ASSESSING THE CONSTITUTIONALITY OF THE ALIEN TERRORIST REMOVAL COURT

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ABSTRACT

In 1996, Congress created the Alien Terrorist Removal Court (ATRC). A court of deportation, the ATRC provides the U.S. attorney general a forum to remove expeditiously any resident alien who the attorney general has probable cause to believe is a terrorist. In theory, resident aliens receive different—and arguably far weaker—procedural protections before the ATRC than they would receive before an administrative immigration panel. In theory, the limited nature of the ATRC protections might implicate resident aliens' Fifth Amendment rights. In practice, however, the ATRC has never been used. Perhaps to avoid an adverse constitutional ruling, the attorney general has never brought a deportation proceeding before the court. This Note examines the constitutionality of statutes underlying the ATRC that allow the government to rely on secret evidence. Although these provisions are constitutional on their face, they would be unconstitutional as applied in some circumstances. This Note concludes by suggesting how the ATRC's secret-evidence provisions must be amended if the provisions are to become constitutional as applied in all circumstances.

INTRODUCTION

The United States Code provides for a court that is quite peculiar: the Alien Terrorist Removal Court (ATRC).[1] The court's

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1. Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §§ 1531–37 (2006). Although the statute does not refer to the Alien Terrorist Removal Court by this name, this name has been used widely by numerous authorities. *E.g.*, David A. Martin, *Graduated*

purpose is not neutral: it provides a forum for the U.S. attorney general to deport expeditiously any resident alien who the attorney general has probable cause to believe is a terrorist.[2] Its procedures are secretive: proceedings must begin ex parte and in camera.[3] During the war on terror, however, the ATRC has never been used despite its emphasis on deporting suspected terrorists.[4]

Tension embroils the ATRC. The United States faces an ongoing threat of domestic terrorism,[5] and one way to reduce that threat is to deport suspicious aliens.[6] The U.S. Constitution, however, constrains how the government may act to deport a resident alien. Although the government may seek to deport any resident alien, in doing so its procedures must be fundamentally fair.[7] For example, it must provide the alien adequate notice of deportation proceedings as well as an opportunity to be heard.[8] When the government does not utilize the

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Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 134.

2. *See* Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 708 (1998) ("The Act allows the government, at a resident alien deportation hearing, to present classified information in a summary report without revealing the classified evidence to the alien, while allowing the judge to examine all the evidence."). Although Senate Democrats and Senate Republicans introduced competing bills to establish the ATRC's procedures, they agreed on the court's basic purpose. President Clinton, introducing the Democrats' bill that later died, summarized this purpose as "[p]rovid[ing] a workable mechanism . . . to deport expeditiously alien terrorists without risking the disclosure of national security information or techniques." 141 CONG. REC. 4225 (1995) (statement of William J. Clinton, President of the United States). A "resident alien" is any person residing in the U.S. who is not an American citizen. BLACK'S LAW DICTIONARY 79 (8th ed. 2004).

3. 8 U.S.C. § 1533(a)(1).

4. Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. REV. 1687, 1723 (2007) ("[T]he 1996 alien terrorist removal system . . . has yet to be invoked.").

5. *See, e.g.*, Gail Gibson, *War on Homegrown Terrorism Proceeding with Quiet Urgency*, BALT. SUN, Apr. 17, 2005, at 1A ("Independent groups that monitor extremist activity inside the United States say that while the country has focused since 2001 on the threat from foreign terrorists, domestic operatives . . . have not gone away and, in some ways, are more dangerous than ever."). Domestic terrorism refers to activities that "occur primarily within the territorial jurisdiction of the United States." 18 U.S.C. § 2331(5)(c) (Supp. V 2005).

6. *See* Rachel L. Swarms, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1 ("[D]eportations are a striking example of how the Bush Administration increasingly uses the nation's immigration system as a weapon in the battle against terror.").

7. *See* U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .").

8. *See* Landon v. Plasencia, 459 U.S. 21, 36–37 (1982) (holding that a lawful, permanent resident alien seeking reentry to the United States is entitled to a hearing and remanding to determine whether eleven hours' prior notice of the hearing was adequate).

ATRC, it addresses these constitutional strictures by conducting administrative hearings to determine deportation. At administrative hearings, the government must disclose its reasons for seeking deportation.[9] This requirement can be burdensome for the government; in some situations, disclosing its reasons for seeking deportation might compromise national security.[10] Requiring disclosure thus can place two national security goals squarely in conflict with each other. On the one hand, tolerating the alien's continued presence within U.S. borders could compromise national security; on the other, disclosing the government's reasons for seeking deportation could compromise national security.[11]

Congress created the ATRC to sidestep this conflict.[12] The ATRC's statutory framework permits the U.S. attorney general to deport a suspicious resident alien without disclosing either the government's confidential reasons for seeking deportation or any confidential evidence supporting those reasons, so long as the presiding judge finds 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.[13]

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9. *Id. But see* D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INT. L.J. 25, 42 n.83 (citing exceptions to this general principle).

10. *See, e.g.*, Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1963 (2005) ("Proponents of secret evidence argue . . . disclosure [of classified information] would jeopardize intelligence-gathering efforts in the field and dry up valuable sources of information. . . . Such a scenario is particularly dangerous if the accused is a member of a worldwide terrorist network, like al Qaeda.").

11. As Professor Scaperlanda writes,

> Without the ability to use classified information as evidence in the deportation of terrorists, the executive branch is placed on the horns of a most difficult dilemma: it can disclose the evidence and deport, alienating [allies] in the process, compromising . . . agents in the field, and possibly compromising . . . intelligence techniques, or it can refuse to disclose the evidence and knowingly harbor a terrorist.

Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 29 (1996).

12. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1258 (codified as amended at 8 U.S.C. §§ 1531–37 (2006)).

13. 8 U.S.C. § 1534(e)(3)(D)(iii).

In other words, whenever national security requires deportation and secrecy, ATRC procedures allow the government to meet both goals by permitting the use of secret evidence.

Using secret evidence, however, implicates a resident alien's Fifth Amendment right to procedural due process.[14] Because the evidence is undisclosed, the alien cannot examine it or test its accuracy. Also, to the extent the information's source is secret, the alien cannot confront that source.[15] The alien might not even learn the nature of the evidence underlying the prosecution; the alien might not know what to defend against or how to do it.[16] Because of these concerns, several commentators have argued that the ATRC's secret-evidence provisions are unconstitutional.[17] Perhaps out of fear about

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14. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Kwong Hai Chew v. Corning, 344 U.S. 590, 596 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1059 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 409 (D.N.J. 1999), *rev'd on other grounds sub nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001); Rafeedie v. INS, 795 F. Supp. 13, 18 (D.D.C. 1992) (mem.).

15. Even though the ATRC's allowance of secret evidence restricts an alien's ability to confront adverse evidence, the ATRC does not implicate the Sixth Amendment right to confront one's accuser because ATRC proceedings are immigration rather than criminal proceedings. *See, e.g.*, Martin, *supra* note 1, at 115 ("[Legal permanent residents] are not given the full array of Fifth and Sixth Amendment rights in the removal proceeding itself, but they [do] have such protections in the underlying criminal prosecution."); *cf.* Note, *supra* note 10, at 1973 ("Indeed, the extent to which the Sixth Amendment's Confrontation Clause, and the Constitution's due process protections more generally, apply to military commission trials is a hotly contested question.").

16. During the Senate's floor debate on the Antiterrorism and Effective Death Penalty Act, Senator Biden presented a colorful hypothetical to illustrate this concern:

> In the administration's bill, the Government could, in some circumstances, use secret information, not disclosed to the defendant, not disclosed to the defendant's lawyers, in order to make a case.
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> . . . . [T]he prosecutor [could] meet alone with the judge and say:
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> "Judge, these are all the horrible things that the defendant did. We're not going to tell the defendant what evidence there is that he did these horrible things. We're not going to let the defendant know what that evidence is. We're not going to let the defendant's lawyer know what it is. We're not going to let the defendant's lawyer answer these questions. You and me judge"—me, the prosecutor; you, the judge—"let's deport him in a secret hearing, using secret evidence. Let's walk out of this courtroom, out of your chambers, walk out and say, 'OK, Smedlap, you're deported. We find you're a terrorist. You're out of here.'"
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> And Smedlap looks and says, "Hey, tell me who said I was a terrorist. How do you know that?" We say, "Oh, no, we can't tell you. We know you did it, and we can't tell you how we know."

