012).

121 See 8 U.S.C. § 1536(a)(2)(A) (2012).

122 See, e.g., *id.* § 1534(i) (2012).

123 See *id.* § 1534(k).

124 See *id.*

125 See 8 U.S.C. § 1532(a) (2012).

126 See *BJELOPERA*, *supra* note 85 (remembering that, in this case, the government received a fortuitously timed tip that enabled them to foil the subway-bombing plot).

127 See generally 8 U.S.C. § 1537 (2012).

128 See generally 8 U.S.C. § 1534(k)(1) (2012).

129 See U.S. CONST. amends. V-VI.

130 See *Brady v. Maryland*, 373 U.S. 83, 91 (1963); see also Fed. R. Crim. P. 16(a)(1) (requiring the government to provide defendants with: [1] their oral statements; [2] written statements made by the defendant that are within the government's possession, custody, or control; [3] written records containing the substance of statements made by the defendant; and [4] the defendant's testimony before a grand jury).

defendant.<sup>131</sup>

Notwithstanding the above, when it comes to terrorist prosecutions, legitimate and common sense reasons counsel against employing these protections and procedure rules.<sup>132</sup> The following discussion identifies three areas of concern when prosecuting terrorist suspects in criminal courts and points out how the ATRC statutory framework provides solutions for each concern: (A) Classified Evidence, (B) Evidence Exclusionary Rule Concerns, and (C) Due Process Checks.

#### A. CLASSIFIED EVIDENCE

The L.A. Eight case highlights the fact that it is sometimes necessary to use classified information in proceedings against terrorist suspects.<sup>133</sup> Like pre-1996 deportation cases, the government had to turn over classified information it intended to use during a criminal prosecution to defendants.<sup>134</sup> Defendants often tried to force that situation in a strategy colloquially called “grey mail.”<sup>135</sup> Congress tackled the grey mail problem by enacting the Classified Information Procedures Act (“CIPA”).<sup>136</sup> Importantly, CIPA does not *prevent* the discovery or use of classified information in criminal cases.<sup>137</sup> Rather, it was designed to allow the government to make an informed decision about the effect a particular prosecution might have on national security before impanelling a jury.<sup>138</sup> CIPA only allows the government to ask the Court to permit substitutions, admissions, or summaries of the classified information before the trial commences.<sup>139</sup> If the Court denies the government’s requests, the government can decide to proceed with the case to trial, which would require turning over the classified information to the defendant; or dismiss certain charges, which might mitigate amount of classified information disclosed; or dismiss the case without revealing classified information.<sup>140</sup>

However, in the terrorism prosecution context, scholars agree that national security risk

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131 See Jencks Act, 18 U.S.C. § 3500 (b) (2012) (imposing discovery obligations on the “United States” generally, untethered to any one governmental entity. The Act requires information to be turned over to the defendant if there has been a witness statement, if the United States possesses the statement and if the statement relates to the witness’s testimony at trial).

132 See *id.*

133 See Henry Weinstein, *Final Two L.A. 8 Defendants Cleared*, L.A. TIMES, Nov. 1, 2007, <http://articles.latimes.com/2007/nov/01/local/me-palestinian1>.

134 See generally *id.*

135 See generally Inderfurth & Massey, *supra* note 8, at 11 n. 4 (defining “Grey mail” as a defense tactic usually available to government employees connected to national security. When charged with a crime, the defendant claims classified records are necessary for the defense. The goal is to request so many classified documents that the federal government says “no.” Then, the defense tries to convince a judge that they cannot get a fair trial without these records. If the tactic is successful, the case or charges are dismissed).

136 CIPA, Pub.L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended in 18 U.S.C. app. 3 (2006)).

137 See *United States v. Mejia*, 448 F.3d 436, 454-55 (D.C. Cir. 2006); see also *United States v. Moussaoui*, 65 F. App’x 881, 887 (4th Cir. 2003) (“CIPA alone cannot justify the sealing of oral argument and pleadings.”); see also *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989) (“[CIPA] creates no new rights of or limits on discovery.”).

138 See Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 447 (2010) (explaining that, prior to CIPA, before admissibility was determined during the course of a public trial, prosecutors had to predict: [1] what classified information the accused might seek to disclose, [2] whether the court would rule it admissible, and [3] whether it would be leaked); see also CIPA § 5 (requiring defendants to notify the government of any classified information the defendant “reasonably expects to disclose . . . in any manner in connection with any trial or pretrial proceeding”).

