

ARTICLE

“USE IT AND LOSE IT”: AN EXPLORATION OF UNUSED COUNTERTERRORISM LAWS AND IMPLICATIONS FOR FUTURE COUNTERTERRORISM POLICIES

by
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This Article explores why the executive branch has declined to use three counterterrorism laws—the Alien Terrorist Removal Procedures, Section 412 of the Patriot Act, and the lone-wolf amendment to the Foreign Intelligence Surveillance Act—and suggests that the reason may be fear that the laws are unconstitutional and, paradoxically, that in some cases they provide too many rights to suspected alien terrorists. The Article also offers three insights from the non-use of counterterrorism laws: (1) that Congress may be passing political responses instead of needed counterterrorism protection; (2) that the judicial branch is using these laws to narrow the scope of other counterterrorism measures; and (3) that we may have a potential gap in security. In this way, the study of unused counterterrorism laws can prove just as insightful and helpful an exercise

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I. INTRODUCTION

As terrorist attacks such as the first World Trade Center bombing, Oklahoma City, and September 11, 2001, continue to threaten our nation, Congress responds by enacting counterterrorism legislation. In 1996, after almost a decade of wrangling, Congress created the Alien Terrorist Removal Court (ATRC) as a way to expeditiously remove terrorist aliens by using classified evidence that the alien himself cannot see.¹ In 2001, six weeks after the terrorist attacks that brought down the World Trade Center and damaged the Pentagon, Congress passed the Patriot Act, including Section 412 which allows the Attorney General to certify certain aliens as threats to national security and hold them for renewable periods of six months, presumably indefinitely, until they can

¹ See *infra* Part II.

be removed.² In December 2004, Congress passed the “Lone-Wolf Amendment” as part of the Intelligence Reform and Terrorism Prevention Act of 2004. The lone-wolf provision amended the Foreign Intelligence Surveillance Act (FISA) to allow surveillance of non-U.S. persons engaging in “international terrorism or activities in preparation therefore” where the individual lacks an explicit connection to a foreign power or international terrorist organization.³

With respect to each of these laws, Congress emphasized the unique nature posed by alien terrorists and how these tools were essential in minimizing terrorist attacks against U.S. interests. Yet, as of this writing, the ATRC, Section 412 of the Patriot Act, and the lone-wolf amendment have never been used, even though the threat posed by terrorists remains. This Article explores the seemingly simple but ultimately complex question of “why” to see if any insights can be drawn for future counterterrorism policies. While there is abundant scholarship addressing counterterrorism laws that are frequently used, there appears to be a dearth of literature analyzing the ramifications for laws that are not employed. This Article offers some insights into the non-use of these laws, but its larger purpose is to start the conversation concerning the disconnect between Congress passing a counterterrorism tool and the executive branch not using it.

Part II of this Article discusses the ATRC, its background, the provisions of the law creating it, the problems it was supposed to solve, and the use of classified evidence in immigration proceedings. In Part III, Section 412 of the Patriot Act is analyzed with a specific focus on the Supreme Court decision *Zadvydas v. Davis*, which concerns the due process rights of aliens and the government’s ability to detain them during the post-order removal period. Part IV discusses the lone-wolf amendment and describes how it departs from traditional FISA procedures. Part V of the Article scrutinizes why these tools have never been used. While the point of this Article is not to analyze the ultimate lawfulness of these tools, the fact that many scholars and some lawmakers feel that these laws are unconstitutional is explored as a possible reason for their non-use. In this respect, it may be a situation of “use it *and* lose it.” On the other side, there is evidence to suggest that, at least with respect to the ATRC and Section 412, their non-use may be more attributable to the amount of protections and due process rights afforded aliens, which, according to some, make these tools unworkable and impractical. In other words, the ATRC and Section 412 may suffer, ironically, from competing, simultaneous narratives of both being unconstitutional and providing too many rights to aliens. This sentiment becomes even more apparent as one realizes that the government has developed alternative ways to handle the problems that motivated the creation of the ATRC and passing of Section 412 in the first place. As

² See *infra* Part III.

³ See *infra* Part IV.

lone-wolf terrorists continue to proliferate, it is a quandary, at first blush, why the lone-wolf amendment has not been used. As this Article shows, many of the lone-wolf terrorists that are planning terrorist attacks and, in fact, succeeded in such attacks (e.g., Maj. Nidal Malik Hasan) are U.S. persons; hence, the lone-wolf amendment by its very terms does not apply. By assessing why the lone-wolf amendment has not been used, this Article questions whether the dichotomy between U.S. persons and non-U.S. persons makes sense in the context of lone wolves.

Part VI of this Article offers three insights from the study of counterterrorism laws that have never been used. First, this Article suggests that the laws' enactments may have been more of a political response to appear tough on terrorism rather than providing any needed or meaningful counterterrorism protection. Second, this Article explores whether there are unintended consequences to the non-use of such counterterrorism laws when the *judicial* branch uses the laws' existence to interpret and narrow the scope of *other* counterterrorism matters. In this respect, an unused law's biggest influence may be the effect it has on other counterterrorism tools that are frequently used. A third observation is that the ATRC, Section 412 and the lone-wolf amendment are focused on alien terrorists. This Article questions whether the focus should be on creating narrowly tailored tools that focus on U.S. persons. In this respect, the Article intimates that perhaps the lone-wolf amendment should be broadened to encompass U.S. persons. One unexpected benefit to analyzing a counterterrorism law that is not being used is that the analysis may actually identify a potential gap in security. In this way, an exploration of unused counterterrorism laws can prove just as insightful and helpful an exercise as the more traditional analysis of frequently employed counterterrorism measures.

II. THE ALIEN TERRORIST REMOVAL COURT

A. *Background*

It took close to a decade for Congress to create the ATRC,⁴ which then ironically sat unused for the next fifteen-plus years.⁵ The ATRC emerged in part out of the government's frustration in handling the L.A. Eight, a group of Los Angeles Palestinians, whom the Department of Justice (DOJ) had "been trying unsuccessfully to deport since 1987 for their activity on behalf of the Popular Front for the Liberation of

⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, §§ 501–507, 110 Stat. 1214, 1258–68 (codified at 8 U.S.C. §§ 1531–37 (2006)); see also Steven R. Valentine, *Flaws Undermine Use of Alien Terrorist Removal Court*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash. D.C.), Feb. 22, 2002, at 1–2, available at <http://www.wlf.org/upload/022202LBValentine.pdf>.

⁵ See LAWRENCE BAUM, SPECIALIZING THE COURTS 16 tbl.1.2 (2011).

Palestine” (PFLP).⁶ While the L.A. Eight had never been accused of committing a crime, the DOJ had claimed that “their fund raising and literature-distribution activities on behalf of the PFLP constitute concerted acts of an international terrorist conspiracy.”⁷ Because deporting suspected alien terrorists would require disclosure of classified information that might reveal sources and methods, the government was left with two unpalatable choices: try to deport the suspected alien terrorists, thereby divulging the classified material, or let them remain in the country. As one scholar has observed: “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.”⁸ The purpose of the ATRC was to strike a balance between the government’s need to protect classified information and the suspected alien terrorist’s ability to defend against the accusations.⁹

In 1988, the Reagan Administration first introduced its version of the ATRC as the Terrorist Alien Removal Act.¹⁰ Rep. Gerald Solomon argued that the legislation was a “carefully measured response to the menace posed by alien terrorists” that “fully comport[ed] with all constitutional requirements applicable to aliens.”¹¹ But the Senate refused to hold hearings on the proposal and the Democratic-controlled Congress did not take any action until 1995, when “Senator Joseph Biden introduced the Omnibus Counterterrorism Act of 1995 as part of the Clinton Administration’s efforts to combat terrorism.”¹² In a cover letter accompanying the legislation, President Clinton stated: “[One] of the

⁶ Benjamin Wittes, *Secret Deportation Panel Raises Due Process Issues; Critics Blast New Court Set up by Anti-Terrorism Law*, RECORDER (Cal.), Apr. 25, 1996, at 1.

⁷ *Id.*

⁸ John Dorsett Niles, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1835 (2008).

⁹ In some respects, the ATRC is similar to the Classified Information Procedures Act (CIPA), 18 U.S.C. app. §§ 1–16 (2006), which provides a way to balance a criminal defendant’s right to defend himself against criminal charges and the government’s need to protect sources and methods. As addressed *infra*, CIPA, however, provides more protection to a defendant than the ATRC does for alien terrorists facing deportation. Under CIPA, unclassified summaries must provide “the defendant with *substantially the same ability* to make his defense as would disclosure of the specific classified information.” *Id.* § 6(c)(1) (emphasis added). By contrast, the ATRC only requires that the unclassified summary allow a suspected alien terrorist the ability “*to prepare a defense.*” 8 U.S.C. § 1534(e)(3)(C) (emphasis added). Because the ATRC has never been utilized, it is hard to determine whether, in practice, these different standards would materially alter the alien’s ability to adequately prepare a defense. A proposed bill (that did not pass) suggested that the ATRC be amended to incorporate the CIPA standard for suspected alien terrorists. See *infra* notes 192–98 and accompanying text.

¹⁰ Clarence E. Zachery, Jr., *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy from Within?*, 9 GEO. IMMIGR. L.J. 291, 292 (1995).

¹¹ 135 CONG. REC. 4460 (1989).

¹² Zachery, *supra* note 10, at 292.

most significant provisions of the bill will . . . [p]rovide a workable mechanism, utilizing U.S. District Court Judges appointed by the Chief Justice, to deport expeditiously alien terrorists without risking the disclosure of national security information or techniques.”¹³ During debate on the Senate floor, Senator Orin Hatch characterized the legislation as “just and fair” and noted that the procedures were warranted “to give our law enforcement and courts the tools they need to quickly remove alien terrorists from within our midst without jeopardizing . . . national security or the lives of law enforcement personnel.”¹⁴ He further noted that 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.”¹⁵ In prepared testimony before the House Judiciary Committee, William O. Studeman, Acting Director of Central Intelligence, noted that the United States could lose the cooperation of other countries if it did not ensure a way to protect classified information: “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.”¹⁶

In creating the ATRC, Congress was concerned that the “present immigration laws force officials of the executive branch to choose between compromising classified information or taking no action” and that alien terrorists pose a “‘*unique threat*’ to the national security interest of the United States.”¹⁷ The House Conference Report accompanying the new law noted that “[t]he removal of alien terrorists from the United States, and the prevention of alien terrorists from entering the U.S. in the first place, present among the most *intractable problems of immigration enforcement*.”¹⁸ 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 11.¹⁹

¹³ 141 CONG. REC. 4225 (1995) (letter from President Clinton to Congress on the Omnibus Counterterrorism Act of 1995).