141 CONG. REC. 14531 (1995) (statement of Sen. Biden).

17. *See, e.g.*, David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 331–35 (1996) (arguing

the ATRC's constitutionality, the attorney general has never used the court.[18] The constitutionality of its secret-evidence provisions has never been tested.[19] Because of the court's potential utility as a forum to safeguard the nation's security from domestic terrorist acts, striking a constitutional balance is critical.

This Note examines the constitutionality of the ATRC's secret-evidence provisions. Part I outlines the ATRC's statutory framework. It examines the court's secret-evidence provisions and places them within the context of the court's procedures more generally. Part II shifts attention to case law, exploring how courts have defined the scope of resident aliens' Fifth Amendment right to prevent the government from using secret evidence against them in immigration proceedings. In light of this case law, Part II examines how past commentators have assessed the ATRC's constitutionality. Part III reassesses the constitutionality of the ATRC's secret-evidence provisions. Although the ATRC's secret-evidence provisions are constitutional on their face, Part III argues that they would fail an as-applied challenge by a lawful, permanent resident alien who lacked the opportunity to cross-examine adverse evidence either directly or constructively through a specially appointed attorney. If the ATRC is to pass constitutional muster as applied in all circumstances, its statutory framework must be amended in two ways. First, Congress must strengthen the ATRC procedural protections to provide unlawful resident aliens and legal, temporary aliens with the same level of protection that the ATRC provides to permanent resident aliens.[20] Second, the ATRC procedures must provide all resident aliens with the option to have a special attorney review the government's secret evidence on the aliens' behalf.

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that the ATRC's statutory framework is unconstitutional); Beall, *supra* note 2, at 708 (same); Lawrence E. Harkenrider, Comment, *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, 166–67 (1996) (same). *But see* Scaperlanda, *supra* note 11, at 29–30 (arguing that the ATRC's statutory framework is constitutional).

18. *See* 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.").

19. *See supra* note 4 and accompanying text.

20. This is so even though the distinction between a legal permanent resident, a legal temporary resident, and an illegal resident is constitutionally significant. For a more complete explanation of this distinction's constitutional significance, see *infra* notes 60–62 and accompanying text.

I. THE ALIEN TERRORIST REMOVAL COURT'S STATUTORY FRAMEWORK

The ATRC came into being in 1996 when Congress passed the Antiterrorism and Effective Death Penalty Act.[21] The congressional majority that created the ATRC intended this court to protect against domestic acts of terrorism without unduly interfering with resident aliens' constitutional rights.[22] To assess whether Congress succeeded, it is important to become familiar with the statutory provisions underlying the ATRC. This Part introduces three categories of these statutory provisions: those providing for the court's jurisdiction and composition of judges, those providing for the court's prehearing procedures, and those providing for the procedures at ATRC hearings.

A. Jurisdiction and Composition

By statute, the ATRC possesses jurisdiction to adjudicate deportation proceedings "[i]n any case in which the Attorney General has classified information that an alien is an alien terrorist."[23] Although it is an Article I court, Article III judges govern it—five U.S. District Court judges, appointed by the Chief Justice of the U.S. Supreme Court.[24] Each judge serves for five years, and no two judges may come from the same judicial circuit.[25]

B. Prehearing Procedures

ATRC cases begin in secret. The U.S. attorney general submits an ex parte, in camera application identifying the resident alien whom the attorney general seeks to deport.[26] A single ATRC judge reviews the attorney general's application.[27] In addition to the application, the judge may consider any "other information, including classified

21. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1258 (codified as amended at 8 U.S.C. §§ 1531–1537 (2006)).

22. *See* 141 CONG. REC. 14524 (1995) (statement of Sen. Hatch) ("Each of the provisions in the [Alien Terrorist Removal Act, Title IV of the Antiterrorism and Effective Death Penalty Act of 1996,] strikes a careful balance between necessary vigilance against a terrorist threat and the preservation of our cherished freedom.").

23. 8 U.S.C. § 1533(a)(1).

24. *Id.* § 1532(a).

25. *Id.* § 1532(a)–(b).

26. *Id.* § 1533(a)(1)(C).

27. *Id.* § 1533(c)(1).

information, presented under oath or affirmation; and testimony received in any hearing on the application."[28] The judge must grant the attorney general's application on a finding of probable cause to believe that "the alien who is the subject of the application has been correctly identified and is an alien terrorist present in the United States; and removal [via administrative proceeding] would pose a risk to the national security of the United States."[29] None of the information that the judge considers in granting the attorney general's application has evidentiary value unless the attorney general presents the same evidence at the removal hearing.[30]

C. Removal Hearing Procedures

If the attorney general's application for an ATRC removal hearing is approved, the alien who is the subject of the hearing must receive reasonable notice of "the nature of the charges against [him], including a general account of the basis for the charges; and the time and place at which the hearing will be held."[31] The hearing must be open to the public,[32] and the individual has a right to be present at the removal hearing and a right to counsel.[33] If the alien cannot afford counsel, the ATRC judge must appoint an attorney.[34]

The removal hearing begins with the government's case-in-chief.[35] The government enjoys relatively free reign regarding the evidence it may present against the resident alien: the Federal Rules of Evidence do not apply,[36] and the alien may not seek to suppress evidence as being unlawfully obtained.[37] Also, the government may present in camera and ex parte any evidence for which the attorney

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28. *Id.* § 1533(c)(1)(A)–(B).

29. *Id.* § 1533(c)(2)(A)–(B).

30. *See id.* § 1534(c)(5) ("The decision of the judge regarding removal shall be based only on that evidence introduced at the removal hearing.").

31. *Id.* § 1534(b)(1)–(2).

32. *Id.* § 1534(a)(2).

33. *Id.* § 1534(c)(1).

34. *Id.*

35. *Id.* § 1534(f).

36. *Id.* § 1534(h).

37. *Id.* § 1534(e)(1)(B). Jennifer Beall writes that the ATRC is unconstitutional because it allows unlawfully obtained evidence to be considered, and she implies that the ATRC's framework should be amended to foreclose such evidence. Beall, *supra* note 2, at 706–08. A full discussion of this issue requires more space than is available for this Note. This Note's scope is limited to assessing whether the ATRC's secret-evidence provisions are constitutional.

general unilaterally "determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual."[38] When the government presents evidence in secret, the source of the information remains secret as well.[39]

For secret evidence to be admissible, in most situations the government must provide the ATRC with an unclassified summary of the evidence.[40] Such a summary must be "sufficient to enable the alien to prepare a defense."[41] In some situations, however, the ATRC judge may allow the government to enter secret evidence even without providing a summary.[42] Specifically, the government may admit secret evidence without providing a summary if the ATRC judge finds 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.[43]

Although the alien may not personally examine any of the government's secret evidence, the alien still may challenge such evidence. If the alien has received an unclassified summary of the secret evidence, the alien may challenge the evidence through this unclassified summary. If the alien has not received an unclassified summary but is lawfully admitted for permanent U.S. residence, the court must appoint the alien a special attorney who possesses a security clearance affording the attorney access to classified information.[44] The lawful, permanent resident alien may then examine and challenge the veracity of the evidence constructively through the specially appointed attorney.[45] If the alien is not lawfully admitted for permanent U.S. residence, however, a special attorney is not available. The illegal or temporary alien's only option for challenging secret evidence is to use an unclassified summary of the evidence, if

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38. 8 U.S.C. § 1534(e)(3)(A), (f).

39. *See id.* § 1534(e)(3)(A) ("[N]either the alien nor the public shall be informed of such evidence or its sources . . . .").

40. *Id.* § 1534(e)(3)(B).

41. *Id.* § 1534(e)(3)(C).

42. *Id.* § 1534(e)(3)(E)(ii).

43. *Id.* § 1534(e)(3)(D)(iii).

44. *Id.* § 1532(e)(1).