139 CIPA § 6(c)(1).

140 See *id.*

is higher than in domestic criminal violation cases, and the CIPA does not do enough to protect classified evidence.<sup>141</sup> Under the CIPA, terrorist suspects are still able to gain access to classified intelligence through discovery or during trial testimony.<sup>142</sup> Such access can expose sources of intelligence and national security information to terrorist groups.<sup>143</sup>

In a piece published in the *New York Times*, Michael B. Mukasey demonstrated two instances where classified intelligence was unintentionally revealed to terrorists during criminal prosecutions.<sup>144</sup> The first instance was the case of Omar Abdel Rahman for his role in the 1993 World Trade Center bombing.<sup>145</sup> In the Rahman case, the government turned over a list of unindicted co-conspirators to the defendants.<sup>146</sup> Osama Bin Laden was on the list, and within ten days, a copy of the list reached Bin Laden.<sup>147</sup> He thereby learned the United States was aware of his and his co-conspirators' connection to the World Trade Center bombing.<sup>148</sup>

The second instance was the case of Ramzi Yousef (hereinafter "Yousef case"), the so-called "mastermind" of the 1993 World Trade Center bombing.<sup>149</sup> During public testimony, a witness's comment about a cell phone battery somehow tipped off terrorists monitoring the trial that one of their communication links was compromised.<sup>150</sup> The terrorist group shut down that phone immediately, which had in fact been under U.S. surveillance and provided valuable intelligence in the past.<sup>151</sup> The government lost that source of intelligence permanently, along with any information that intelligence source may have revealed related to future attacks.<sup>152</sup>

These instances underscore conceivable risks to national security during a terrorist prosecution. However, the ATRC framework provides solutions for these two situations. In the Rahman case, the ATRC framework would have prevented him from discovering the list of co-conspirators and subsequently leaking that list to Bin Laden.<sup>153</sup> Under the ATRC, Rahman would be allowed only to receive a summary of classified information without the specific names of each alleged co-conspirator.<sup>154</sup> As for the Yousef case, the ATRC statutory framework gives the judge discretion to conduct witness testimony *in camera*.<sup>155</sup> As such, Yousef and those monitoring the courtroom would be unable to hear the comment about the cell phone battery.<sup>156</sup>

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141 See, e.g., Radsan, *supra* note 138, at 451 (arguing that CIPA only offers a partial solution to the classified evidence dilemma because it still requires the government to make a decision between prosecuting with some disclosure and dismissing the case to avoid any more disclosure); see also Inderfurth & Massey, *supra* note 8, at 12.

142 See Fed. R. Crim. P. 16(a).

143 See generally *id.*

144 Michael B. Mukasey, *José Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, <http://online.wsj.com/news/articles/SB118773278963904523>.

145 See *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999) (explaining that Abdel Rahman was a blind sheik who led a conspiracy to perform jihad against the United States).

146 See Mukasey, *supra* note 144.

147 *Id.*

148 *Id.*

149 See *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003) (stating that in 1993, Yousef drove a van packed with explosives into the basement of the World Trade Center, set a timer to detonate, and escaped before the bomb exploded. He killed six people, injured over a thousand people, and cause more than \$500 million in property damage).

150 See Mukasey, *supra* note 144.

151 *Id.*

152 *Id.*

153 *Id.*

154 See Inderfurth & Massey, *supra* note 8, at 14 (recognizing that defendants counter classified evidence through a special advocate who keeps the defendants apprised of the situation).

155 See Niles, *supra* note 18 (saying that judges have significant leeway when deciding what information to review).

156 See *id.* at 1841 (making clear that aliens are allowed access to non-sensitive evidence and witnesses, but that they

Furthermore, under the ATRC's LPR protections, Yousef's interest would have been protected.<sup>157</sup> The LPR protections require a suspect's special attorney advocate to be present at *in camera* hearings.<sup>158</sup> That special attorney could contest the testimony on Yousef's behalf without exposing that testimony to terrorists monitoring the case.<sup>159</sup> Indeed, the special advocate protection is akin to cross-examination—albeit by a surrogate.<sup>160</sup> Professor Amos Guiora proposed a similar solution in his article advancing proposals for a terrorist prosecution forum; he suggested, “[T]he intelligence information would be presented *in camera* by the prosecutor and . . . would be subject to rigorous cross-examination.”<sup>161</sup> That is precisely what the ATRC framework provides.<sup>162</sup>

Therefore, had Rahman's and Yousef's prosecutions occurred under the ATRC statutory framework, national security information and an intelligence source would have been protected. In other words, the ATRC statutory framework takes CIPA a step further because the scheme prevents terrorist suspects from receiving any national security information whatsoever and prevents disclosures of national security information during trial.<sup>163</sup>