¹⁴ 141 CONG. REC. 14524 (1995).

¹⁵ *Id.* (emphasis added).

¹⁶ *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, Acting Director of Central Intelligence).

¹⁷ Zachery, *supra* note 10, at 302, 309 (quoting Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong. § 201(c) (1995) (emphasis added)).

¹⁸ H.R. REP. NO. 104-518, at 115 (1996) (Conf. Rep.) (emphasis added).

¹⁹ LAWRENCE BAUM, *SPECIALIZING THE COURTS* 89 (2011). Despite the various reasons for its non-use, after September 11, some speculated that the ATRC would finally come out of its hibernation. As Prof. David Martin noted, “[t]he Justice Department has not yet brought any cases in the ATRC, but that quiescence may end with the new antiterrorism

B. Provisions

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996²⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996²¹ established the “Alien Terrorist Removal Procedures” (ATRP) and the ATRC to remove aliens accused of engaging in terrorist activity by using secret evidence submitted in the form of classified information.²² Unlike the immigration judges in the executive branch who preside over traditional removal proceedings, the judges on the ATRC are sitting federal judges with life tenure, who are appointed by the Chief Justice to five-year terms.²³ These federal judges oversee the entire proceedings, from whether an alien terrorist can be subjected to the jurisdiction of the ATRC in the first place, to the preparation of an unclassified summary of confidential information.²⁴ With respect to the initial jurisdiction question, the Attorney General or Deputy Attorney General must submit an ex parte and in camera request for a removal hearing to a judge who must determine that there is probable cause to believe that the alien is a terrorist physically present in the United States and that removal by traditional immigration proceedings would pose a risk to national security.²⁵ If a judge makes such findings, then the alien is removable if the judge, after convening a special removal hearing, determines based on a preponderance of the evidence²⁶ that the alien matches the description of an alien terrorist.²⁷

efforts sparked by the September 11 bombings.” David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 135. It is now 2012—eleven years after 9/11—and it still has not been used.

²⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of the U.S. Code). The IIRIRA combined what had previously been separate exclusion and deportation procedures into a single removal hearing that distinguishes between those aliens who have been admitted through formal immigration proceedings and those who have not. *Id.* sec. 304, § 240, 110 Stat. at 3009-587 to 3009-593.

²² 8 U.S.C. §§ 1531–37 (2006). The ATRP is Title V of the Immigration and Nationality Act (INA). Antiterrorism and Effective Death Penalty Act of 1996 § 401, 110 Stat. at 1258. The ATRC is established in section 502 of the ATRP. *Id.* sec. 401 § 502, 110 Stat. at 1259.

²³ 8 U.S.C. § 1532(a)–(b).

²⁴ *Id.* §§ 1533(c), 1534(e)(3).

²⁵ *Id.* § 1533(a), (c). If the judge does not find probable cause, the judge must prepare a written explanation of his decision. *Id.* § 1533(c)(3). The DOJ then has twenty days to file an appeal to the Court of Appeals for the Federal Circuit where the Court of Appeals reviews the case ex parte. *Id.* § 1535(a)(1)–(2). If the DOJ does not file an appeal, the alien is not necessarily free to go as the alien could be subject to normal DOJ deportation proceedings under title II of the INA.

²⁶ *Id.* § 1534(g). Normal removal hearings based on title II of the INA require the government’s burden to be the higher “clear and convincing” standard. *Id.* § 1229a(c)(3)(A). Hence, while the ATRC takes place in an Article III court with a federal judge and appointed counsel, the overall burden of proof is lower.

This removal hearing is open to the public.²⁸ The Federal Rules of Evidence do not apply, and the alien may not seek to suppress evidence that was unlawfully obtained.²⁹ If the terrorist alien is ordered removed, the alien is ineligible for any discretionary relief from removal such as asylum or adjustment of status.³⁰ Appeals by either party may be taken directly to the Court of Appeals for the District of Columbia.³¹

Unlike traditional removal proceedings where the alien has the right to have counsel present if procured on his own,³² the ATRP provides for appointed counsel paid for at government expense.³³ Importantly, when classified evidence is used, the alien receives an unclassified summary that is supposed to contain enough detail to allow the alien to “prepare a defense.”³⁴ The nature of this summary, as will be explored in Part V *infra*, is controversial, with critics either denouncing the summary itself as too damaging to national security, or lamenting that such a summary provides insufficient detail to allow an alien to prepare an adequate defense. Professor David Martin describes this delicate balance: “The dilemma could not be more acute. An innocent respondent is left virtually defenseless without the details buried in the classified evidence. But if the information is shared, a guilty respondent is given a key that leaves the government’s informant frightfully exposed.”³⁵

If, after two attempts, the government fails to provide a satisfactory summary that would allow the alien to “prepare a defense,” then the ATRC removal proceedings are to terminate, unless (and this is a crucial exception) the judge *waives such a summary* on the grounds that the alien’s continued presence 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.”³⁶ In other words, the proceedings can continue against the alien *without any unclassified summary at all*.³⁷

Aliens who are lawful permanent residents (LPRs), however, are provided an additional protection: a specially cleared counsel may review the classified evidence and offer arguments or cross-examination on behalf of the alien but may not communicate with the alien about any of

²⁷ *Id.* §§ 1531(1), 1534(g).

²⁸ *Id.* § 1534(a)(2).

²⁹ *Id.* § 1534(e)(1)(B), (h).

³⁰ *Id.* § 1534(k).

³¹ *Id.* § 1535(c).

³² *Id.* § 1229a(b)(4)(A).

³³ *Id.* § 1534(c)(1).

³⁴ *Id.* § 1534(e)(3)(A)–(C).

³⁵ Martin, *supra* note 19, at 129.

³⁶ 8 U.S.C. § 1534(e)(3)(C)–(D).

³⁷ *Id.* § 1534(e)(3)(E)(ii).

the classified evidence.³⁸ Some scholars have questioned the ultimate effectiveness of this safeguard. As Martin observes:

[I]f the government’s case turns critically on the informant’s testimony regarding meetings with known terrorists in which the LPR 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.³⁹

Aliens who are not LPRs must prepare a defense without the benefit of a summary or specially cleared counsel.⁴⁰ As a practical matter, discussed more *infra*, it seems difficult to imagine a situation where the government would need to resort to classified information to remove an alien who was here illegally or out of status (e.g., visa violation), as the government could rely on the alien’s status or administrative documents to establish deportability. Hence, the main impetus of the ATRC appears to be deporting LPRs who are engaging in terrorist activity.

C. Use of Classified Information in Immigration Proceedings

To understand the problems that the ATRC was supposed to rectify, and to later analyze why it has not been used, one must understand the ways that classified evidence can be used in immigration proceedings.⁴¹ At the outset, it should be noted that classified evidence is introduced and considered in less than a handful of cases adjudicated by the immigration courts each year.⁴² As then INS General Counsel informed a

³⁸ *Id.* § 1534(e)(3)(F).

³⁹ Martin, *supra* note 19, at 136.

⁴⁰ 8 U.S.C. § 1534(e)(3)(E).

⁴¹ To be sure, using classified evidence in proceedings concerning aliens has arisen in other contexts outside of immigration, most notably the habeas cases filed by the detainees at Guantanamo Bay after the Supreme Court’s *Boumediene v. Bush* decision. 128 S. Ct. 2229 (2008). *Boumediene* touched on using classified information but delegated resolution of the issue to the district courts hearing the habeas cases. *See id.* at 2276 (“We recognize . . . that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.”). In hearing the habeas cases, the district courts enacted procedures for allowing security cleared private counsel to view classified information that the detainee himself cannot see. *See, e.g.,* Basardh v. Obama, 612 F. Supp. 2d 30, 31 (D.D.C. 2009); *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *2 (D.D.C. Nov. 6, 2008) (discussing classified portions of evidence in which counsel for both parties presented arguments without the detainee present). Hence, although the ATRC has never been used, some of its provisions—such as a specially cleared counsel who can review classified information—have been modified for other contexts.

⁴² *National Security Considerations in Asylum Applications: A Case Study of Six Iraqis: Hearing Before the Subcomm. on Tech., Terrorism, and Gov’t Info. of the S. Comm. on the*

congressional committee in 1998, “while the use of classified information has garnered much recent media attention, it is, in fact, quite rare.”⁴³

There are six conceptual settings where classified information can be used in immigration proceedings: (1) excluding an alien from entering the United States for the first time; (2) excluding an LPR from returning to the United States after temporarily leaving; (3) adjusting an alien’s immigration status to that of an LPR; (4) determining whether to grant discretionary relief from removal after an alien has been found removable; (5) determining whether to set bond or to detain an alien awaiting a removal hearing; and (6) removing an alien.⁴⁴ As of this writing, no court has addressed the constitutionality of using classified evidence to remove an alien (category six), although courts have addressed the other five settings.⁴⁵

The most non-controversial use of classified information is in exclusion or removal proceedings involving “arriving aliens” at the border. Provisions of the INA specifically authorize expedited removal of an arriving alien based on certain national security and terrorism grounds,⁴⁶ and expressly allow the use of classified evidence in opposition to an alien’s application for admission.⁴⁷ In such exclusion cases at the border, the alien is entitled neither to a hearing nor notice of particular allegations, but may submit a statement, or information, on his own behalf.⁴⁸ The statute also does not provide for a burden of proof but simply authorizes the Attorney General to order removal of an alien if he is “satisfied on the basis of confidential information that the alien is inadmissible” due to national security concerns.⁴⁹ In *United States ex rel. Knauff v. Shaughnessy*,⁵⁰ and *Shaughnessy v. United States ex rel. Mezei*,⁵¹ the Supreme Court gave the executive branch unfettered discretion to use classified information in deciding whether to admit an alien at the border, holding that “[w]hatever the procedure authorized by Congress

Judiciary, 105th Cong. 6 (1998) (prepared statement of Paul W. Virtue, General Counsel, Immigration and Naturalization Service).