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

such a summary is available.[46] Any alien may cross-examine nonsecret evidence and nonsecret witnesses.[47]

After the government presents its case-in-chief, the alien may introduce evidence to defend against the charges.[48] The government then has an opportunity to close the hearing by replying in rebuttal.[49] Ultimately, the government must carry a "burden to prove, by the preponderance of the evidence, that the alien is subject to removal because the alien is an alien terrorist."[50] If the government carries this burden, the alien is deportable.[51] Normal methods of discretionary relief from deportation, such as asylum, adjustment of status, or registry, are not available.[52] Either party, however, may appeal.[53]

The court's framework contains several procedural safeguards for resident aliens who come before it. The court's arbiters are Article III judges; its hearings are open to the public; resident aliens have the right to attend their own hearings, the right to counsel, and the right to cross-examine nonsecret evidence; and if the resident aliens are lawfully admitted for permanent U.S. residence, the aliens have the right either to review secret evidence constructively through specially appointed counsel or to receive an unclassified summary of the secret evidence.[54]

Nevertheless, the ATRC lacks several procedural safeguards. ATRC proceedings begin against resident aliens before the aliens are aware of the charges. At ATRC hearings, the government may enter secret evidence against resident aliens that the aliens may not personally review. In some situations, temporary or unlawful resident aliens might not even receive an unclassified summary of that secret

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46. *See id.* § 1534(e)(3)(E)(i) ("[I]f the alien involved *is an alien lawfully admitted for permanent residence*, the procedures described in subparagraph (F) [for constructively reviewing secret evidence] shall apply." (emphasis added)).

47. *Id.* § 1534(c)(2)–(3).

48. *Id.* § 1534(f).

49. *Id.*

50. *Id.* § 1534(g).

51. Even if an alien is ruled deportable, actual deportation is not automatic. The U.S. government may retain custody of the alien until it finds another country that is willing to accept the alien. *Id.* § 1537(b).

52. *See id.* § 1534(k) (forbidding the judge to consider relief from removal based on asylum, withholding or cancellation of removal, voluntary departure, adjustment of status, or registry).

53. *Id.* § 1535(c)(1).

54. A lawful, permanent resident alien also enjoys a right of automatic appeal upon denial of a written summary of classified information. *Id.* § 1535(c)(2).

evidence. These provisions implicate resident aliens' Fifth Amendment rights to procedural due process and have prompted several commentators to argue that the ATRC is unconstitutional.[55]

Throughout the ATRC's statutory framework, Congress's purpose for the court is evident: to provide a forum through which the U.S. attorney general may deport resident aliens who likely are terrorists without requiring the attorney general to sacrifice any state secrets in doing so.

II. ASSESSING THE CONSTITUTIONALITY OF THE ATRC'S SECRET-EVIDENCE PROVISIONS

As of this writing, no court has ever assessed whether the ATRC's secret-evidence provisions violate a resident alien's right to procedural due process.[56] At a more general level, no court has ever decided whether the government may use secret evidence before any tribunal to find a resident alien deportable. Several courts have, however, addressed secret evidence's constitutionality in other immigration settings.[57] Arguing by analogy, it is possible to assess the constitutionality of using secret evidence in deportation hearings before the ATRC.[58]

A. Secret Evidence, Immigration, and Resident Aliens' Due Process Rights

At the outset, it is important to note that a resident alien enjoys the right to procedural due process. The Fifth Amendment protects every person within the jurisdiction of the United States, whether that person is a citizen, a lawful permanent resident, or a person "whose presence in this country is unlawful, involuntary, or transitory."[59] The

55. *See infra* Part II.B.

56. *See supra* note 4 and accompanying text.

57. *See infra* notes 63–117 and accompanying text.

58. *See infra* Parts II.B, III.A.

59. Mathews v. Diaz, 426 U.S. 67, 77 (1976); *see also* U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ."); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law."); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.").

Fifth Amendment, however, does not protect every person to the same extent:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. . . . [A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.[60]

The strength of a resident alien's procedural due process right is commensurate with the strength of the alien's ties to the United States. As the U.S. Supreme Court has elaborated, "[m]ere lawful presence in the country . . . gives [the resident alien] certain rights; [those rights] become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization."[61]

A resident alien's procedural due process rights are thus defined along a sliding scale, increasing in potency with the alien's growing ties to the United States. An unlawful resident receives the least protection under the Fifth Amendment; a lawful, temporary resident receives more protection; and a lawful, permanent resident receives the most extensive protection. Within this rubric, several courts have assessed the constitutionality of using secret evidence against an alien in an immigration proceeding.[62] In all, courts have assessed the constitutionality of secret evidence in five immigration contexts: excluding an alien from entering the United States for the first time,

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60. *Diaz*, 426 U.S. at 78–79; *see also* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

61. *Eisentrager*, 339 U.S. at 770.

62. The ATRC is not the only apparatus that purports to allow the U.S. attorney general to use secret evidence against a noncitizen in an immigration proceeding. Federal regulation allows the attorney general to use secret evidence in a variety of immigration contexts. *See* 8 C.F.R. § 1240.11(c)(3)(iv) (2007) (permitting the use of classified information in applications for asylum and withholding of removal in removal hearings); *id.* § 1240.33(c)(4) (permitting the use of classified evidence in applications for asylum and withholding of deportation in exclusion hearings); *id.* § 1240.11(a)(3) (permitting the use of classified information in adjustment of status reports); *id.* § 1003.19(d) (permitting the use of classified information in custody and bond determinations).

excluding a resident alien from returning to the United States after temporarily leaving, changing a resident alien's legal status, determining whether to set bond or to detain a resident alien awaiting a deportation hearing, and determining whether to grant discretionary relief from deportation after an alien has been held deportable. This Part discusses courts' treatment of each of these contexts in turn.

1. *Excluding an Alien from Entering the United States.* Aliens with few ties to the United States have experienced little success in challenging the use of secret evidence. A leading case is *United States ex rel. Knauff v. Shaughnessy*.[63] In *ex rel. Knauff*, a German-born woman sought entry into the United States to become a naturalized citizen.[64] She had served England's Royal Air Force "efficiently and honorably" during World War II, had worked for the U.S. War Department in Germany after the war, and had married a naturalized U.S. citizen who had fought for the United States in World War II and received an honorable discharge from the Army.[65]

When Knauff arrived at Ellis Island, these facts were not enough to secure her entry into the United States. Immigration and Naturalization officers detained her, and the U.S. attorney general "concluded upon the basis of confidential information that the public interest required [her to] be denied the privilege of entry into the United States."[66] The attorney general entered an order permanently excluding her from the country.[67] He also denied her a hearing on the matter, finding that disclosure of the confidential information at such a hearing "would be prejudicial to the public interest."[68]

The controversy made its way to the U.S. Supreme Court, which upheld the attorney general's actions and ruled that the use of secret evidence against Knauff was constitutional. As the Court reasoned, admission to the United States is a privilege rather than a right.[69] Because initial entry into the United States is a mere privilege,

63. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).
64. *Id.* at 539.
65. *Id.*
66. *Id.* at 544.
67. *Id.* at 539–40.
68. *Id.* at 541.
69. *Id.* at 542.

"[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[70]

Ms. Knauff's case generated much publicity, and the INS eventually granted her a hearing despite the Court's holding.[71] There, "it was discovered that the confidential informant was her husband's angry ex-girlfriend."[72] The Board of Immigration Appeals ultimately held that there was insufficient evidence to support a decision to exclude Ms. Knauff from the United States.[73] Yet *Knauff* remains good law: the attorney general may use secret evidence in determining whether to admit or to exclude a noncitizen who wishes to enter the United States for the first time.[74]

2. *Excluding a Resident Alien from Reentering the United States.* In contrast to a noncitizen wishing to enter the United States for the first time, noncitizens who have entered the United States lawfully for permanent residence develop a right to reenter the country if they leave temporarily.[75] At least one court has held that the government may not use secret evidence to exclude them. In *Rafeedie v. INS*,[76] a lawful, permanent resident alien who had lived in the United States for fourteen years left the country for two weeks.[77] On the basis of secret evidence, the U.S. attorney general sought to exclude him when he attempted to reenter the country.[78] The U.S. District Court for the District of Columbia struck down the use of secret evidence because of the man's strong ties to the United States and the risk that using secret evidence would erroneously classify him as a risk to

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70. *Id.* at 544.