#### A. EVIDENCE EXCLUSIONARY RULE CONCERNS

In terrorism cases, sometimes the most reliable evidence available can be excluded from trial based on evidentiary exclusion rules in criminal court.<sup>164</sup> Evidence exclusion rules evolved to protect defendants from coercion and other abusive conduct that potentially violate constitutionally guaranteed rights by law enforcement.<sup>165</sup> However, government or foreign personnel—that are clearly not law enforcement—largely gather the evidence in terrorism cases.<sup>166</sup>

Indeed, intelligence gathering agencies or the military, which use fundamentally different methods and have fundamentally different objectives than traditional law enforcement investigations, usually obtain terrorist prosecution evidence.<sup>167</sup> The goal of intelligence gathering is to collect information in order to prevent future harms.<sup>168</sup> In contrast, the goal of a criminal investigation are to preserve evidence, to protect the integrity of information gathered, and ultimately to ensure a fair

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are not afforded the same privilege with classified information).

157 *See id.* at 1840-41.

158 This proposition assumes that the Lawful Permanent Resident (“LPR”) protections would apply to all defendants. That consideration is discussed in more detail *infra* at Part IV(D).

159 *See Niles, supra* note 18, at 1840.

160 *See generally id.* at 1841 (acknowledging that an alien is allowed to cross-examine non-secret witnesses, and it supports the inference that when the alien is unable to do so due to sensitivity issues, the alien's authorized special advocate will do so on the alien's behalf).

161 Amos N. Guiora & John T. Parry, *Light at the End of the Pipeline?: Choosing A Forum for Suspected Terrorists*, 156 U. PA. L. REV. 356, 361 (2008).

162 *See Inderfurth & Massey, supra* note 8, at 14 (noting that although the defendant is not allowed to directly participate in the cross-examination when sensitive material is being discussed, the defendant's special advocate will advocate the defendant's position as rigorously as possible).

163 *Id.*

164 *See id.* at 18 (stating that evidence gathering procedures in terrorism cases often do not comply with Federal Criminal Evidence requirements, so the ATRC provides a statutory framework to rectify this shortcoming).

165 *See generally id.* (allowing the inference that normal evidence gathering procedures are rigorous in order to fully protect a defendant's constitutional rights).

166 *See id.* (stating that U.S. military personnel often conduct investigations on terrorism suspects).

167 *See id.* (highlighting the difference between purpose of collecting evidence by traditional law enforcement and intelligence organizations, specifically that law enforcement attempts to be proactive while intelligence gathering is usually reactive).

168 *Id.*

trial based on the evidence.<sup>169</sup> Therefore, inevitably, evidence gathered by intelligence forces against terrorism suspects fails to satisfy rules developed to preserve the integrity of evidence for domestic criminal prosecutions.<sup>170</sup>

Because there is little to no law enforcement involvement, it makes little sense to apply exclusion rules designed to protect defendants against law enforcement coercion or abuse. Admissibility of hearsay, statements given without *Miranda* warnings,<sup>171</sup> and chain of custody are areas where discussants suggest court rules should be relaxed for terrorism cases.<sup>172</sup>

Hearsay is an out-of-court statement, i.e., a verbal or nonverbal assertion, made by a declarant, and offered into evidence for the truth of the matter asserted.<sup>173</sup> Hearsay is generally inadmissible subject to exceptions because the evidence is deemed unreliable.<sup>174</sup> Inadmissibility of hearsay in terrorism trials is problematic for three reasons.

First, statements the government wants to use against terrorists are almost always hearsay.<sup>175</sup> Specifically, the statements were obtained for intelligence purposes out of court, and there is no applicable exception to admit them.<sup>176</sup> Second, the information sometimes comes from foreign intelligence sources unable or unwilling to testify at trial.<sup>177</sup> Without the source's testimony, statements (or evidence of conduct—e.g., video surveillance or other recording) would fail to meet the *Crawford* standard.<sup>178</sup> Third, foreign evidence collection procedures often do not comply with U.S. court standards, which makes it difficult to introduce statements obtained under those conditions.<sup>179</sup> Despite the status of intelligence evidence as hearsay, that evidence should not be excluded because it is the most reliable evidence available against a terrorism suspect.<sup>180</sup> Yet, under traditional exclusionary rules, the hearsay would be excluded in criminal courts.<sup>181</sup>

*Miranda* warnings are problematic for different reasons. During the course of an intelligence gathering operation, terrorist suspects that are interviewed are not given *Miranda* warnings because their statements are elicited to get intelligence.<sup>182</sup> In contrast, when U.S. law enforcement questions a criminal suspect, the suspect is given *Miranda* warnings before an interrogation because that information is intended to be used for the suspect's prosecution.<sup>183</sup> The suspect can then invoke

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169 See *id.* (reiterating that in criminal law there are highly detailed and particular methods that were developed in order to protect the integrity of the evidence and ensure that it is admissible during trial).