⁴³ *Id.*

⁴⁴ See Niles, *supra* note 8, at 1843–44 (discussing the first five categories).

⁴⁵ *Id.*

⁴⁶ 8 U.S.C. § 1225(c) (2006).

⁴⁷ *Id.* This provision also applies to illegal aliens captured within the country or “entries without inspection” (EWI). *Id.* § 1225(a). Because being an EWI is a fully sufficient ground for removing an illegal alien, it is unlikely the government would choose to use such classified information in its case-in-chief. See *id.* § 1182(a)(6)(A)(i). Rather, as discussed in the text, such classified information may be relevant if the EWI subsequently requests discretionary relief from removal, such as asylum.

⁴⁸ *Id.* § 1225(c)(3). An arriving alien bears the burden of proving admissibility. 8 C.F.R. § 235.1(f) (2011) (“Each alien seeking admission . . . must establish to the satisfaction of the immigration inspecting officer that the alien is not subject to removal under the immigration laws . . .”).

⁴⁹ 8 U.S.C. § 1225(c)(1)–(2).

⁵⁰ 338 U.S. 537 (1950).

⁵¹ 345 U.S. 206 (1953).

is, it is due process as far as an alien denied entry is concerned.”⁵² In a subsequent case, however, the Court distinguished LPRs returning to the United States after a brief period overseas.⁵³ In this case, a court held that classified evidence cannot be used as a basis for an adverse decision unless the LPR is provided some way to effectively confront and rebut the evidence.⁵⁴ In sum, immigration officials may legally exclude arriving aliens suspected of involvement in terrorism or other national security threats based on confidential information, even if the government never discloses evidence regarding its basis for exclusion to the alien. With respect to LPRs returning to the United States after temporarily leaving, however, a court has required the resident alien to be able to confront the evidence.

In the third setting, where an alien requests an adjustment in status, at least one appellate court has found that classified evidence cannot be used to deny what would be mandatory relief. In *American-Arab Anti-Discrimination Committee v. Reno*,⁵⁵ the court rejected an attempt by the INS to use undisclosed classified information to deny legalization to two Palestinians it accused of associating with a terrorist organization. These aliens had overstayed their visas and were requesting that their statuses be adjusted to lawful permanent residents. The statutory provision under

⁵² *Knauff*, 338 U.S. at 544; *Mezei*, 345 U.S. at 212. Although these cases are from the 1950s and have been criticized for their use of confidential information that was later repudiated (see Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, STAN. L. & POL’Y REV., Summer 1996, at 23, 27–28), they remain good law. See, e.g., *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1084 (9th Cir. 2011) (quoting *Knauff*, 338 U.S. at 544); *Kwai Fun Wong v. INS*, 373 F.3d 952, 971 (9th Cir. 2004) (quoting *Mezei*, 345 U.S. 206, at 212); see also *Adams v. Baker*, 909 F.2d 643, 647–49 (1st Cir. 1990) (noting that because the power to exclude nonresident aliens is a “fundamental sovereign attribute,” finding that consular decision to deny nonimmigrant visa to Gerry Adams, President of Sinn Féin, on the basis of hearsay evidence derived from newspapers and reports is subject to extremely limited judicial review).

⁵³ See *Rafeedie v. INS*, 880 F.2d 506, 509, 522–23 (D.C. Cir. 1989) (finding expedited removal proceedings unconstitutional as applied to a lawful permanent resident, but leaving open the possibility that additional procedures might provide adequate process).

⁵⁴ For example, in *Rafeedie*, the court found a due process violation when the INS used secret evidence to exclude an LPR from the United States upon his return from a trip abroad. In reaching this decision, the court said, “Rafeedie—like Joseph K. in *The Trial*—can prevail . . . only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government’s confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.” 880 F.2d. at 516; see also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–98 (1953) (“Although Congress may prescribe conditions for [a lawful resident alien’s] expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.”).

⁵⁵ 70 F.3d 1045 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999).

consideration required that “the Attorney General shall adjust” the alien’s status if the statutory eligibility requirements are satisfied.⁵⁶ After examination of the government’s evidence, the court found that the government’s reliance on classified information would constitute a due process violation and granted the plaintiffs a permanent injunction against its use.⁵⁷ In characterizing the INS’s use of secret evidence in that case, the court noted that “[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations” and that “[o]nly the most extraordinary circumstances could support one-sided process.”⁵⁸

The fourth setting where classified evidence may be used is in denying aliens discretionary relief that aliens seek after being found subject to removal. The government usually has a straightforward case to prove an alien is out of status or in the United States illegally and, thus, does not need to rely on classified evidence to make its case-in-chief. As Professor Martin notes:

Entrance without inspection and visa overstay charges can be demonstrated from INS records, and in LPR cases, INS typically proves the deportability charge simply by filing an appropriate record of the criminal conviction. In each of these instances, rebuttal or contest of the charges is formally open to the alien, but few seize the opportunity—there really is no doubt of the facts that clearly point to removability. Therefore, in a strong majority of immigration proceedings, respondents admit removability at an early summary hearing and either accept that they must depart or else litigate only the relief issue.⁵⁹

When an alien found removable argues that he should be entitled to *relief from removal*, such as by requesting asylum or cancellation of removal, the government is allowed to use classified evidence to show why such discretionary relief should be denied.⁶⁰ The INA provides for the government to use “national security information,” which the alien is not allowed to see, in opposing “an application by the alien for discretionary

⁵⁶ 8 U.S.C. § 1255a(a) (2006). Note that, unlike the provision at issue in *Reno*, the general adjustment of status provision is discretionary. *See id.* § 1255(b).

⁵⁷ *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1052.

⁵⁸ *Id.* at 1069, 1070 (internal quotation marks omitted).

⁵⁹ Martin, *supra* note 19, at 131.

⁶⁰ The primary kinds of discretionary relief all contain mandatory ineligibility bars based on an alien’s involvement in terrorism or if he poses a national security threat. *See* 8 U.S.C. § 1158(b)(2)(A)(iv)–(v) (containing a bar on asylum for aliens involved in terrorism or posing a threat to national security); *id.* § 1229b(c) (same for cancellation of removal and adjustment of status); *id.* § 1229c(a)(1), (b)(1)(C) (same for voluntary departure). *See* Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, IMMIGR. BRIEFINGS, Oct. 2006, at 10–14. (discussing the immigration benefits that are barred based on terrorist activity). The alien bears the burden of establishing eligibility for any discretionary relief and that such relief should be granted as a matter of discretion. 8 C.F.R. § 240.64(a) (2011).

relief” under this Act.⁶¹ If the evidence is found “relevant,”⁶² the immigration judge informs the alien of the government’s proffer of classified information.⁶³ For asylum cases, the alien receives an unclassified summary of the classified information from the classifying agency only if the agency determines that it can issue the summary “consistently with safeguarding both the classified nature of the information and its sources.”⁶⁴ Beyond these protections, which some have described as “minimal,”⁶⁵ the alien has no access to the classified information.⁶⁶ If the evidence establishes an alien’s involvement with terrorism or that he poses a threat to national security (which are both grounds for mandatory denial of most forms of discretionary relief), then the alien must rebut that evidence by a preponderance of the evidence.⁶⁷

⁶¹ Specifically, the statute says: “[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine *such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this chapter . . .*” 8 U.S.C. § 1229a(b)(4)(B) (emphasis added).

⁶² See 8 C.F.R. § 1240.11 (2011) (governing applications for adjustment of status and providing for the consideration of classified information if the immigration judge determines that such information is “relevant”); *id.* § 1240.11(c)(3)(iv) (governing applications for asylum and authorizing the immigration judge or the Board of Immigration Appeals to determine the relevancy of any proffered classified evidence).

⁶³ *Id.* § 1240.11(c)(3)(iv) (allowing but not requiring the agency possessing the classified information to provide an unclassified summary to the alien).

⁶⁴ *Id.* (permitting the use of classified information in adjudication of application for asylum in removal hearings). The regulations also provide that “[t]he summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence.” *Id.* In 2009, the Ninth Circuit remanded a case denying a woman asylum based on classified evidence because the government had not only failed to provide a meaningful summary but also had not claimed that a more detailed summary could not be provided because of the necessity to safeguard both the classified nature of the information and its source. See *Kaur v. Holder*, 561 F.3d 957, 961–63 (9th Cir. 2009). This case demonstrates that while the regulations provide for the use of classified information in denying individuals discretionary relief, courts generally disfavor the use of classified information and will require the government to be detailed about why a meaningful summary cannot be provided.

⁶⁵ Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT’L L.J. 515, 520 (2002).

⁶⁶ 8 U.S.C. § 1229a(b)(4)(B).

⁶⁷ 8 C.F.R. § 1240.8(d) (2011). The government relies on several Supreme Court cases to defend its use of classified evidence to defeat applications for discretionary relief. See, e.g., *Jay v. Boyd*, 351 U.S. 345, 354, 358 (1956) (stating, with regard to discretionary relief from deportation, that “a grant thereof is manifestly not a matter of right under any circumstances” and that confidential information can be used to deny discretionary relief if disclosure would be “prejudicial to the public interest, safety, or security.” (internal quotation marks omitted)); *INS v. Yang*, 519 U.S. 26, 30 (1996) (describing discretionary relief from deportation as an “act of grace” akin to a presidential pardon because it involves “unfettered discretion”) (quoting *Jay*, 351 U.S. at 354). Opponents of using classified evidence to defeat discretionary relief minimize the significance of *Jay*, arguing that *Jay* concerned a dispute over a statutory interpretation and that its approval of the

The use of classified evidence in detention (bond) decisions during the pendency of immigration proceedings is unsettled. Unlike discretionary relief issues where there is explicit statutory authority to use classified information,⁶⁸ the statutory language concerning detention issues is more ambiguous. The INA gives the Attorney General broad discretionary power to release an alien from detention on bond (or to hold an alien without bond) while proceedings are still pending, but does not expressly provide that confidential information may be used for this decision.⁶⁹ Rather, regulations provide that, during this hearing, the immigration judge's determination "may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [immigration officials]."⁷⁰ The Fifth Circuit has interpreted this language to provide implied statutory authority for the government's use of undisclosed, classified information in bond hearings,⁷¹ but other courts have disagreed on constitutional grounds.⁷² Despite those setbacks for the government, the question of statutory authorization for detention issues is far from settled, as the government argues that release during pendency of immigration issues is a form of

constitutionality of using classified evidence was mere dicta. *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* remains good law but was decided on statutory interpretation grounds); David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 280 (2000–2001) ("*Jay* is of limited utility for defenders of secret evidence, however, for it expressly disclaimed any constitutional holding. The case presented only a statutory challenge to the use of secret evidence, and the Court noted that the alien had presented no constitutional challenge."). An analysis of these competing positions is beyond the scope of this Article.