71. Kopel & Olson, *supra* note 17, at 334; Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 963 (1995).

72. Kopel & Olson, *supra* note 17, at 334 (citing ELLEN KNAUFF, THE ELLEN KNAUFF STORY (1952)).

73. Weisselberg, *supra* note 71, at 963–64.

74. *See* Note, *supra* note 10, at 1968 ("Although both Knauff and Mezei 'became—and remain—causes célèbres highlighting the potential problems with using classified information,' they nonetheless continue to carry significant weight with courts today." (footnote omitted) (quoting Kelley Brooke Snyder, Note, *A Clash of Values: Classified Information in Immigration Proceedings*, 88 VA. L. REV. 447, 459 (2002))).

75. *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

76. Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992) (mem.).

77. *Id.* at 16.

78. *Id.* at 16–17.

national security.[79] In striking down the government's use of secret evidence, the court applied the three-part balancing test for gauging whether governmental action satisfies procedural due process, which the U.S. Supreme Court developed in the 1976 case *Mathews v. Eldridge*[80]:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[81]

Under the *Mathews* test's first prong, the court held that the lawful, permanent resident alien "has a substantial stake that could be affected by official action. '[T]he result, after all, may be to separate him from family, friends, property, and career, and to remit him to starting a new life in a new land.'"[82] Under the test's second prong, relying on secret evidence posed a risk of error "weigh[ing] heavily" against the government.[83] Finally, under the test's third prong, the government's interest in using secret evidence—protecting national security—was significant but not all-encompassing.[84] During the exclusion proceedings, the government had allowed Rafeedie to stay in the United States, even permitting him "to move from his home in Ohio to Texas."[85] According to the court, this action suggested the government had "at least implicitly determined that allowing plaintiff to remain free in the United States pending resolution of this litigation is in the public interest or, at the very least, not against the public interest."[86] In light of these facts, the court held that Rafeedie's interest in remaining in the country coupled with the risk of error posed by using secret evidence outweighed the government's interest

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79. *Id.* at 20.

80. Mathews v. Eldridge, 424 U.S. 319 (1976). This test has become standard for adjudicating procedural due process challenges. Courts and commentators commonly refer to the test as the *Mathews* test, and this Note will do the same.

81. *Id.* at 335.

82. *Rafeedie*, 795 F. Supp. at 18 (alteration in original) (quoting Rafeedie v. INS, 880 F.2d 506, 522 (D.C. Cir. 1989)).

83. *Id.* at 19.

84. *Id.*

85. *Id.* at 20.

86. *Id.*

in using secret evidence against him.[87] The court struck down the government's use of secret evidence.[88]

3. *Change-of-Status Determinations.* In *American-Arab Anti-Discrimination Committee v. Reno*,[89] the U.S. Court of Appeals for the Ninth Circuit considered whether the U.S. attorney general could use secret evidence against lawful, temporary resident aliens in a change-of-status determination.[90] The INS had initiated deportation proceedings against eight resident aliens, alleging that they were members of the Popular Front for the Liberation of Palestine (PFLP), "a world-wide Communist organization."[91] The aliens challenged the government's basis for seeking to expel them, arguing that expelling them for allegedly belonging to a Communist organization violated the First Amendment.[92] The attorney general subsequently dropped that basis for deportation but replaced it by alleging that the aliens belonged to an organization "involv[ed] in global terrorism."[93] The government also charged six of the individuals for being temporary residents who had overstayed their visas.[94] This statement was true, and two of the aliens who had overstayed their visas applied to change their status to lawful, permanent residence.[95] The government denied their request for a change in status on the basis of secret evidence.[96] It justified its decision broadly, not naming any particular grounds for suspecting the two resident aliens of wrongdoing other than their alleged connection to the PFLP.[97]

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87. *Id.* at 19–20.

88. *Id.* at 20.

89. Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999).

90. *Id.* at 1052. Among its other purposes, a change-of-status proceeding determines whether a resident alien is considered an illegal resident, a legal temporary resident, or a legal permanent resident. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1255–58 (2006) (detailing the ways in which the federal government may adjust or change a nonimmigrant's status).

91. *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1053 (quoting Nomination of William H. Webster to Be Director of Central Intelligence: Hearing Before the S. Select Comm. of Intelligence, 100th Cong. 95 (1987) (statement of William Webster, Judge)).

92. *Id.* at 1052.

93. *Id.* at 1069.

94. *Id.* at 1053.

95. *Id.* at 1054.

96. *Id.*

97. *Id.* at 1069.

Applying the *Mathews* test, the court considered the aliens' interest at issue in the change-of-status determination, the government's interest in using secret evidence at the hearing, and the risk of erroneous deprivation that secret evidence might cause.[98] Without commenting why, but perhaps because deportation proceedings against the individuals had begun, the court equated the aliens' interest in changing their status to lawful, permanent residence with their right to remain in their homes.[99] The court considered this interest to be great: "Aliens who have resided for more than a decade in this country, even those whose status is now unlawful because of technical visa violations, have a strong liberty interest in remaining in their homes."[100]

On the other hand, and crucial to the decision's applicability in other circumstances, the government's interest in using secret evidence was weak because

> the Government has offered no evidence to demonstrate that these *particular* aliens threaten the national security of this country. . . . [A]lthough it indicates that the PFLP advocates prohibited doctrines and that the aliens are members, it does not indicate that either alien has personally advocated those doctrines or has participated in terrorist activities.[101]

Also, the court concluded that the risk of erroneous deprivation was large: "There is no direct evidence in the record to show what percentage of decisions utilizing undisclosed classified information result in error; yet, as the district court below stated, 'One would be hard pressed to design a procedure more likely to result in erroneous deprivations.'"[102] The court invalidated the use of secret evidence, writing, "Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process."[103]

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98. *Id.* at 1068–69.

99. *Id.*

100. *Id.*

101. *Id.* at 1069–70 (emphasis added).

102. *Id.* at 1069 (quoting Am.-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365, 1375 (C.D. Cal. 1995)).

103. *Id.* at 1070.

4. *Bond Determinations.* In *Kiareldeen v. Reno*,[104] the U.S. District Court for the District of New Jersey considered whether the government could use secret evidence in determining whether to detain or to release on bond a lawful, permanent resident alien awaiting deportation proceedings.[105] Applying the *Mathews* test, the court struck down the use of secret evidence.[106] As the court wrote, the individual's interests "must be accorded the utmost weight. Kiareldeen has been removed from his community, his home, and his family, and has been denied rights that '[rank] high among the interests of the individual.'"[107] It also stressed, "the risk of erroneous deprivation . . . militates in the petitioner's favor. Use of secret evidence creates a one-sided process by which the protections of our adversarial system are rendered impotent."[108] The government argued that it satisfied the final *Mathews* factor because its desire to protect national security constituted a strong governmental interest in using secret evidence.[109] As in *Rafeedie*, however, the government had engaged in actions that undercut its claim that the particular resident alien posed a serious threat. In the court's words, "even the government does not find its own allegations sufficiently serious to commence criminal proceedings. The petitioner asserts, unchallenged, that the FBI recently closed its criminal investigation of [him], and does not intend to reopen the investigation unless it receives new information that he is involved in terrorist activity."[110] Under these circumstances, the resident alien's interest in remaining free and the interest against an erroneous bond determination outweighed the government's interest in using secret evidence.[111]

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104. Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999), *rev'd on other grounds sub nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001). The Third Circuit highlighted the limited scope of its opinion: "We vigorously emphasize that the issue before us is solely the grant of attorneys' fees and costs. We are not reviewing the merits of the decisions in the administrative proceedings or in the district court." *Kiareldeen v. Ashcroft*, 273 F.3d at 547.

105. *See Kiareldeen v. Reno*, 71 F. Supp. 2d at 407–14 (examining the use of secret evidence).

106. *Id.* at 414.

107. *Id.* at 413 (alteration in original).

108. *Id.*

109. *Id.* at 414.