170 See *id.* at 24 (stating that when intelligence agencies, both foreign and domestic, gather evidence, they often do not comply with domestic court standards).

171 *Miranda v. Arizona*, 384 U.S. 436 (1966).

172 See Inderfurth & Massey, *supra* note 8, at 25-26 (paraphrasing an ABA panel discussion where discussants suggested that Article III courts should admit all plausible evidence).

173 Fed. R. Evid. 801(a)-(c).

174 See *id.* at 802.

175 See Inderfurth & Massey, *supra* note 8, at 18 (noting that evidence collected by the intelligence community is often hearsay).

176 See *id.* at 24 (discussing the recognized exceptions in terrorism cases for admitting normally inadmissible evidence, and reminding the reader that the exceptions are finite).

177 See *id.*

178 See *id.*; see generally *Crawford v. Washington*, 541 U.S. 36 (2004).

179 See Inderfurth & Massey, *supra* note 8, at 24.

180 See *id.* (supporting the idea that the primary reason for evidentiary exclusions with regard to hearsay is because it is common and reliable).

181 See *id.*

182 See *id.* at 21 (arguing that even though intelligence gathering on the battlefield is not done for evidentiary purposes, it may be useful to give those being questioned some form of *Miranda* warning in order to preserve the integrity of the information being gathered).

183 See *id.* at 20 (stating that the United States requires the suspect be administered *Miranda* warnings if the evidence

the right to remain silent or the right to an attorney, and the interrogation must cease.<sup>184</sup> Of course, *Miranda* can be waived.<sup>185</sup>

Most important, the purpose of the *Miranda* warning is to protect a suspect from law enforcement coercion.<sup>186</sup> That rationale does not hold water when a suspect is apprehended on the battlefield or under exigent circumstances. It is pointless to warn a suspect of his or right to an attorney or right to remain silent on the battlefield. Indeed, exigent circumstances may require the suspect's immediate interrogation to prevent imminent harm.<sup>187</sup> Likewise, there is no way to predict that a suspect is going to be tried in a U.S. court if found in a foreign country. In those situations, it is impractical to pause and warn the suspect of his or her *Miranda* rights.<sup>188</sup> Nevertheless, successful *Miranda* challenges result in statements being suppressed.<sup>189</sup>

Another evidentiary hurdle with terrorist persecutions in criminal court is the chain of custody required for admitting evidence during trial.<sup>190</sup> The Federal Rules have specific requirements to ensure the authenticity of evidence for use in prosecutions known as the "chain of evidence."<sup>191</sup> Scholars acknowledge when attempting to prosecute terrorists the burden of the chain of custody are unfeasible and often impossible.<sup>192</sup> Having a member of the military travel from the battlefield to the Court in order to authenticate evidence or testify to the chain of evidence undermines national security interests on the battlefield.<sup>193</sup> One can also imagine a situation where an intelligence source, like a terrorist cell phone, provides evidence that the government is unwilling to expose in the process of authenticating the exhibit for trial. Nevertheless, just because the government does not want to reveal the source of evidence does not mean the evidence itself is unreliable. Similarly, just because a military service member cannot testify in court about the chain of custody of the evidence does not mean the evidence is unreliable.

As indicated, evidentiary exclusion rules exist to protect the defendant from improper law enforcement practices and prevent police abuses.<sup>194</sup> The same logic falls short for situations where evidence is gathered under the rules of war or for intelligence purposes, like preventing a future attack.<sup>195</sup> The military is not law enforcement.<sup>196</sup> Yet, the military is often called upon to gather evidence used to prosecute terrorist suspects.<sup>197</sup> In short, the rationale for the hearsay, *Miranda*, and

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gained through an interrogation is to be allowed at trial).

184 *Id.*

185 *See* *Tague v. Louisiana*, 444 U.S. 469 (1980) (recognizing that the burden to establish that a defendant knowingly and intelligently waived the rights protected by *Miranda* rests on the state).

186 *See* *Inderfurth & Massey*, *supra* note 8, at 20.

187 *See* *New York v. Quarles*, 467 U.S. 649, 653 (1984) (acknowledging a public safety exception to the *Miranda* requirement).

188 *See* *Inderfurth & Massey*, *supra* note 8, at 21 (agreeing that *Miranda* warnings on the battlefield would be impractical).

189 *See* *Oregon v. Elstad*, 470 U.S. 298, 306–07 (1985) (recognizing failure to administer *Miranda* warnings creates a presumption of compulsion, which if not rebutted, means that the statements are excluded from evidence. Conversely, if a suspect claims that statements were elicited by torture, it may be unfair to use the statements at trial).

190 *See* *Inderfurth & Massey*, *supra* note 8, at 25.