⁶⁸ *See supra* note 61.

⁶⁹ 8 U.S.C. § 1226(a); *see also* *United States ex rel. Barbour v. Dist. Dir.*, 491 F.2d 573, 578 (5th Cir. 1974) ("Discretionary relief—and release on bail is a form of discretionary relief—may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security, if the use of such information is sanctioned by regulations.").

⁷⁰ 8 C.F.R. § 1003.19(d) (2011).

⁷¹ *Barbour*, 491 F.2d at 578.

⁷² In *Kiareldeen*, the court restricted the use of classified information for detention hearings, resulting in the release of a long-detained alien who the government asserted had terrorist connections. 71 F. Supp. 2d at 407–14. *Kiareldeen* had been detained for 19 months based on secret evidence that is believed to have been offered by his estranged wife, with whom he was having a custody battle. In granting Mr. *Kiareldeen*'s petition for habeas corpus, the court noted: "[T]he court cannot justify the government's attempt to 'allow [persons] to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded.'" *Id.* at 419 (quoting *Bridges v. Wixon*, 326 U.S. 135, 153–54 (1945)). A similar result occurred in *Najjar v. Reno*, 97 F. Supp. 2d 1329, (S.D. Fla. 2000), *appeal dismissed as moot, order vacated by* 273 F.3d 1330 (11th Cir. 2001), where the court concluded that using classified evidence for a detention hearing violated the alien's constitutional rights.

“discretionary” relief and thus covered by the express authorization discussed *supra* note 61.⁷³

Finally, until the creation of the ATRC in 1996, the government could not use classified information as part of its *case-in-chief* for removal, except for excludable aliens at the border. Under traditional removal proceedings, the “alien shall have a reasonable opportunity to examine the evidence against [him], to present evidence on [his] own behalf, and to cross-examine witnesses presented by the Government,” but the statute does not specify that classified information may be used for *removal* proceedings.⁷⁴ Because, as discussed previously, aliens with visa violations or undocumented aliens can usually be found removable without the need to resort to classified evidence, Congress presumably created the ATRC to deal with LPRs charged under terrorist grounds of deportability. Because the ATRC has never been used, there is no case law analyzing its constitutionality. The analysis of why the ATRC has never been used proceeds in Part V, *infra*. Section 412 of the Patriot Act, discussed next, similarly has never been used.

III. SECTION 412 OF THE USA PATRIOT ACT

A. Provisions

In 2001, Congress passed Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act⁷⁵ to deal with the detention and removal of alien terrorists, but as with the ATRC, the executive branch has never used the tool. Section 412 empowers the Attorney General or Deputy Attorney General (with no power of delegation)⁷⁶ to take into custody any alien when there are “reasonable grounds to believe” that the alien is engaging in activities that “threaten the national security of the United States,” including espionage or sabotage, inciting terrorist activity, or being a member of a foreign

⁷³ See Martin, *supra* note 19, at 131 n.217 (noting that the government’s position that the release during the pendency of the immigration proceedings is a form of “discretionary relief,” and therefore covered by the express authorization in 8 U.S.C. § 1229a(b)(4)(B) (2006), has some support in *United States ex rel. Barbour v. Dist. Dir.*, 491 F.2d 573 (5th Cir. 1974)).

⁷⁴ 8 U.S.C. § 1229a(b)(4)(B). Rather, this provision allows classified information to be used “in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief” but does not specify removal proceedings.

⁷⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350 (codified at 8 U.S.C. § 1226a).

⁷⁶ 8 U.S.C. § 1226a. It may be unclear after the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, whether this authority rests with the Department of Justice or the Department of Homeland Security.

terrorist organization.⁷⁷ Immigration or criminal charges must be filed within seven days after custody or the alien “shall” be released.⁷⁸

In order to effect custody under Section 412, the Attorney General (or his Deputy) must certify⁷⁹ that the statutory criteria have been met, and these certifications must be reviewed every six months.⁸⁰ Aliens, however, who cannot be removed from the United States in the “reasonably foreseeable future,” can be detained for “*additional periods of up to six months*” when the government can show that the release of that person will “threaten the national security of the United States or the safety of the community or any person.”⁸¹ This latter provision has prompted Georgetown law professor David Cole to comment that Section 412 allows the government to detain alien terrorists “indefinitely in some circumstances.”⁸²

Significantly, mandatory detention of the aliens applies automatically upon certification (there is no opportunity for bond); it also occurs “irrespective of any relief from removal for which the alien may be eligible” (unless the certification is revoked).⁸³ If the alien is determined not to be removable, however, he may no longer be detained.⁸⁴ While the alien is not entitled to a hearing (the Attorney General or his Deputy’s certification is enough), the statute does provide for immediate habeas corpus review of the detention in any federal district court, with appeal rights running to the Court of Appeals for the District of Columbia.⁸⁵ Section 412 also requires the Attorney General to report to the Judiciary Committees of both houses of Congress twice a year on its use of the provision, including the number of aliens certified, their nationality, the grounds for certification, and the duration of detention.⁸⁶

The potential of Section 412’s authority to indefinitely detain aliens who threaten national security cannot be considered in isolation. Section 411 of the Patriot Act broadened the definition of engage in “terrorist activity” to include the use of a “firearm, or other weapon or dangerous device with the intent to endanger, directly or indirectly, the safety of one

⁷⁷ 8 U.S.C. § 1226a(a)(1),(3) (citing other code provisions).

⁷⁸ *Id.* § 1226a(a)(5).

⁷⁹ *Id.* § 1226a(a)(1).

⁸⁰ *Id.* § 1226a(a)(7).

⁸¹ *Id.* § 1226a(a)(6) (emphasis added).

⁸² David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 702 (2009); see also Mark Bastian, Note, *The Spectrum of Uncertainty Left by Zadvydas v. Davis: Is the Alien Detention Provision of the USA Patriot Act Constitutional?*, 47 N.Y.L. SCH. L. REV. 395, 396 (2003) (noting that Section 412 “may lead to the indefinite detention of suspected terrorists, if doing so is necessary for national security”).

⁸³ 8 U.S.C. § 1226a(a)(2).

⁸⁴ *Id.*

⁸⁵ *Id.* § 1226a(b)(1)–(3).

⁸⁶ USA PATRIOT Act of 2001 § 412(c) (codified at 8 U.S.C. § 1226a note).

or more individuals or to cause substantial damage to property.”⁸⁷ Furthermore, Section 411 describes “the solicitation or donation of funds to a ‘terrorist organization’ as participation in a ‘terrorist activity,’ unless the alien can show that he ‘did not know, and should not reasonably have known, that the [act] would further the organization’s terrorist activity.’”⁸⁸ It also defines “terrorist organization” to include any “group of two or more individuals, whether organized or not, which engages in [terrorist activities].”⁸⁹ Hence, according to one scholar, “engage in terrorist activity” now encompasses “a noncitizen who used a kitchen knife in a domestic dispute with her abusive husband, or a noncitizen who found themselves in a bar fight, picked up a bottle, and threatened another person with it.”⁹⁰ As she explains, “[c]learly, not all such persons pose a danger or flight risk necessitating mandatory preventative detention; nevertheless the Patriot Act empowers the Attorney General to detain such persons without even proving that they pose a danger or flight risk.”⁹¹

B. Zadvydas v. Davis

In order to understand Section 412 of the Patriot Act and place it in its proper context, it is necessary to understand the Supreme Court’s *Zadvydas v. Davis* decision, which was issued just months before September 11, 2001.⁹² Zadvydas was an alien born to Lithuanian parents in Germany. He had a lengthy criminal record and had a history of flight from both criminal and deportation proceedings. In 1994, he was ordered deported but Lithuania refused to accept him because he was neither a Lithuanian citizen nor a permanent resident, and Germany would not accept him because he was not a German citizen. Hence, the INS kept him in custody after the expiration of the 90-day removal period in order to continue to try to deport him.⁹³ In September 1995, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 challenging his continued detention.⁹⁴

⁸⁷ *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1933 (2002) (quoting USA PATRIOT Act of 2001 § 411(a)(1)(E)(ii); 8 U.S.C. § 1182(a)(3)(B)).

⁸⁸ *Id.* at 1933 (quoting § 411(a)(1)(F)).

⁸⁹ *Id.* (quoting § 411(a)(1)(G)).

⁹⁰ Dana Keith, *In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and the United Kingdom in the Aftermath of September 11, 2001*, 16 FLA. J. INT’L L. 405, 440 n.186 (2004).

⁹¹ *Id.*

⁹² 533 U.S. 678 (2001) (decided June 28, 2001).

⁹³ *Id.* at 684–85.

⁹⁴ *Id.* *Zadvydas* was consolidated with a second case involving Kim Kim Ho Ma, a Cambodian who fled to the United States at the age of seven. He also had a violent criminal background and was ordered removed, but as with *Zadvydas*, Cambodia refused to accept him, and the government continued to hold him beyond the 90-day removal period because of fears that he would rejoin his former gang. *Id.* at 685–86.