110. *Id.*

111. *See id.* at 413–14 (holding that "the petitioner's private interest in his physical liberty[] must be accorded the utmost weight," "the risk of erroneous deprivation[] also militates in the petitioner's favor," and "the government's claimed interest in detaining the petitioner cannot be said to outweigh the petitioner's interest in returning to freedom").

5. *Considering Discretionary Relief from Deportation.* In *Jay v. Boyd*,[112] the U.S. Supreme Court held 5–4 that the government may use secret evidence to convince an administrative tribunal to refrain from using its discretion to suspend the deportation of an alien already found deportable.[113] Explaining its decision, the Court agreed with the district court's determination "that the U.S. attorney general may consider confidential information outside the record when deciding whether to grant discretionary relief from deportation."[114]

Dissenting, Chief Justice Warren sharply criticized the government's reliance on secret evidence, even in an administrative hearing for mere discretionary relief: "Such a hearing is not an administrative hearing in the American sense of the term. It is no hearing."[115] Justice Black, also dissenting, elaborated on this view:

> What is meant by "confidential information"? According to officers of the Immigration Service it may be "merely information we received off the street"; or "what might be termed as hearsay evidence, which could not be gotten into the record" . . . . No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, much less decide the most trifling issue on it.[116]

Despite this objection, *Jay v. Boyd* remains good law.[117]

In short, courts have assessed the constitutionality of using secret evidence in exclusion hearings, reentry proceedings, change-of-status determinations, bond determinations, and discretionary relief determinations. No court, however, has squarely addressed the

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112. Jay v. Boyd, 351 U.S. 345 (1956).

113. *Id.* at 347, 361.

114. *Id.* at 347 (alteration in original).

115. *Id.* at 361–62 (Warren, C.J., dissenting).

116. *Id.* at 365 (Black, J., dissenting) (footnote omitted).

117. *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp. 2d 402, 410–11 (D.N.J. 1999), *rev'd on other grounds sub nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001) (recognizing that *Jay v. Boyd* remains good law but was decided on statutory interpretation grounds).

constitutionality of using secret evidence to rule a resident alien deportable.

B. Assessing the ATRC's Constitutionality by Analogy: Past Commentators' Thoughts

Several scholars have commented on the constitutionality of using secret evidence in a deportation hearing.[118] Most have done so by applying the *Mathews* test, arguing by analogy from some or all of the five circumstances relating to immigration in which courts have assessed the constitutionality of secret evidence.[119] Commentators applying this test have largely agreed with federal courts' application of the three *Mathews* factors. First, a resident alien possesses an interest in remaining in the United States; this interest militates against allowing the use of evidence the alien cannot see or cross-examine.[120] Second, using secret evidence creates a risk of erroneously depriving the resident alien of this interest to remain in the United States.[121] This risk also weighs against allowing the use of secret evidence before the ATRC.[122] Third, and cutting in the other

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118. *See, e.g.*, Kopel & Olson, *supra* note 17, at 331–35 (arguing that the ATRC's secret-evidence provisions are unconstitutional); Scaperlanda, *supra* note 11, at 29–30 (arguing that the ATRC's secret-evidence provisions are constitutional); Beall, *supra* note 2, at 694 (arguing that the ATRC's secret-evidence provisions are unconstitutional); Harkenrider, *supra* note 17, at 154–66 (same); Jim Rosenfeld, Note, *Deportation Proceedings and the Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 742–49 (1995) (same); *see also* Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—The Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 120 (1996) (arguing that the Comprehensive Terrorism Prevention Act of 1995 "tramples the rights of law-abiding resident aliens" and "should not be adopted without substantial revisions," but stopping short of declaring that the Act would be unconstitutional).

In some circumstances, ATRC proceedings might also implicate a resident alien's other constitutional rights, such as the right to freedom of association. Such circumstances are beyond the scope of this Note. For a helpful discussion of how the ATRC might implicate an alien's First Amendment rights, see Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 623–24, 643–53 (1996).

119. Scaperlanda, *supra* note 11, at 27–29; Beall, *supra* note 2, at 707–08; Harkenrider, *supra* note 17, at 155–65; Rosenfeld, *supra* note 118, at 744–48. *But see* Kopel & Olson, *supra* note 17, at 331–35 (describing the ATRC as a "New Star Chamber" and arguing that its proceedings are unconstitutional without reference to *Mathews*).

120. Scaperlanda, *supra* note 11, at 27, 29–30; Beall, *supra* note 2, at 707; Harkenrider, *supra* note 17, at 155–58; Rosenfeld, *supra* note 118, at 744–45.

121. Scaperlanda, *supra* note 11, at 27–29; Beall, *supra* note 2, at 707; Harkenrider, *supra* note 17, at 158–61, 163–64; Rosenfeld, *supra* note 118, at 745–46.

122. *See* Beall, *supra* note 2, at 707 ("The second factor (risk of error) is great, and the value of additional procedural safeguards is obvious."); Harkenrider, *supra* note 17, at 158–61, 163–64 (calling the lowered evidentiary standards the "most notorious features of the removal court

direction, the government possesses an interest in using secret evidence whenever disclosing the information would compromise national security.[123]

The commentators also are relatively unified in how they would weigh each of the three *Mathews* factors. A resident alien's interest in remaining in the United States is "great,"[124] "weighty,"[125] "substantial,"[126] or similarly defined.[127] The risk of error from using secret evidence is "great,"[128] "grave,"[129] or similarly stated.[130] The government's interest in using secret evidence to protect national security is more complex. In the abstract, this interest is "strong,"[131] "weighs heavy,"[132] or is "tremendously important."[133] In practice,

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provisions"); Rosenfeld, *supra* note 118, at 746 ("[D]ue process history reveals the grave danger, during times like these, of instituting procedures which fail to adequately protect due process rights."). *But see* Scaperlanda, *supra* note 11, at 28–29 (arguing that even though using secret evidence increases the risk of an erroneous deprivation, the ATRC's other procedural protections might overcome that risk).

123. *See, e.g.*, Scaperlanda, *supra* note 11, at 29 ("Without the ability to use classified information as evidence in the deportation of terrorists, the executive branch is placed on the horns of a most difficult dilemma . . . .").

124. Scaperlanda, *supra* note 11, at 27 ("Her problem may be compounded by the scarlet letter she has to bear. Having been adjudged a terrorist, she may be unable to gain admittance to any other country, forcing her to take a place . . . as an indefinite guest at a governmental detention facility.").

125. Beall, *supra* note 2, at 707 (quoting Landon v. Plasencia, 459 U.S. 21, 34 (1982)).

126. Harkenrider, *supra* note 17, at 156.

127. *See* Rosenfeld, *supra* note 118, at 744 ("If the banishment of an alien from a country into which he has been invited . . . where he may have formed the most tender of connections, where he may have vested his entire property and acquired property . . . and where he may have nearly completed his probationary title to citizenship . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the norms can be applied." (alteration in original) (quoting JAMES MADISON, REPORT TO THE GENERAL ASSEMBLY OF VIRGINIA (1800), *reprinted in* VA. COMM'N ON CONST'L GOV'T, THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF 1799, at 36 (1960)).

128. Beall, *supra* note 2, at 707.

129. Rosenfeld, *supra* note 118, at 746.

130. *See* Scaperlanda, *supra* note 11, at 28 ("[T]he risk of error is greater, maybe even much greater, when a person is denied access to the full raw evidence against him, leaving him incapable of testing the integrity of that evidence by cross-examination and rebuttal."); Harkenrider, *supra* note 17, at 160 ("Even if it is accepted that the singular purpose of confrontation is to promote accuracy . . . the frail guarantee that the alien will be given a version of events prepared by his opponent which is merely 'sufficient to prepare a defense' does little to promote this process." (footnote omitted)).

131. Beall, *supra* note 2, at 708.

132. Scaperlanda, *supra* note 11, at 29; *see also* Harkenrider, *supra* note 17, at 165 ("This government interest in secrecy should weigh heavily in the balance.").