191 *Id.*

192 *Id.*

193 *See id.*

194 *See id.* at 20 (discussing how failure to administer *Miranda* warnings to terrorist suspects can preclude the information from being allowed in court, thus helping the defendant).

195 *See id.* at 18.

196 *See* *The Posse Comitatus Act*, 18 U.S.C. § 1385 (2012) (prohibiting the use of the military for law enforcement purposes).

197 *See* *Inderfurth & Massey*, *supra* note 8, at 18-19 (suggesting that due to the unique role of the military they often

chain of custody exclusionary rules is not rational for evidence in terrorism prosecution cases.<sup>198</sup> These rules hinder terrorism prosecutions.

The ATRC statutory framework provides a solution to the exclusion problems in terrorism cases.<sup>199</sup> All of the evidentiary rules for criminal prosecutions in federal court are contained in the Federal Rules of Evidence.<sup>200</sup> Therefore, to avoid evidentiary exclusions, one need only make the Federal Rules of Evidence inapplicable in the terrorist prosecution forum.<sup>201</sup> Instead, a judge should determine whether the information is reliable enough to admit into evidence. This is in fact how evidence submission takes place in the ATRC.<sup>202</sup> The ATRC's statutory framework explicitly states that the Federal Rules of Evidence do not apply.<sup>203</sup> As such, issues of hearsay, *Miranda* warnings, and chain of custody are irrelevant in proceedings before that ATRC.<sup>204</sup> Therefore, if a terrorism case were in the ATRC, hearsay, *Miranda*, and chain of evidence are all nonstarters.<sup>205</sup> Put differently, the ATRC statutory framework resolves exclusionary rule hurdles to prosecuting terrorist suspects in domestic criminal courts.

## B. DUE PROCESS CHECKS

One foundational element in implementing legislation pertains to fairness, despite any emotional biases, because “[w]e know that even if logic dictates doing things one way, we need to do it a different way in order to be what we want to be as a people.”<sup>206</sup> In other words, a terrorist prosecution forum must afford a suspect protection and rights so the proceedings are legitimate. A terrorism prosecution forum cannot be one sided in favor of the government or else it will be perceived as unfair. Therefore, an ideal terrorism prosecution forum will satisfy concepts of justice, evenhandedness, and due process. Americans are uncomfortable with the possibility of detaining the wrong person and are also uncomfortable with trial results that appear to lack integrity.<sup>207</sup>

To that end, the ATRC framework safeguards suspects in several ways. First, the ATRC requires a high-ranking government official to certify that national security information is evidence against a terrorist.<sup>208</sup> Also, the ATRC guarantees an Article III judge will review classified evidence to ensure that a defendant is able to put on a defense.<sup>209</sup> In fact, a former Chief Assistant U.S. Attorney, Andrew McCarthy, recommended using Article III judges as a way of maintaining fairness.<sup>210</sup> He

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encounter and collect evidence on terrorist suspects before law enforcement agencies get involved).

198 See *id.* at 19 (arguing that the goals for intelligence gathering operations are different than those for law enforcement, and that the evidentiary rules should not be the same).

199 See generally *id.* (discussing the importance of the ATRC in creating ways around normal evidentiary standards).

200 See *id.* at 23.

201 See generally *id.* at 18-19 (arguing that as long as the Federal Rules of Evidence are not applicable to military intelligence gathering or terrorist prosecutions, the traditional evidentiary rules do not apply).

202 *Id.* at 28.

203 8 U.S.C. § 1534 (h).

204 *Id.*

205 *Id.*

206 Andrew C. McCarthy, *A Case for a National Security Court*, 57 WAYNE L. REV. 275 (2011).

207 See W. Dudley McCarter, *Juror Nondisclosure*, 55 J. MO. B. 214, 216 (1999); see generally *State v. Dett*, 891 A.2d 1113 (2006).

208 8 U.S.C. § 1534(e)(1)(c) (2012).

209 Indeed, Article III judges are key to a suspect's protection in the ATRC. Article III judges are familiar with criminal cases and are equipped to understand the type of information a defendant needs to make a defense. This is particularly relevant to the classified evidence summaries because the judge determines whether the summary is adequate to make a defense.