When a final order of removal has been entered against an alien, the government generally secures the alien's removal during a subsequent 90-day statutory "removal period."⁹⁵ When the government is unable to remove an alien (as with *Zadvydas*), it can continue to detain the alien under 8 U.S.C. § 1231(a)(6), which states that a removable alien who poses a risk to the community "may be detained" beyond the ninety day removal period.⁹⁶ The Supreme Court found the word "may" to be ambiguous and that it did not (and could not from a constitutional perspective) allow the Attorney General discretion to detain an alien indefinitely.⁹⁷ Lambasting the notion of preventive detention, the Court held that indefinite detention of aliens would raise "serious constitutional concerns," and therefore found that the statute contained an implicit "reasonable time" limitation.⁹⁸ As such, the Court held that post-order removal detention of aliens for longer than six months violated due process if it was unlikely that the government would be able to physically remove the alien to another country. The Court borrowed the time frame from the pre-1996 statutory framework for deportable aliens where the legislative history indicated that Congress "previously doubted the constitutionality of detention for more than six months."⁹⁹ As the Court explained, after six months, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."¹⁰⁰ If sufficient evidence is not shown, release is required.

Importantly and perhaps presciently, the Court did express a caveat for terrorism cases, noting that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."¹⁰¹ The Court also noted in dicta that to protect the community it would allow a narrow exception to detain beyond six months "a small segment of particularly dangerous individuals . . . say, suspected terrorists" as long as there were "strong procedural protections" in place.¹⁰² As a commentator notes, "the dictum in *Zadvydas*

⁹⁵ *Id.* at 682.

⁹⁶ 8 U.S.C. § 1231(a)(6) states: "An alien ordered removed [1] who is inadmissible . . . [or 2] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be* detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." (emphasis added).

⁹⁷ *Zadvydas*, 533 U.S. at 689–91.

⁹⁸ *Id.* at 682.

⁹⁹ *Id.* at 701.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 696.

¹⁰² *Id.* at 691 (citation omitted).

has left the door open for litigation with regard to alien-terrorist detention.”¹⁰³ As editors from the *Harvard Law Review* observe, “[t]he majority [in *Zadvydas*] found the INA’s post-order detention provision problematic because it applied to a broad range of aliens rather than a narrow segment of the population, and because it offered minimal procedural protections.”¹⁰⁴ It appears that Section 412 of the Patriot Act essentially codifies the *Zadvydas* exception, allowing a terrorist alien to be held longer than six months if the Attorney General certifies that the national security of the United States or the safety of the community would be at risk.¹⁰⁵ Whether Section 412 is considered constitutional in light of *Zadvydas* is explored in Part V.B, *infra*.

IV. LONE-WOLF AMENDMENT

A. Background

The lone-wolf amendment, enacted in 2004 as section 6001(a) of the Intelligence Reform and Terrorism Prevention Act (IRTPA),¹⁰⁶ amended FISA to allow surveillance and physical searches of *non-U.S. persons*¹⁰⁷ engaged in “international terrorism or activities in preparation therefore,”¹⁰⁸ without requiring a linkage to an identifiable “foreign power,” or an international terrorist organization.¹⁰⁹ Non-U.S. persons include alien tourists, visiting business persons, exchange visitors, foreign sailors, diplomatic and consular personnel and illegal aliens, but not LPRs.¹¹⁰ As explained by Professor Patricia Bellia, “[m]any terrorist organizations lack a centralized, hierarchical structure; thus, individual terrorists can carry out activities in sympathy with a widespread anti-American movement, but not at the direction of any particular organization.”¹¹¹ While the ATRC and Section 412 were passed (and then

¹⁰³ Bastian, *supra* note 82, at 408.

¹⁰⁴ *Developments in the Law*, *supra* note 87, at 1924.

¹⁰⁵ See Kelley Brooke Snyder, Note, *A Clash of Values: Classified Information in Immigration Proceedings*, 88 VA. L. REV. 447, 463 (2002) (“The recently passed PATRIOT Act effectively codifies this exception, requiring continued detention of removable aliens who are alleged terrorists.”).

¹⁰⁶ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001, 118 Stat. 3638, 3742 (codified as amended at 50 U.S.C. § 1801 (2006 & Supp. 2009)).

¹⁰⁷ The term “United States person” is a term of art used in FISA which includes by definition United States citizens and permanent resident aliens. 50 U.S.C. § 1801 (i).

¹⁰⁸ *Id.* § 1801 (b) (1) (C).

¹⁰⁹ “Foreign power” is defined broadly to include, *inter alia*, “a group engaged in international terrorism or activities in preparation therefor” and “a foreign-based political organization, not substantially composed of United States persons.” *Id.* § 1801 (a) (4)–(5).

¹¹⁰ Brenton Hund, *Disappearing Safeguards: FISA Nonresident Alien “Loophole” is Unconstitutional*, 15 CARDOZO J. INT’L & COMP. L. 169, 170 n.6 (2007) (quoting H.R. REP. NO. 95-1283, pt. 1, at 32 (1978)).

¹¹¹ Patricia L. Bellia, *The “Lone Wolf” Amendment and the Future of Foreign Intelligence Surveillance Law*, 50 VILL. L. REV. 425, 428 (2005).

not used) over a decade ago, the lone-wolf amendment has been continually subject to sunset provisions, requiring ongoing congressional authorization. In fact, as of this writing, the lone-wolf provision has been extended five times, with the most recent extension occurring in May 2011, when it was extended to June 2015.¹¹² Every time the lone-wolf amendment has come up for reauthorization, its proponents have to explain how it can be such an essential counterterrorism tool warranting renewal if it has never been used.

In March 2011, Todd Hinnen, the acting head of DOJ's National Security Division, testified that the lone-wolf provision should be reauthorized, labeling it a "critical tool[] for national security investigations."¹¹³ Although he acknowledged that, as of March 2011, *the lone-wolf amendment had never been used*, he attested that "it is designed to fill an important gap in our collection capabilities by allowing us to collect on an individual foreign terrorist who is inspired by—but not a member of—a terrorist group."¹¹⁴ He then recounted some examples for its potential use: allowing surveillance "when an individual acts based upon international terrorist recruitment and training on the internet without establishing a connection to any terrorist group" or "when a member of an international terrorist group, perhaps dispatched to the United States to form an operational cell, breaks with the group but nonetheless continues to plot or prepare for acts of international terrorism."¹¹⁵ He posited that such scenarios seem "increasingly likely given the trend toward independent extremist actors who 'self-radicalize.'"¹¹⁶ In fact, he stated that the government "might have difficulty obtaining FISA collection authority without the lone-wolf provision."¹¹⁷

David Kris, the former head of DOJ's National Security Division, testified similarly in 2009. He stated, "[w]hile we cannot predict the

¹¹² Although the lone-wolf amendment was initially set to expire in 2005, Congress authorized a new sunset date of December 31, 2009. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 103, 120 Stat. 192, 195 (2006). Before that date expired, however, Congress enacted a short-term extension to February 28, 2010. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 1004, 123 Stat. 3409, 3470 (2009). Congress then subsequently enacted a third temporary extension to February 28, 2011, Act of Feb. 27, 2010, Pub. L. No. 111-141, 124 Stat. 37, 37 (2009), and a fourth extension until May 27, 2011, FISA Sunsets Extension Act of 2011, Pub. L. No. 112-3, § 2, 125 Stat. 5, 5. On May 26, 2011, Congress extended the lone-wolf amendment for four years until June 2015. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216; *see also* Charlie Savage, *Deal Reached on Extension of Patriot Act*, N.Y. TIMES, May 20, 2011, at A16.

¹¹³ Statement of Todd Hinnen, Acting Asst. Att'y Gen. for Nat'l Security, Before the H. Judiciary Subcomm. on Crime, Terrorism and Homeland Sec. (Mar. 9, 2011), *available at* <http://www.justice.gov/nsd/opa/pr/testimony/2011/nsd-testimony-110309.html>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

frequency with which [the lone-wolf provision] may be used, we can foresee situations in which it would be the *only avenue* to effect surveillance.”¹¹⁸ Rep. Pete Sessions, in urging for Congress to make the lone-wolf provision permanent (instead of being subjected to short-term sunset provisions), stated: “This country is under a constant threat of violence and terrorism, and that’s why it’s necessary to make sure that all of our intelligence and law enforcement have the appropriate tools to defeat those who would wish to do us harm.”¹¹⁹ In urging Democratic leaders to extend the lone-wolf amendment, Ranking Member Lamar Smith implored that “Congress has a duty to protect the American people. Failing to reauthorize our national security laws in a time of heightened threat *is reckless*.”¹²⁰ Similarly, Rep. Jim Sensenbrenner noted that if the lone-wolf provision was not reauthorized, an “individual terrorist [could] slip through the cracks and *endanger thousands of innocent lives*.”¹²¹ He further stated that “*Congress cannot drop the ball on our national security*.”¹²² Senator Jon Kyl characterized the lone-wolf provision as filling a “*critical intelligence gap*.”¹²³ Hence, similar to the passionate rhetoric before the ATRC’s creation in 1996, proponents assert that the lone-wolf amendment is an imperative counterterrorism tool. Given that the threat posed by lone wolves only appears to be increasing,¹²⁴ it is a fair question to ask why the lone-wolf provision (first passed in 2004) has never been used. To discern why the executive branch has not once utilized this supposedly critical tool, it is necessary to look at the reasons for its passage and the purported problems it was supposed to rectify.

B. *Reasons for the Lone-Wolf Amendment’s Passage*

The impetus behind the lone-wolf provision was an actual or perceived inability to search Zacarias Moussaoui’s laptop computer before the 9/11 attacks.¹²⁵ In 2006, Moussaoui pled guilty to conspiring with the 9/11 terrorists and is serving a life sentence.¹²⁶ Disturbingly, Moussaoui was in custody on an immigration charge as of August 2001

¹¹⁸ *Reauthorizing the USA PATRIOT Act: Ensuring Liberty: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 112 (Sept. 23, 2009) (written testimony of David Kris, Asst. Att’y Gen.) [hereinafter *Reauthorizing the USA PATRIOT Act*] (emphasis added).

¹¹⁹ 156 CONG. REC. H847 (daily ed. Feb. 25, 2010).

¹²⁰ *Id.* at H846 (quoted in statement of Rep. Sessions) (emphasis added).

¹²¹ *Id.* at H896 (emphasis added).

¹²² *Id.* (emphasis added).

¹²³ 155 CONG. REC. S9934 (daily ed. Sept. 29, 2009) (emphasis added).

¹²⁴ *See infra* notes at 303–07 and accompanying text.

¹²⁵ *See Bellia, supra* note 111, at 426.

¹²⁶ Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 4, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/03/AR2006050300324.html>.