133. Rosenfeld, *supra* note 118, at 747.

however, "information does not always end up being as dangerous to national security as originally presented."[134] For this reason, given the "repeated, excessive deprivations of individual liberty that have been executed in the name of 'national security,' healthy skepticism is called for whenever this interest is invoked by legislators."[135]

Commentators' analysis under the *Mathews* test also has differed in several regards. Professor Michael Scaperlanda and Jennifer Beall differ from other commentators in that they examine not only the procedural safeguards that the ATRC lacks, but also those that it adds compared to an administrative proceeding.[136] Professor David Martin is the first commentator to differentiate among different classes of resident aliens based on the strength of their ties to the United States.[137] He also is the first commentator to examine whether constructive review of secret evidence sufficiently protects the procedural due process rights of lawful, permanent resident aliens.[138]

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134. Beall, *supra* note 2, at 708.

135. Rosenfeld, *supra* note 118, at 747; *see also* Harkenrider, *supra* note 17, at 164 ("National security is a unique concern, perhaps the most imperative of federal government functions. . . . [T]he public view of this function often transmutes into a vital yet amorphous stake against a faceless enemy. Guided only by a xenophobic national angst, this preoccupation threatens the very nation it seeks to protect.").

136. As Professor Scaperlanda explains, "[p]rocedural fairness derives from a flexible aggregate of safeguards, which cannot accurately be viewed in isolation from each other." Scaperlanda, *supra* note 11, at 33 n.62. Scaperlanda and Beall are not the first to argue from this perspective. In 1975, Judge Friendly gave a lecture at the University of Pennsylvania Law School in which he argued that "the elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another." Henry J. Friendly, Lecture, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975). Judge Friendly named eleven procedural rights that indicate due process. In decreasing importance, they are an individual's rights to an unbiased tribunal, to notice of the proposed action and of the grounds asserted for it, to an opportunity to present reasons against the proposed action, to call witnesses, to know adverse evidence, to obtain a decision on the matter based solely on the evidence presented, to counsel, to the making of a record, to a statement of reasons underlying the tribunal's decision, to public attendance of the hearing, and to judicial review. *See id.* at 1279–95 (discussing each factor).

137. *See* Martin, *supra* note 1, at 82–83, 136–37 (concluding that the Court "should recognize that the line separating lawful permanent residents, domiciled with the clearest possible consent from the community, from other aliens temporarily or unlawfully present carriers greater significance" than the "exclusion-deportation line").

138. *See id.* at 135–36. Professor Martin develops a five-category hierarchy of resident aliens, depending on the strength of their ties to the United States and on the circumstances in which the government seeks to deport them. *See id.* at 92–100 (describing a hierarchy of lawful permanent residents, admitted nonimmigrants, entrants without inspection, parolees, and applicants at the border). Noting that the ATRC has jurisdiction only over resident aliens—

Professor Martin argues that constructive review is constitutionally insufficient:

> One can expect that [special attorneys] will be tough and demanding, but the requirement that they not divulge any of the classified information to their clients cannot help but impair their effectiveness. To return to an earlier example, if the government's case turns critically on the informant's testimony regarding meetings with known terrorists in which the [lawful permanent resident] allegedly participated, dogged cross-examination can try to expose internal inconsistencies in the witness's testimony. But it seems nearly impossible for counsel to develop and present detailed countertestimony without tipping his client as to the crucial dates at issue—which could then compromise the secret information and thus violate the terms of counsel's role.[139]

In the end, although Professor Martin describes the ATRC as "a good-faith congressional effort to provide as many substitute safeguards as possible while still shielding . . . confidential information,"[140] he argues that the court's proceedings as applied to lawful, permanent residents would be unconstitutional.[141]

As these scholars demonstrate, although no court has squarely addressed whether the government may constitutionally use secret evidence to find a resident alien deportable, it is possible to gain insight through arguments by analogy.

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groups within his hierarchy that enjoy the greatest constitutional protections—he assesses the court's constitutionality as applied against lawful, permanent residents. *Id.* at 134.

139. *Id.* at 136.

140. *Id.* at 135.

141. *See id.* at 136 ("The ATRC is an impressive effort at substitute safeguards, but as applied to [lawful permanent residents], it is just not good enough."). All but one of the scholars who have examined the ATRC's constitutionality argue that its procedures violate a resident alien's right to procedural due process. *Compare id.* (arguing that the ATRC is unconstitutional), *with* Scaperlanda, *supra* note 11, at 28–30 (arguing that the ATRC is constitutional). Perhaps importantly, Scaperlanda analyzed an early version of the bill creating the ATRC that would have required the government ultimately to meet a burden of clear and convincing evidence rather than a mere preponderance. *See id.* at 28 ("[T]he order of deportability will only issue on a finding that the Attorney General met her burden by clear and convincing evidence.").

III. REASSESSING THE CONSTITUTIONALITY OF THE ATRC'S SECRET-EVIDENCE PROVISIONS

A. Reassessing the ATRC's Constitutionality

This Note's analysis begins where other commentators' analyses end. Like the previous analysis, this Part analyzes the ATRC's constitutionality under the *Mathews* test. It does not, however, belabor the direction in which each factor leans: Resident aliens, whether permanent and whether lawful, possess an interest against being deported from the United States.[142] Using secret evidence poses a risk of deporting a resident alien erroneously.[143] The government possesses an interest in preventing the disclosure of sensitive information and in preventing domestic acts of terrorism.[144]

Instead, this Part focuses on each factor's magnitude. Because the *Mathews* test is a balancing test, the magnitude of each factor is just as important as its direction. Evaluating the magnitude of each factor shows that although aliens who possess different legal statuses enjoy different levels of constitutional protection, the ATRC risks a successful as-applied challenge from unlawful residents or legal temporary residents because the court provides them with weaker procedural protections than it provides legal permanent aliens.[145] The ATRC also risks a successful as-applied challenge insofar as it allows deportation proceedings to continue without providing an alien with a special attorney to review secret evidence on the alien's behalf.[146] Exposing the ATRC to these constitutional uncertainties is unnecessary because the government's interest in deporting a suspected alien terrorist presumably is just as great when the alien is an illegal or legal temporary resident as it is when the alien happens to enjoy the legal, permanent resident status.[147]

1. *Reassessing the Magnitude of a Resident Alien's Interest Against Being Deported.* As the U.S. Supreme Court has held, a lawful, permanent resident possesses a strong interest against being

142. *See supra* notes 82, 98–100, 107, 120, 124–27 and accompanying text.
143. *See supra* notes 83, 102–08, 121–22, 128–30 and accompanying text.
144. *See supra* notes 84–86, 101, 109–10, 123, 131–35 and accompanying text.
145. *See infra* Part III.B.1.
146. *See infra* Part III.B.2.
147. *See infra* Part III.B.1.

deported.[148] As discussed in Part II, however, the interest of an unlawful or temporary resident is less clear-cut. The federal judiciary has adjudicated only one case, *American-Arab Anti-Discrimination Committee v. Reno*, involving a temporary resident's rights against the government's use of secret evidence in an immigration proceeding.[149] Without commenting why, though perhaps because the aliens who brought the challenge were facing pending deportation proceedings, the court equated the aliens' right to a change in status with their right to remain in their homes.[150] Because each resident alien had resided in the country for over a decade, the court described this interest as "strong."[151] To support this statement, the court cited a U.S. Supreme Court case involving a lawful, permanent resident alien;[152] the court, however, stopped short of directly equating the strength of temporary residents' right to remain in their homes with the strength of the corresponding right of permanent residents.[153] The court ultimately held that, because of the strength of the aliens' right to remain in their homes, the government could not use secret evidence in the temporary residents' change-of-status determinations.[154]

As *American-Arab Anti-Discrimination Committee* suggests, unlawful or temporary residents may need to substantiate the strength of their interests against being deported, whereas a court will presume the strength of this interest for lawful, permanent residents. Resident aliens thus should not be treated as a homogenous group when assessing the ATRC's constitutionality; aliens' "sliding scale" of constitutional protection survives.[155] An unlawful or temporary

148. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

149. Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999).

150. *See id.* at 1068–69 ("Aliens who have resided for more than a decade in this country, even those whose status is now unlawful because of technical visa violations, have a strong liberty interest in remaining in their homes.").

151. *Id.* at 1068–69.