210 See McCarthy, *supra* note 206, at 279–80.

hypothesized that allowing Article III judges to administer cases under rules that protect intelligence information would sufficiently operate as an “independent judicial check” on the executive branch, ensuring the proceedings are not a rubber stamp or sham.<sup>211</sup>

In addition, ATRC proceedings foster public participation in the process by requiring proceedings to be open to the public.<sup>212</sup> This element provides transparency and keeps prosecutors honest.<sup>213</sup> Terrorist suspects also benefit from no cost advocacy and prior notice before an ATRC proceeding commences.<sup>214</sup> Therefore, like traditional criminal proceedings, a terrorist suspect tried in the ATRC has the right to an attorney at no cost, is informed of the allegations against him, and has an opportunity to present a defense.<sup>215</sup>

A terrorist suspect is even protected during *in camera* sessions.<sup>216</sup> A suspect has an advocate present to contest testimony or evidence on the suspect’s behalf during all *in camera* sessions.<sup>217</sup> Importantly, although the terrorist suspect does not see any classified evidence, his or her advocate does.<sup>218</sup> Therefore, a suspect’s defense team does get all the evidence in its original form.<sup>219</sup>

Finally, a terrorist suspect has the additional protection and right to appellate review of decisions at all stages of the proceeding.<sup>220</sup> So, if the ATRC judge errs or the evidence is insufficient to sustain the claims, the suspect can bring that argument before an appellate tribunal.<sup>221</sup>

In short, the ATRC statutory framework provides due process checks that legitimize terrorist prosecution in that court. The framework is therefore ideal for resolving the struggles prosecutors currently face when prosecuting terrorist suspects in criminal courts. However, the ATRC statutory framework does have its limits.

The next part proposes changes to the ATRC’s statutory framework to make the ATRC a forum capable of adjudicating terrorism cases.

#### IV. TRANSFORMING THE ATRC

As enacted, the ATRC is an incomplete terrorism prosecution forum because it lacks necessary authorities to adjudicate criminal proceedings.<sup>222</sup> The ATRC is, after all, structured as an alien deportation court.<sup>223</sup> However, because Congress already equipped the ATRC for overseeing terrorism cases and providing protections to terrorist suspects, only minor amendments are needed to transform the ATRC into an effective prosecution forum. The following proposals will give

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211 *Id.*

212 *See* 8 U.S.C. § 1534(a)(2) (2012).

213 *See generally Public Right of Access to Criminal Trials: Richmond Newspapers, Inc. v. Virginia*, 94 HARV. L. REV. 149 (1980).

214 *See* 8 U.S.C. § 1534(b), (c) (2012).

215 *See id.* § 1534 (a)-(c).

216 *See id.* § 1534 (f).

217 *See id.* § 1534 (e)(3)(F).

218 *See id.* § 1534 (e)(3)(A).

219 *See id.* § 1534 (c).

220 At the application stage, the defendant can seek review by the D.C. Circuit if they are not provided a summary, and, when the case is decided, that decision is subject to review by the D.C. Circuit. Ultimately, the Supreme Court may even grant *certiorari*.

221 *See* 8 U.S.C. § 1535 (c)(4)(D) (2012).

222 *See* 50 U.S.C. § 1804(a)(6) (2012) (allowing for certifications by the Assistant to the President for National Security Affairs, an executive branch official or *officials designated by the President* from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation)

223 Emily C. Kendall, *The Alien Terrorist Removal Court and Other National Security Measures You May Never Hear of: The Need for Comprehensive National Security Reform*, 18 TEX. WESLEYAN L. REV. 253, 269 (2011).

the ATRC necessary powers, authority, and jurisdiction to be a viable forum for both terrorism prosecutions and terrorist removal.

#### A. AMEND CERTIFICATION REQUIREMENT

The ATRC's application and certification process should be amended so the ATRC jurisdiction can be invoked at the local and regional levels. Currently, the ATRC requires the Attorney General to certify all ATRC removal proceeding applications.<sup>224</sup> Although requiring certification helps ensure the ATRC hears only the most serious national security cases, in practice this certification is difficult for regional government entities to obtain.<sup>225</sup>

In 2008, Congress modified a similar certification provision in the Foreign Intelligence Surveillance Act, to give local and regional office level supervisors authority to certify applications for the FISC.<sup>226</sup> Such amendment is practical and necessary to make the ATRC function for terrorism prosecution or removal.

Indeed, post-9/11 the ATRC application and certification process is more complicated for two reasons. First, since 2003, the Department of Homeland Security ("DHS"), as opposed to the DOJ, is responsible for initiating deportation proceedings against aliens.<sup>227</sup> Second, cross department certification is impractical.<sup>228</sup> Even assuming the authority to certify an ATRC application has passed to the Secretary of DHS, which is not at all clear, it is inefficient for each satellite DHS office to ask headquarters to certify each case.<sup>229</sup> As such, the application and certification authority should be amended to extend or delegate application certification ability to supervisors at local offices. Also, it would be prudent for the amendment to clarify which agency is responsible for bringing cases before the ATRC.