(remaining longer than his period of authorized stay),¹²⁷ and the FBI believed that he was planning a terrorist attack involving piloting commercial airliners. But the FBI felt it did not have sufficient information to tie him to a “foreign power” to obtain a FISA warrant. Hence, according to the 9/11 Commission Report, the FBI declined to submit a FISA application to the Foreign Intelligence Surveillance Court (FISC).¹²⁸ Prior to the lone-wolf amendment, the FISC could only authorize a physical search of a laptop or electronic surveillance if there was “probable cause” to believe that the target was a foreign power or its agent.¹²⁹ The lone-wolf amendment has been deemed the “Moussaoui fix” as it was passed to address this belief that FISA’s predicate requirement that the target be an “agent of a foreign power” is too onerous if the government cannot establish a connection to a foreign group.

Critics contend, however, that the FBI could have searched Moussaoui’s laptop by obtaining a traditional criminal warrant and did not need to resort to FISA. Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,¹³⁰ the FBI would have needed to establish probable cause that Moussaoui was going to engage in criminal activity (i.e., terrorism) but would not have needed to link him to a foreign power. Critics also assert that the FBI had enough evidence of a foreign connection to seek a FISA warrant, but just misunderstood FISA’s requirements.¹³¹ As national security expert and former assistant general counsel to the CIA Suzanne Spaulding testified before Congress in 2009:

¹²⁷ Moussaoui entered the United States on a French passport and thereafter remained for 90 days without a visa. His legal immigration status expired on May 22, 2001. *See* SENATE SELECT COMM. ON INTELLIGENCE & HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, S. REP. NO. 107-351, H.R. REP. NO. 107-792, at 316 (2002).

¹²⁸ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 273–74 (2004). It is not known whether a search of Moussaoui’s laptop before 9/11 would have helped prevent the attacks, although the 9/11 Commission characterized it as a “missed opportunity.” *Id.* at 273 (“If Moussaoui had been connected to al Qaeda, questions should instantly have arisen about a possible al Qaeda plot that involved piloting airliners, a possibility that had never been seriously analyzed by the intelligence community.”).

¹²⁹ 50 U.S.C. §§ 1804–05, 1823–24 (2000).

¹³⁰ Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, §§ 801–02, 82 Stat. 197, 211–223 (codified as amended at 18 U.S.C. §§ 2510–2522 (2006)).

¹³¹ As a Senate Judiciary Committee Report explained, the FBI misunderstood the FISA requirement: “[K]ey FBI personnel responsible for protecting our country against terrorism did not understand the law. The SSA [Supervisory Special Agent] at FBI Headquarters responsible for assembling the facts in support of the Moussaoui FISA application testified before the Committee in a closed hearing that he did not know that ‘probable cause’ was the applicable legal standard for obtaining a FISA warrant. In addition, he did not have a clear understanding of what the probable cause standard meant. . . . In addition to not understanding the probable cause standard, the SSA’s supervisor (the Unit Chief) responsible for reviewing FISA applications did not have a proper understanding of the legal definition of the ‘agent of a foreign power’

Although the Lone Wolf provision is often referred to as the “Moussaoui fix,” in fact, no “fix” was needed in the Moussaoui case because it was not FISA’s requirements that prevented the FBI from gaining access to his computer back in August of 2001. The problem was a misunderstanding of FISA. . . .

In order to obtain a FISA order authorizing access to Moussaoui’s computer, the FBI needed to show probable cause to believe that Moussaoui was acting “for or on behalf of a foreign power.” A foreign power is defined to include a group engaged in international terrorism. There is no requirement that it be a “recognized” terrorist organization. Two people can be “a group engaged in international terrorism.”¹³²

Therefore, according to critics, the new authority embodied by the lone-wolf amendment is not needed—rather, government agents need to better understand the authorities already at their disposal and effectively utilize them.

C. *Primer on Surveillance Law*¹³³

In order to evaluate the ostensible need for the lone-wolf amendment, and later analyze reasons for its non-use, it is helpful to review Title III¹³⁴ and the FISA¹³⁵ to appreciate how the lone-wolf amendment departs from FISA’s traditional framework. While surveillance law is complex, and an in-depth exploration of these statutes is beyond the scope of this Article, a brief background is warranted to place the lone-wolf amendment in its proper context.

In 1967, the Supreme Court held in *Katz v. United States*¹³⁶ that in order to conduct electronic surveillance of one’s private conversations, a government agent must obtain a warrant from a judicial officer based on probable cause that criminal activity will be revealed, and the warrant must adhere to the Fourth Amendment’s particularity requirements

requirement. Specifically, he was under the incorrect impression that the statute required a link to an already identified or ‘recognized’ terrorist organization, an interpretation that the FBI and the supervisor himself admitted was incorrect. Thus, key FBI officials did not have a proper understanding of either the relevant burden of proof (probable cause) or the substantive element of proof (agent of a foreign power).” SENS. PATRICK LEAHY ET AL., FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES, AN INTERIM REPORT 17–18 (2003) (footnote omitted).

¹³² *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 126–27 (written statement by Suzanne Spaulding).

¹³³ Much of this background on surveillance law comes from another article this author wrote in 2009. *See generally* Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269 (2009).

¹³⁴ Title III governs the use of wiretaps for domestic criminal law investigations. *See supra* note 130.

¹³⁵ FISA has been amended numerous times since 1978 and, as codified today, it runs from 50 U.S.C. §§ 1801–1871.

¹³⁶ 389 U.S. 347 (1967).

specifying the place to be searched.¹³⁷ The Court in *Katz*, however, explicitly declined to extend its holding to cases “involving the national security.”¹³⁸ In 1968, Congress passed Title III to regulate domestic electronic surveillance to meet the Fourth Amendment’s particularity requirements.¹³⁹ Congress enacted Title III to ensure that if the government obtained evidence pursuant to this statutory rubric, it would be admissible in court.¹⁴⁰ The critical point about Title III is that it requires probable cause that the target is or will be involved in *criminal activity*.

In passing Title III, Congress specified that none of its provisions would “limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States,” or “limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against . . . any other clear and present danger to the structure or existence of the Government.”¹⁴¹ These caveats seemed to suggest that “national security” wiretaps in both domestic and international investigations could continue outside the parameters of Title III.

In 1972, however, during the Vietnam War, the Supreme Court held in *United States v. United States District Court (Keith)*¹⁴² that the President had no constitutional power to conduct warrantless surveillance of domestic individuals and organizations that have “no significant connection” to a foreign power. In *Keith*, the defendants were accused of trying to bomb a CIA office in Ann Arbor, Michigan, but there was no connection to a foreign power or entity. The Supreme Court held that surveillance of domestic targets—even under circumstances of “clear and present” danger—is unconstitutional without a judicial warrant based on probable cause and meeting the particularity requirements of the Fourth Amendment.¹⁴³ In a footnote, the Court expounded on its distinction between threats from purely domestic organizations (requiring a

¹³⁷ *Id.* *Katz* overruled *Olmstead v. United States*, which held that tapping of wires that did not involve a physical intrusion was not a search or seizure under the Fourth Amendment. *Olmstead v. United States*, 277 U.S. 438 (1928).

¹³⁸ *Katz*, 389 U.S. at 358 n.23.

¹³⁹ *See supra* note 130. Some of the requirements under Title III are more restrictive than what is required under the Fourth Amendment.

¹⁴⁰ Title III only allows wiretapping for certain enumerated crimes, limits the time period for the surveillance, requires minimization procedures to limit eavesdropping on innocent parties, and requires reporting to the court on the results of the surveillance. 18 U.S.C. §§ 2516(1), (3), 2518(5), (6), (8)(b) (2006).

¹⁴¹ 18 U.S.C. § 2511(3) (1976). This provision was repealed in 1978 by the Foreign Intelligence Surveillance Act of 1978, Pub.L. No. 95-511, § 201(c), 92 Stat. 1783, 1797.

¹⁴² 407 U.S. 297 (1972).

¹⁴³ *Id.* at 321.

warrant) and threats from groups with a connection to a foreign power: “[W]e use the term ‘domestic organization’ in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies.”¹⁴⁴ Yet, the Supreme Court left open the possibility that the President may have authority to conduct warrantless surveillance of foreign powers and their agents.¹⁴⁵ Significantly, after *Keith*, every federal appeals court to address the issue, including the FISA Court of Review, has concluded that the President has the inherent authority to conduct warrantless surveillance to gather foreign intelligence.¹⁴⁶

Although *Keith* held that a warrant is required to conduct surveillance of domestic security threats, the Supreme Court did note that the issuance of a warrant for intelligence purposes “may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.”¹⁴⁷ The Court intimated that Congress could create warrant requirements that would be “more appropriate to domestic security cases,” and that did not have to follow the strict requirements of Title III.¹⁴⁸ Interestingly, the Court even mentioned that a “specially designated court” could be used.¹⁴⁹ (As discussed more in Part VI, *infra*, it is this language that one could employ to argue for an expansion of the lone-wolf amendment to encompass U.S. persons.)

As a result of the *Keith* decision that suggested the rules for gathering intelligence may be different from the rules for law enforcement, and as a result of governmental abuses of civil liberties that occurred during the Vietnam War and Watergate scandal,¹⁵⁰ Congress enacted FISA in 1978 to

¹⁴⁴ *Id.* at 309 n.8.

¹⁴⁵ *Id.* at 321–22.

¹⁴⁶ *See, e.g.,* United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974); United States v. Brown, 484 F.2d 418, 425–26 (5th Cir. 1973); *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). It should be noted, however, that except for *In re Sealed Case*, the other cases concerned surveillance occurring before the enactment of FISA.