152. *Id.* (citing *Landon*, 459 U.S. at 34 (holding that a lawful, permanent resident who leaves the country for a short time is entitled to due process if the government denies reentry)).

153. *See id.* at 1069 (accepting the premise only that "the 'equities' of long residence in the country are relevant to legalization" (citing Firestone v. Howerton, 671 F.2d 317, 321 n.10 (1982))).

154. *Id.* at 1070.

155. *See supra* notes 60–61 and accompanying text.

resident alien, however, might in some situations be able to prove an interest against deportation similar in magnitude to that of a lawful, permanent resident.[156] In such a situation, a court might hold ATRC proceedings to be unconstitutional as applied against an unlawful or temporary resident alien.

2. *Reassessing the Risk of Error.* As courts and commentators have made clear, allowing the government to rely on secret evidence in deportation proceedings increases the risk of error. Relying on secret evidence, however, might increase the risk of error differently in differing circumstances. The magnitude by which secret evidence increases the risk of error depends on at least three factors: whether the resident alien receives a summary of the government's secret evidence; the extent to which that summary accurately and precisely describes the evidence; and, in circumstances in which the government cannot provide a summary of secret evidence, whether the resident alien receives a special attorney to observe and cross-examine the actual evidence on the alien's behalf.

The reason that secret evidence risks error is simple: because the resident alien may not observe the evidence, the alien cannot test its veracity.[157] As commentators have discussed, providing a resident alien with an unclassified summary of the evidence abates this concern, at least to the extent that the summary accurately and precisely describes the actual evidence.[158] Unfortunately, it is unrealistic to expect the government's summary to be accurate and precise. To the extent such a summary were accurate and precise, it would run the risk of tipping off a resident alien to the government's actual confidential information as well as to that information's source. For the summary procedure to have been invoked, an Article III judge already would have ruled that alerting the resident alien to this information "would likely cause serious and irreparable harm to the

156. *See supra* notes 150–51 and accompanying text.

157. *See, e.g.*, Jackson, *supra* note 9, at 49 ("Lacking cross-examination, aliens may face biases or inaccurate evidence without the chance to expose these weaknesses to the fact finder."). Jackson also argues that secret evidence produces a risk of erroneous deportation because it "disables aliens from explaining the substance and context of the evidence to the fact finder." *Id.* A special attorney would be able both to cross-examine the evidence and to explain its substance and context on behalf of the alien to the fact finder.

158. *See, e.g.*, Scaperlanda, *supra* note 11, at 28 (noting that such a summary "enhances—albeit imperfectly—the ability of the alien to defend herself").

national security or death or serious bodily injury to any person."[159] The U.S. attorney general also already would have demonstrated probable cause to believe that the resident alien is a terrorist.[160] Under these circumstances, the attorney general and the judge would share a strong incentive to err on the side of providing the alien with an unclassified summary that is inaccurate or imprecise.[161] It is therefore unrealistic to expect that an unclassified summary of the government's secret evidence will do much to reduce the risk of error.

Even assuming that the government's unclassified summary would be accurate and precise, substituting the summary for actual evidence still would pose constitutional problems because it would increase the risk of erroneous deportation. Resident aliens receiving such a summary would still not be able to observe or cross-examine the actual evidence against them.[162] No matter how well this unclassified summary were to describe the evidence, the aliens would only imperfectly learn the nature of the actual evidence against them. The aliens thus would be only imperfectly able to challenge its veracity and to build a defense. To the extent that the resident aliens' ability to challenge the veracity of evidence against them and to plan a defense grows weaker, the risk of erroneous deprivation—and the risk of a successful as-applied constitutional challenge—correspondingly grows stronger.[163]

In some circumstances, providing an unclassified summary of secret evidence might jeopardize national security. In these circumstances, the statute allows the government to conduct ATRC

159. 8 U.S.C. § 1534(e)(3)(D)(iii)(I) (2006).

160. *See supra* note 29 and accompanying text.

161. Congress has followed the same impulse. Although the ATRC requires an unclassified summary to be "sufficient to enable the alien to prepare a defense," an early version of the bill ultimately creating the ATRC would have given this standard more teeth; it would have required such a summary "to provide the alien with substantially the same ability to make his defense as would disclosure of the classified information." Harkenrider, *supra* note 17, at 150 & n.40 (quoting S. 735, 104th Cong., § 503(e)(6)(B) (1995), *as reprinted in* 141 CONG. REC. S7857, S7862 (daily ed. June 7, 1995)). Congress thus considered, but shied away from, a standard that would have required the government's unclassified summary to more closely track its actual secret evidence.

162. *Cf.* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 418 (D.N.J. 1999), *rev'd on other grounds sub nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001) (noting that being "denied the opportunity to meaningfully cross-examine one person . . . unconstitutional damages [a party's] due process right to confront his accusers").

163. *See supra* notes 128–30 and accompanying text.

proceedings without providing such a summary.[164] If the resident alien before the ATRC enjoys the status of lawful and permanent resident, the alien may request a special attorney to observe and cross-examine the actual secret evidence on his behalf.[165] Exercising this option lessens the risk of erroneous deportation enough, this Note argues, to shield ATRC proceedings from successful as-applied procedural due process challenges.

Here, this Note parts ways with Professor Martin, who worries that a special attorney's duty not to disclose the government's secret evidence might cause the attorney to be ineffective.[166] The attorney would need to protect against tipping off the alien to the government's secret evidence, Professor Martin argues, limiting the attorney not only in what to tell the alien, but also in what to ask. Due to these limitations, he concludes the special attorney might not be able to prepare an adequate defense.

Professor Martin's concern is valid, but not fatal to the special attorney's effectiveness. It is true that a special attorney might need to formulate questions carefully to the resident alien to avoid tipping off the alien to confidential information. Unlike the attorney general and unlike the ATRC's presiding judge, however, a resident alien's special attorney would owe the alien a fiduciary duty.[167] Thus, the special attorney alone could be trusted to formulate questions to the alien with the alien's best interests in mind.[168] To the extent that formulating questions too cautiously might curtail the attorney's effectiveness, the attorney therefore could be trusted to minimize any adverse effect.[169] A forward-looking attorney also could circumvent

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164. *See supra* notes 42–43 and accompanying text.

165. *See supra* note 45 and accompanying text.

166. *See supra* text accompanying note 139.

167. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007) ("A lawyer shall act with reasonable diligence . . . in representing a client."); *id.* cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

168. *See supra* note 2 and accompanying text.

169. A special attorney would have reason to be cautious in phrasing questions so as to avoid leaking information to the resident alien: "[a] special attorney receiving classified information . . . who discloses such information [to the alien] shall be subject to a fine . . . imprisoned for not less than 10 years nor more than 25 years, or both." 8 U.S.C. § 1534(e)(3)(F)(ii)(II) (2006). Still, as the Model Rules of Professional Conduct instruct, a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007). The special attorney's obligation thus helps to ameliorate the danger that fear of criminal prosecution would

any potential problem by comprehensively interviewing the alien before reviewing the government's secret evidence. To be sure, conducting such an interview would be cumbersome; without knowing the specific events against which the attorney would need to defend the alien, the special attorney would be well advised to elicit all information that could possibly be relevant. Once apprised of this information, however, the special attorney would be in a position to represent the alien effectively after observing and cross-examining the government's secret evidence. The attorney would be sufficiently able to prepare a defense; the only remaining question would be whether the attorney's ability to observe and cross-examine the secret evidence sufficiently reduces the risk of erroneous deportation.

The answer to this question is yes. To a special attorney, the evidence is not secret; the attorney possesses a security clearance allowing access to classified material.[170] The resident alien enjoys an attorney-client relationship with that attorney; the special attorney is under a fiduciary duty to act in the alien's best interests.[171] Although 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.[172] Thus, in this situation, the ATRC's secret-evidence provisions pass constitutional muster.

The secret-evidence provisions might not pass constitutional muster, however, in circumstances when an unlawful or temporary resident alien receives no summary of evidence. In that situation, the resident alien receives no special attorney to review the evidence.[173] Accordingly, the alien faces the same risk of error as Boyd and Rafeedie. Just as in *Jay v. Boyd* and *Rafeedie*, the resident alien might prevail in a due process claim.