#### B. EXPAND THE COURT'S JURISDICTION

The ATRC's jurisdiction needs to be expanded in order to adjudicate criminal cases. Presently, the ATRC has jurisdiction over *aliens* when national security information is used or a likelihood of severe harm is present.<sup>230</sup> The ATRC has no personal jurisdiction over U.S. citizens and

224 See generally 8 U.S.C. § 1533(a).

225 Leslie A. Holman, *The Impact of September 11th on America's Immigration Laws, Policy, and Procedures*, 27-DEC VT. B.J. 17, 19 (2001) (noting that specifically, the Attorney General or the Deputy Attorney General (there is no power of delegation) may certify an alien as a terrorist if reasonable grounds exist to believe the alien is a terrorist or has committed a terrorist activity).

226 See 50 U.S.C. § 1804(a)(6) (2012) (allowing for certifications by the Assistant to the President for National Security Affairs, an executive branch official or *officials designated by the President* from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation).

227 See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192 (codified at 6 U.S.C. § 251 (2006)) (transferring the functions of the Immigration and Naturalization Service ("Service" or "INS") to the Department of Homeland Security ("DHS"), and retaining in the Department of Justice under the direction of the Attorney General the functions of the Executive Office for Immigration Review ("EOIR")).

228 *Id.*

229 See *About ICE: Office of Principle Legal Advisor*, <http://www.ice.gov/about/offices/leadership/opla/> (last visited Mar. 22, 2015) (explaining that Immigration and Customs Enforcement ("ICE") Office of the Principal Legal Advisor ("OPLA") is the exclusive legal representative for the U.S. government in exclusion, deportation, and removal proceedings before the immigration courts. Moreover, OPLA attorneys also litigate immigration related hearings that involve criminal aliens, terrorists, and human rights abusers).

230 See 8 U.S.C. § 1534 (e)(1)(c) (2012).

the ATRC has no authority over violations of criminal statutes.<sup>231</sup> The Court's personal jurisdiction is therefore inadequate for terrorism cases perpetrated by U.S. citizens. Even so, because it is reasonable to adjudicate all terrorism cases in the same forum, the ATRC's personal jurisdiction should be amended to include all terrorist defendants regardless of immigration status.

Additionally, the ATRC needs additional subject matter jurisdiction to be able to hear criminal terrorism cases. Existing ATRC authority limits subject matter jurisdiction to determining whether an alien is a terrorist for purpose of deportation.<sup>232</sup> However, terrorism prosecutions are based on violations of federal criminal statutes.<sup>233</sup> In this sense, the Court should be authorized to adjudicate federal terrorism crimes.

Finally, the ATRC judges require additional disposition authority. Currently, the ATRC judge's only disposition authority is deportation.<sup>234</sup> If the Court is to decide criminal matters, it must be able to impose criminal sentences upon successful convictions. Therefore, the ATRC statutory framework should be amended to allow ATRC judges to sentence convicted terrorists.

### C. TWO STANDARDS OF PROOF

The ATRC should have different standards of proof depending on the subject matter of the proceeding. In terrorist removal cases, the standard should remain at *clear and convincing evidence*. That standard makes sense because deportation is not a punishment or deprivation of an alien's liberty interest.<sup>235</sup> Likewise, *in camera* hearings regarding classified and national security information can remain at the clear and convincing standard because such proceedings address only the admissibility of evidence. However, the standard for criminal matters should be *beyond a reasonable doubt* to comply with the Constitution. In all criminal proceedings, a defendant is presumed innocent.<sup>236</sup> That presumption would make little sense without the higher standard of proof for criminal cases because a defendant's liberty is ultimately at stake.

### D. EXTEND LPR PROTECTIONS TO ALL DEFENDANTS

The ATRC LPR protections are the most powerful protections available to a suspect provided by ATRC statutory framework. However, those protections are unavailable for all nonpermanent residents.<sup>237</sup> Because liberty interests are at stake in a criminal case, ATRC LPR protections should be extended to all defendants regardless of alien status.<sup>238</sup> Doing so will assure the highest level of due process available under the statute for criminal defendants tried in the ATRC. Having a special advocate on the defense team who is able to view all the classified evidence and contest that evidence balances out the minimization procedures the Court applies with respect to classified evidence.<sup>239</sup> Giving such protection to all defendants adds a level of legitimacy to the proceedings.

231 See 8 U.S.C. § 1531 (1) (2012); see 8 U.S.C. § 1534 (a)(1) (2012).

232 See 8 U.S.C. § 1534 (a)(1) (2012).

233 See, e.g., 18 U.S.C. § 2339(B) (2012).

234 See Blum, *supra* note 3, at 1.

235 See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which . . . his continuing to reside here shall depend.").

236 See *Coffin v. U.S.*, 156 U.S. 432, 454 (1895).

237 See *Boumediene v. Bush*, 553 U.S. 723, 761 (2008) (holding that aliens detained at the U.S. Naval Station in Guantanamo Bay, Cuba, have the constitutional privilege of habeas corpus).