¹⁴⁷ *Keith*, 407 U.S. at 323.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Between 1975 and 1976, the Church Committee did an exhaustive inquiry into domestic spying and discovered (1) that the FBI had conducted 500,000 investigations into alleged subversives from 1960–1974; (2) that the CIA had engaged in widespread mail openings in the United States; (3) that Army intelligence operatives had conducted secret inquiries against 100,000 U.S. citizens opposed to the Vietnam War; (4) that the NSA monitored every cable sent overseas or received by Americans from 1947 to 1975; and (5) that the NSA conducted surveillance of telephone conversations of an additional 1,680 citizens. Loch K. Johnson, *NSA Spying Erodes Rule of Law*, in INTELLIGENCE AND NATIONAL SECURITY, THE SECRET WORLD OF SPIES 410, 411 (Loch K. Johnson & James J. Wirtz eds., 2d ed. 2008). For statistics on the amount of intelligence gathered on Americans between 1947 and 1975, see William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1226–27 (2007).

replace presidentially ordered surveillance of national security threats and to reign in politically motivated surveillance.¹⁵¹ FISA provides a statutory framework for the U.S. government to engage in electronic surveillance and physical searches¹⁵² to obtain “foreign intelligence information,” which generally encompasses evidence of international terrorism, espionage, and sabotage.¹⁵³ Like Title III, FISA surveillance can target U.S. citizens as well as foreign nationals inside this country, but provides simplified procedures for obtaining and executing warrants for both electronic surveillance and physical searches. FISA allows wiretapping of aliens and citizens in the U.S. based on a finding of probable cause to believe that the target is a member of a foreign terrorist group or an agent of a foreign power.¹⁵⁴ The lone-wolf amendment, however, eliminates this requirement for non-U.S. persons and allows the government to apply FISA without the link to a foreign power as long as the target is still planning to engage in international terrorism.¹⁵⁵

In sum, the main difference between Title III and FISA is that Title III requires a finding of probable cause that the search will reveal evidence or instrumentalities of a crime,¹⁵⁶ whereas under traditional FISA the government only needs to establish probable cause that the target is a member of a foreign terrorist group or an agent of a foreign

¹⁵¹ See Banks, *supra* note 150, at 1211–12.

¹⁵² As enacted in 1978, FISA covered only electronic surveillance. It was amended in 1994 to cover physical searches and again in 1998 to cover pen register, trap and trace devices, and business records acquisition. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, sec. 807, §§ 301–09, 108 Stat. 3423, 3443–53 (1994) (physical searches); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, sec. 601, §§ 401–06, 112 Stat. 2396, 2405–10 (1998) (pen registers and trap and trace devices); *Id.* sec. 602, §§ 501–03, 112 Stat. at 2410–12 (business records).

¹⁵³ “Foreign intelligence information” is a term of art and is defined as “information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against [an] actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; [] sabotage, international terrorism . . . by a foreign power or an agent of a foreign power; or [] clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or [] information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to [] the national defense or the security of the United States; [] or the conduct of the foreign affairs of the United States.” 50 U.S.C. § 1801(e) (2006 & Supp. 2009).

¹⁵⁴ *Id.* § 1805 (2006). The definition of an “agent of a foreign power” includes any person who “knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power,” or any person who “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power.” *Id.* § 1801(b)(2)(A), (C).

¹⁵⁵ *Id.* § 1801(b)(1)(C). By way of background, FISA warrant applications go to federal judges that comprise the Foreign Intelligence Surveillance Court. Similar to a grand jury proceeding, the FISC conducts its business *ex parte*, where the government is the only party present at its proceedings. Appeals from the FISC go to the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. §§ 1801–05.

¹⁵⁶ See FED. R. CRIM. P. 41 (2010).

power.¹⁵⁷ Hence, while both FISA court orders and criminal warrants require impartial judicial review and must be supported by probable cause, the probable cause inquiry under the two statutes is different. This lower threshold for conducting surveillance under FISA reflects the inherent differences between obtaining surveillance for intelligence (i.e., prevention) purposes and obtaining evidence to be used to convict an individual in a court of law. Although the Supreme Court has not ruled on the constitutionality of FISA, several lower courts, including the FISC, have upheld its constitutionality even without traditional probable cause, because “governmental interests in gathering foreign intelligence are of paramount importance to national security, and may differ substantially from those presented in the normal criminal investigation.”¹⁵⁸

V. ANALYSIS OF NON-USE

While the ATRP, Section 412 of the Patriot Act, and the lone-wolf amendment were all passed to deal in some way with the threat posed by alien terrorists, they have never been used. If Congress identifies a threat and legislates to address it, but the executive branch fails to use the tool, it calls into question whether the government really understands the threat, the right tools needed to address it, or how to effectively implement the tools. It may also indicate that the tools were a political response instead of a practical one. This Part explores possible reasons for these tools’ non-use, while Part VI explores implications for future counterterrorism policies.

A. *The Alien Terrorist Removal Court*

There are several possible reasons for the ATRC’s non-use: (1) questionable constitutionality; (2) affording too many rights to aliens; and (3) an unneeded counterterrorism tool.

1. *Constitutionality: Use It and Lose It*

Many scholars have argued that the ATRC deprives aliens of procedural due process under the Fifth Amendment; hence, its non-use may reflect a fear that if it was used to remove aliens based on classified evidence, it may be struck down as unconstitutional. In this respect, it

¹⁵⁷ See *supra* note 129.

¹⁵⁸ *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987). See also *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987) (noting that “the showing necessary under the Fourth Amendment to justify a surveillance conducted for national security purposes is not necessarily analogous to the standard of probable cause applicable to criminal investigations” and concluding that “the probable cause showing required by FISA is reasonable”). In 2002, the FISA Court of Review suggested that FISA court orders do not constitute warrants for purposes of the Fourth Amendment analysis. Relying on a general reasonableness analysis, however, it upheld FISA orders as a proper balance between national security and privacy. *In re Sealed Case*, 310 F.3d 717, 741, 744 (FISA Ct. Rev. 2002).

may be a case of “use it and lose it.” While the point of this Article is not to determine the ultimate constitutionality of the ATRC, the fact that many feel that the ATRC poses an unconstitutional deprivation of due process is explored as a possible reason for its non-use.

The legislative history of the ATRC reflects that, at the outset, its constitutionality was a topic of concern. As Senator Smith noted: “Given the compelling nature of the national security interests at stake in the rare cases in which the need for this special procedure would arise and the protections that are afforded to the alien by our bill, *we have no doubt that our proposal is fully constitutional.*”¹⁵⁹ In 1993, then-Senate Judiciary Committee Chairman, Joseph Biden, also commented “that nothing in the proposal rises to the level of being unconstitutional.”¹⁶⁰ Despite these assurances, immediately after the ATRC’s passage in 1996, scholars started commenting on its constitutionality and whether it violated aliens’ Fifth Amendment rights to procedural due process.¹⁶¹ Interestingly, while many scholars have argued that the ATRC is unconstitutional, they have frequently focused their analysis on *different* provisions of the ATRC.¹⁶² Hence, there does not appear to be a consensus on which aspects of the ATRC may be unconstitutional, perhaps further compounding the reason for the ATRC’s non-use.

Although aliens within this country receive constitutional protection, the protection they receive is not as complete as that afforded to American citizens. The Supreme Court in *Mathews v. Diaz* held that:

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. For 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.¹⁶³

Additionally, the Supreme Court has made clear that all aliens “whose presence in this country is unlawful, involuntary, or transitory” are entitled to some measure of due process, although not as extensive as provided to U.S. citizens.¹⁶⁴ While a discussion of the due process protections afforded different categories of aliens is beyond the scope of

¹⁵⁹ 141 CONG. REC. 2182 (1995) (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ See *infra* notes 171–92 and accompanying text.

¹⁶² *Id.*

¹⁶³ *Mathews v. Diaz*, 426 U.S. 67, 78–79 (1976) (footnotes omitted).

¹⁶⁴ *Id.* at 77.

this Article,¹⁶⁵ for purposes of this analysis, it is enough to note that the Supreme Court applies a balancing test to determine the level of due process protection owed to an alien at a removal hearing (which is less than that provided at a criminal trial). In *Landon v. Plasencia*, the Court balanced the interest at stake for the individual against the competing government interest in enforcing immigration laws and promulgated the following test:

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.¹⁶⁶

Because the ATRC has never been used, it is unclear how a court would apply this balancing test to the ATRC's provisions, which contain a number of procedural protections beyond traditional immigration proceedings but also limit an alien's ability to confront critical evidence concerning removability. As explained in Part II, the government commences ATRC proceedings against aliens before they are aware of the charges. If a federal judge determines that the jurisdictional prerequisites of the ATRC are met (namely, that removing the alien from the United States by regular removal proceedings would pose a risk to the national security of the United States because such proceedings would disclose classified information¹⁶⁷), a hearing occurs in federal court where the government may enter secret evidence against aliens that the aliens may not personally review or confront.¹⁶⁸ In certain circumstances, temporary or unlawful aliens receive neither an unclassified summary of that secret evidence nor a specially cleared counsel to advocate on their behalf.¹⁶⁹ At a minimum, if an unclassified summary cannot be provided, LPRs receive a specially cleared counsel, but that counsel is not allowed to discuss the secret evidence with the LPR.¹⁷⁰

One scholar maintains that the ATRC is constitutional as applied to LPRs because they receive this special counsel to advocate on their behalf (if an unclassified summary cannot be provided); yet, he believes the ATRC is unconstitutional as applied to temporary and unlawful aliens who, in some cases, will not be able to confront the classified evidence in any way. As such, he argues that the ATRP needs to be amended to allow *every* alien the same protections it provides LPRs, namely use of a “special

¹⁶⁵ See generally Martin, *supra* note 19, at 49, 92–101 (discussing “five distinct categories of noncitizens that could and should be used in the future to establish greater clarity in distinguishing rights gradations among aliens”).

¹⁶⁶ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

¹⁶⁷ 8 U.S.C. § 1533 (2006).

¹⁶⁸ *Id.* § 1534.

¹⁶⁹ *Id.* § 1534(e) (3).

¹⁷⁰ *Id.* § 1534(e) (3) (F).

attorney who can review and cross-examine the government's secret evidence or else ban the use of such evidence."¹⁷¹ Thus, for this commentator, the protections afforded by the specially appointed counsel play a large role in the ATRC's constitutionality.