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cause the attorney to tiptoe too softly when questioning the alien, which might detract from the effectiveness of representation.

170. *See supra* note 44 and accompanying text.

171. *See supra* notes 167–69 and accompanying text.

172. Allowing an attorney to review confidential evidence on behalf of a client is a common enough practice that the ABA Model Rules of Professional Conduct address the situation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 7 (2007) ("Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.").

173. *See supra* note 46 and accompanying text.

3. *Reassessing the Magnitude of the Government's Interest.* As *American-Arab Anti-Discrimination Committee*, *Rafeedie,* and *Kiareldeen* counsel, the government may not voice its interest in using secret evidence in abstract terms.[174] Rather, its relevant interest must be specific and fact based—the extent to which that particular resident alien would endanger national security if left at large within U.S. borders or the extent to which disclosing the government's particular sensitive information about the alien would prejudice national security or put any individual at substantial risk of harm.[175]

When gauging the constitutionality of ATRC proceedings against a particular individual, the totality of the government's interactions with that individual conceivably could cut in either direction. As in *Rafeedie* and *Kiareldeen*, the government may undermine its argument that the resident alien is dangerous by treating the alien outside of the proceedings as though not dangerous.[176] Conversely, it is conceivable that the government could strengthen its argument that the resident alien is a terrorist by treating the alien cautiously in all interactions.

The government might argue that the applicability of *American-Arab Anti-Discrimination Committee* and *Kiareldeen* to ATRC proceedings is questionable. For ATRC proceedings even to commence, the U.S. attorney general must prove to the ATRC judge that the government possesses, at a minimum, probable cause to believe that the resident alien in question is a terrorist.[177] Probable cause is not an inconsequential standard, and nothing in *American-Arab Anti-Discrimination Committee* or *Kiareldeen* suggests that the government's level of suspicion approached that standard in those cases. In *American-Arab Anti-Discrimination Committee*, the government alleged broadly that the resident aliens in question were connected to a terrorist organization.[178] It did not allege any wrongdoing or plans of wrongdoing by either resident alien. In *Kiareldeen*, the government's information against the resident alien

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174. *See, e.g.*, Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999) (holding that a "broad generalization regarding a distant foreign policy concern and a related national security threat" was not adequate to justify the "use of undisclosed information").

175. *See supra* note 97 and accompanying text.

176. *See supra* notes 84–86, 109–10 and accompanying text.

177. *See supra* note 29 and accompanying text.

178. *See supra* note 91 and accompanying text.

consisted of one piece of uncorroborated hearsay, and Kiareldeen believed the source of the information was a person who had instigated his arrest on false charges six times.[179] To the extent that neither factual situation reaches probable cause, *American-Arab Anti-Discrimination Committee* and *Kiareldeen* would seem inapposite to a challenge against the ATRC. Because the government must possess probable cause to use the ATRC, its interest in deporting a resident alien successfully brought before that court might be stronger than its corresponding interest in either *American-Arab Anti-Discrimination Committee* or *Kiareldeen*.

Weighing in the final balance, a resident alien's interest in remaining in the United States can be strong no matter what legal status the resident alien enjoys.[180] The risk of erroneous deprivation posed by secret evidence varies, depending on whether the resident alien receives a summary of the secret evidence, the extent to which that summary accurately and precisely describes the evidence, and—in circumstances in which the government cannot provide a summary of secret evidence—whether the resident alien receives a special attorney to observe and cross-examine the actual evidence on the alien's behalf.[181] The government's interest in deporting a resident alien who the attorney general reasonably suspects to be a terrorist is strong—perhaps stronger than the government's interest to deport the aliens at issue in *American-Arab Anti-Discrimination Committee* and *Kiareldeen*. Because of the variation in the magnitude of each interest, it is conceivable that the ATRC's secret-evidence provisions might be unconstitutional as applied in some circumstances. For ATRC proceedings to be constitutional in all situations, a few of the court's statutory provisions must be amended.

B. Remedying the ATRC's Constitutional Deficiencies

1. *Treat Unlawful and Temporary Resident Aliens the Same as Lawful, Permanent Resident Aliens.* The government's interest in detaining or deporting a terrorist who is unlawfully residing, or lawfully but temporarily residing, in the United States is presumably equal to the government's interest in detaining or deporting a

179. Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413, 416–17 (D.N.J. 1999), *rev'd on other grounds sub. nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001).

180. *See supra* notes 148, 150–51 and accompanying text.

181. *See supra* Part III.A.2.

terrorist who happens to enjoy the status of a lawful, permanent resident.[182] Because the constitutional interests of an unlawful or temporary resident alien may in some cases rival those of a lawful, permanent resident,[183] Congress should eliminate the statutory provisions in the ATRC's framework that distinguish between the groups. Otherwise, Congress risks having ATRC proceedings against temporary resident or unlawful resident alien terrorists invalidated as unconstitutional.[184]

2. *Appoint a Special Attorney in Every ATRC Proceeding, and Allow the Attorney to Review the Government's Secret Evidence.* The ATRC's secret-evidence provisions run the greatest risk of violating a resident alien's constitutional rights when the government uses secret evidence without appointing a special attorney.[185] In such a situation, even if the alien were to receive an unclassified summary of the government's secret evidence, the alien would be able to challenge the veracity of the evidence only imperfectly.[186] Appointing a special attorney to each resident alien who comes before the ATRC would allay this constitutional concern because each resident alien could review and challenge the government's secret evidence constructively through a special attorney.[187]

Appointing a special attorney in every ATRC proceeding would burden the government. Short of banning secret evidence, however, allowing a special attorney to observe and cross-examine secret evidence is the surest way to eliminate the risk that using such evidence would cause an erroneous deportation. To the government's benefit, appointing special counsel in all ATRC proceedings would ensure that the U.S. attorney general could prosecute a deportation proceeding against an individual who the attorney general has probable cause to believe is a terrorist without needing to publicly disclose a state secret. Without such changes, however, the ATRC risks being held unconstitutional.

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182. *Cf., e.g.*, Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069–70 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999) (drawing no line between temporary and permanent residents when considering the government's interest in deportation).

183. *See supra* notes 150–53 and accompanying text.

184. *See supra* note 154 and accompanying text.

185. *See* discussion *supra* Part II.A.2.

186. For a discussion of this, see *supra* notes 161, 165 and accompanying text.

187. For a discussion of this, see *supra* Part III.A.2.

CONCLUSION

The ATRC's statutory framework has several constitutional deficiencies. The court's framework, however, which allows for the use of secret evidence, does not need a significant overhaul to remedy these concerns. For the use of secret evidence during ATRC proceedings to become constitutional in all cases, the ATRC's statutory framework must guarantee temporary resident aliens and unlawful resident aliens the same protections it provides legal, permanent resident aliens; and the ATRC's framework must either stipulate that every resident alien receive a special attorney who can review and cross-examine the government's secret evidence or else ban the use of such evidence.

These two suggestions for reform are not meant to exhaust what the government could, or even should, do to improve ATRC proceedings.[188] Rather, they are meant to describe only what the government must do, at a minimum, for the ATRC's statutory framework allowing for the use of secret evidence to comply in all circumstances with resident aliens' constitutional right to procedural due process. The ATRC cannot ensure compliance in all circumstances with resident aliens' constitutional right to procedural due process unless it does two things: provide illegal resident aliens and legal, temporary resident aliens with the same procedural protections that it provides legal, permanent resident aliens; and appoint a special attorney to every alien who comes before the court to review secret evidence on the alien's behalf. Without these changes, the ATRC's secret-evidence provisions could be found unconstitutional.

188. Several calls for reform deserve discussion. Lawrence Harkenrider, for example, recommends raising the government's burden of proof to deport a resident alien from a mere preponderance to clear and convincing evidence. Harkenrider, *supra* note 17, at 166. Jennifer Beall suggests that the ATRC's framework should be amended to foreclose the use of evidence that is illegally obtained. *See* Beall, *supra* note 2, at 707 ("[D]eport[ation] based on illegally obtained . . . evidence . . . violat[es] a fundamental element of due process, the right to confrontation.").