238 See *id.* (suggesting that non-LPR aliens detained for terrorism prosecution should have constitutional protections).

239 See *Inderfurth & Massey*, *supra* note 8, at 14.

### E. HYBRID COURT

With the amendments recommended above, the ATRC can function as a hybrid court. That is, the ATRC should be viable for seeking terrorist removal as well as terrorist prosecution. Since *Erie v. Tompkins*, federal courts apply state law and federal procedural rules simultaneously in the same court.<sup>240</sup> Applying immigration law and criminal law in the same court is no different. Moreover, the ATRC federal judges are familiar with balancing a dual docket (civil and criminal).<sup>241</sup> Therefore, it should not be difficult for ATRC judges to manage both removal proceedings and criminal terrorism cases.

Similar hybrid courts have been successful in the international context applying both domestic penal law and international law.<sup>242</sup> The successful hybrid legal applications indicate the ATRC can do so as well. Moreover, if an alien is subject to removal and suspected of criminal terrorism, it conserves judicial resources to resolve both issues in the same proceeding. No doubt, many of the issues would overlap.

Finally, DHS and DOJ attorneys are equipped to handle criminal and immigration matters when it involves an alien.<sup>243</sup> Whichever agency represents the government in the ATRC,<sup>244</sup> it should have little difficulty managing dual dockets.<sup>245</sup>

### F. NAME CHANGE

This article's final proposal is to give the transformed ATRC a new name. "Alien Terrorist Removal Court" does not encompass the hybrid jurisdiction of the herein proposed terrorism court. The name "United States Homeland Security Court"<sup>246</sup> could be one option. That name connotes aspects of immigration and national security; practically speaking, immigration processing falls under the purview of the DHS as they involve the security of the homeland.<sup>247</sup> Another option is simply "United States Terrorism Court," a name that highlights the terrorism-centric aspect of the Court. Whichever name, with the proposals above, the ATRC is a complete solution for prosecuting, deporting, and detaining terrorist suspects.

### CONCLUSION

It is a shame that the ATRC has sat unused for almost two decades.<sup>248</sup> The ATRC's powerful statutory authority makes it a mighty weapon against terrorist suspects, and an ideal forum for prosecuting terrorist suspects. Indeed, the ATRC's statutory framework exemplifies a balance of national security considerations with due process of law. The government should use the ATRC to combat terrorism and to prosecute terrorist suspects. The latter use takes some statutory

240 See generally *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

241 See 28 U.S.C. § 516 (2012).

242 See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003) (discussing hybrid domestic-international courts and the blending of international and domestic laws in those courts).

243 See generally, 8 U.S.C. § 1533(a).

244 See *id.*

245 See 28 U.S.C. § 516 (2012) (stating that DOJ attorneys also litigate in both immigration and criminal cases).

246 See Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1, 13 (2006) (proposing a "Homeland Security Court" using Article I judges to determine the lawfulness of intelligence gathering, terrorist surveillance, and detention of prisoners of the Global War on Terror).

247 See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192 (codified at 6 U.S.C. § 251 (2006)).

248 See Andrew Becker, *Terrorism Court Unused 16 Years After Creation*, CAL. WATCH (Apr. 12, 2012), <http://californiawatch.org/dailyreport/terrorist-court-unused-16-years-after-creation-14746>.

amendment, which is provided in this article.<sup>249</sup> Nonetheless, activating the Court is prudent and follows precedent.<sup>250</sup> In 2002, the FISA Review Court heard its first case two decades after its creation.<sup>251</sup> Like the FISA Review Court, the ATRC's twenty-year hibernation is up.

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249 See *supra* Part IV.A.

250 Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2012); see *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (calling the ATS a “kind of legal Lohengrin,” and pointing out that as of 1975, there were only two cases ever brought under the ATS – the first case being in 1960); see Carolyn A. D’Amore, Note, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 600 (2006) (noting that until 1980, only a handful of cases were brought under that statute); see also Major William E. Marcantel, Jr., *Human Rights Boon or Ticking Time Bomb: The Alien Tort Statute and the Need for Congressional Action*, 217 Mil. L. Rev. 113, 119 (2013) (detailing that after 1980, ATS suits became increasingly more frequent); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int’l L. 461, 461 (1989) (noting that the ATS was originally part of the Judiciary Act of 1789).

251 See *In re Sealed Case*, 310 F.3d 717, 719 (Foreign Int. Surv. Ct. Rev. 2002) (noting that this case was the first appeal to the Court of Review since the passage of FISA in 1978).