Conversely, other scholars question the effectiveness of the special counsel and believe its protections do not obviate the due process concerns. Professor Martin observes: "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."¹⁷² Martin's concerns with the ATRC further extend to the unclassified summary where an alien may be prevented from preparing a "meaningful defense":

Although the government typically provides an unclassified summary of the evidence in such cases, often such a summary is as brief and unhelpful as a one-sentence statement that the evidence concerns the respondent's "association . . . with the Palestinian Islamic Jihad." It is logical to assume that the hidden evidence would contain dates and places of the individual's alleged contacts with persons believed to be associated with the terrorist organization. With such details, the individual could mount a focused defense, perhaps demonstrating presence elsewhere at the times indicated, or offering an innocent explanation for the contacts. Lacking such details, the defendant may be reduced to providing general character witnesses, completely failing to engage what might prove to be the crucial factual allegations underlying the government's case.¹⁷³

At the same time, Martin recognizes that the secrecy of informants remains of paramount concern:

This is an extremely dangerous business, and those who undertake it need the strongest possible assurance that their identities will be shielded. If the deportation respondent is in fact associated with a terrorist organization, yielding up even the minor detail of the date of an alleged meeting could reveal that a government informant was present at that moment. Associates still at large could work back from that information to root out or kill the informant.¹⁷⁴

Martin concludes that while the "ATRC is an impressive effort at substitute safeguards . . . as applied to LPRs, it is just not good enough."¹⁷⁵

¹⁷¹ Niles, *supra* note 8, at 1864.

¹⁷² Martin, *supra* note 19, at 136.

¹⁷³ *Id.* at 127–28 (alteration in original) (footnote omitted) (quoting *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1334 (S.D. Fla. 2000)).

¹⁷⁴ *Id.* at 129; *see also* *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.").

¹⁷⁵ Martin, *supra* note 19, at 136; *see also id.* at 134–35 ("Although [the ATRC] has been denounced in some circles as a Star Chamber, in fact it represents a good-faith

According to Martin, secret evidence should never be used as the basis for removing persons admitted as LPRs as they “have been specifically invited to make a permanent home in this country, and we should not uproot them without giving them a full chance to confront the information against them.”¹⁷⁶ Hence, for Martin, “the case is extremely strong that deportation [of LPRs] on the basis of secret evidence simply should not be permitted under the Due Process Clause.”¹⁷⁷ But instead of condemning the ATRC altogether, Martin acknowledges that “that there is a richer middle ground” and advocates that the protections of a special counsel and unclassified summaries be applied to a wider array of circumstances where classified information is used, such as asylum proceedings or similar persecution-based claims (but not to deport LPRs in the case-in-chief).¹⁷⁸ This thoughtful approach demonstrates that while the ATRC may never have been used, its tools may be useful in alternative situations to the ones envisioned by Congress.¹⁷⁹

Scholars David B. Kopel and Joseph Olson maintain that the ATRC’s statutory framework is unconstitutional because the aliens do not know the source of the classified information and therefore cannot effectively

congressional effort to provide as many substitute safeguards as possible while still shielding the confidential information.” (footnotes omitted)).

¹⁷⁶ Statement of David Martin to the Nat’l Comm’n on Terrorist Attacks upon the United States (Dec. 8, 2003), *available at* http://govinfo.library.unt.edu/911/hearings/hearing6/witness_martin.htm [hereinafter Statement of David Martin to the 9/11 Comm’n].

¹⁷⁷ Martin, *supra* note 19, at 134. Martin is especially concerned “that secrecy permits government abuse and sloppiness—allowing the government to rely too much on unfounded conjecture or on information that might derive only from deliberate falsehood planted by someone with a personal grudge.” *Id.* at 128.

¹⁷⁸ *Id.* at 136 (“For example, asylum and similar persecution-based claims, though rarely met by a government proffer of classified information, would be good candidates for assignment to a procedure like that provided in the ATRC when such information is introduced.”). Jeanne A. Butterfield, Executive Director of the American Immigration Lawyers Association, testified before Congress in support of a similar proposal of extending the ATRC’s due process protections (namely provision of counsel) to bond determination hearings and hearings opposing applications for discretionary relief that rely on classified information. *Effective Immigration Controls to Deter Terrorism: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 47 (2001).

¹⁷⁹ In fact, in March 2011, the White House issued an executive order establishing procedures for periodic reviews of detainees at Guantanamo Bay who are being held under law-of-war authority or, in some cases, have been referred for prosecution. During the periodic reviews, the detainees’ representatives, in some cases, will not be shown classified information but instead will be provided a “sufficient substitute or summary” that must “provide a meaningful opportunity to assist the detainee during the review process.” *See* Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011), at Sec. 3(a)(5). This “meaningful opportunity” standard seems stronger, however, than the ATRC’s standard to prepare “a defense.”

rebut it.¹⁸⁰ Specifically, they eschew the “unreviewable claims of secret informant[s]”—who “often lie”—and express concern over “illegally obtained” evidence, which is admissible in the ATRC “no matter how flagrantly the law was broken.”¹⁸¹ While they acknowledge that the ATRC, which they refer to as the “Star Chamber,” only applies to aliens and not U.S. citizens, they assert that “[c]ancers always start small.”¹⁸²

In contrast to Martin, Kopel and Olson, Professor Michael Scaperlanda concludes that the ATRC’s statutory framework is constitutional and a “nuanced attempt to effectuate the government’s legitimate interest in maintaining national security.”¹⁸³ According to Scaperlanda, the ATRC “takes away procedural protection where deemed necessary in the interest of national security but mitigate[s] the damage in two ways: by placing an independent check on the executive’s assertion of security interests and by providing the alien with other added procedural safeguards.”¹⁸⁴ For Scaperlanda, the added procedural protections of Article III judges, court-appointed counsel for indigent aliens, and a right to appeal to the Court of Appeals for the District of Columbia, allay the alien’s inability to know all of the evidence against him and the right to cross-examine witnesses or officials about that evidence.¹⁸⁵ Yet, Scaperlanda was analyzing an earlier version of the ATRC that used clear and convincing evidence as the burden of proof for deportation.¹⁸⁶ Therefore, it is unclear whether he would find the current ATRC provision with its preponderant evidence standard to be constitutional.

Other scholars have focused on other provisions of the ATRC as possible sources of concern. Jennifer Beall argues that the ATRC’s framework should be amended to preclude the use of evidence that is illegally obtained: “[Deportation] based on illegally obtained and secret evidence . . . violat[es] a fundamental element of due process, the right to confrontation.”¹⁸⁷ Beall is troubled that a “legal resident alien, who has been convicted of no crime, can be deported based on illegally obtained and secret evidence.”¹⁸⁸ Another scholar advocates raising the government’s burden of proof to deport an alien from a mere

¹⁸⁰ See 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).

¹⁸¹ *Id.* at 332, 334.

¹⁸² *Id.* at 335.

¹⁸³ Scaperlanda, *supra* note 52, at 28.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (“[T]he order of deportability will only issue on a finding that the Attorney General met her case by clear and convincing evidence.”).

¹⁸⁷ Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism*, 73 IND. L.J. 693, 707 (1998).

¹⁸⁸ *Id.* The ATRP states that “an alien subject to removal under this subchapter shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained” 8 U.S.C. § 1534(e)(1)(B) (2006).

preponderance of evidence¹⁸⁹ to clear and convincing evidence.¹⁹⁰ This scholar notes that the “suspected alien terrorist may too easily be denied his confrontation rights by the government’s use of secret evidence and then deported on a mere preponderance of the evidence.”¹⁹¹ According to him, “the dearth of significant procedural and evidentiary safeguards in the removal court provisions creates an undue risk that legal resident aliens who have obeyed the immigration laws and are guilty of nothing more than unpalatable political affiliations will suffer erroneous deprivation of their liberty to remain in this country.”¹⁹²

In 2001, Rep. David Bonior was so concerned about the ATRC’s constitutionality that he sponsored legislation that would abolish the ATRC. Although this legislation did not pass, it garnered 100 co-sponsors.¹⁹³ According to the House Report accompanying a prior version of the legislation, “the use of secret evidence cannot be squared with due process.”¹⁹⁴ As the report explained:

When the government is free to introduce its evidence behind closed doors, all the requisites of a fair adversarial process have been abandoned. No person should be deprived of liberty on the basis of evidence kept secret from that person. This simple statement is a fundamental requisite of any fair legal system. This legislation would restore the most basic notions of due process to immigration proceedings and promote the Supreme Court’s promise that citizens and non-citizens alike are protected by the Due Process clause of the fifth amendment.¹⁹⁵

The Secret Evidence Repeal Act of 2001 would have applied the Classified Information Procedures Act (CIPA)—which is used in the criminal context—to immigration proceedings.¹⁹⁶ Under this legislation, the government would have been required to provide an unclassified summary of the classified information that gave the alien “substantially the same ability” to make his defense as would disclosure of the specific classified information.¹⁹⁷ As explained *supra*, the current version of the

¹⁸⁹ 8 U.S.C. § 1534(g).

¹⁹⁰ Lawrence E. Harkenrider, *Due Process or “Summary” Justice?: The Alien Terrorist Removal Provisions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 TULSA J. COMP. & INT’L L. 143, 166 (1996).

¹⁹¹ *Id.* at 146.

¹⁹² *Id.* at 166.

¹⁹³ Secret Evidence Repeal Act of 2001, H.R. 1266, 107th Cong.

¹⁹⁴ H.R. REP. NO. 106-981, at 8 (2000).

¹⁹⁵ *Id.*

¹⁹⁶ H.R. 1266 § 3.

¹⁹⁷ H.R. REP. NO. 106-981, at 5–6. Before passage of the ATRP in 1996, Congress debated about whether the summary should “provide the alien with substantially the same ability to make his defense as would disclosure of the classified information.” See Harkenrider, *supra* note 190, at 150 n.40 (quoting Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., § 301). Because this heightened standard was seen as too damaging to national security, the current version was diluted to only require that the unclassified summary be “sufficient to enable the alien to prepare a

ATRC only requires the unclassified summary be “sufficient to enable the alien to prepare *a* defense.”¹⁹⁸ According to the House Report, this heightened standard, “drawn from CIPA, has successfully and constitutionally balanced national security interests and the rights of the defendant in criminal cases involving classified information.”¹⁹⁹ Hence, for Rep. Bonior, the ATRC’s lack of use was presumably due to its unconstitutional deprivation of due process for aliens, and this legislative proposal would have provided more due process protection to the alien on par with criminal proceedings. Interestingly, in June 2001, Rep. Dana Rohrabacher proposed a more limited version of Rep. Bonior’s bill that would apply CIPA only to permanent resident aliens and those with unexpired visas.²⁰⁰ It similarly did not pass.

While the constitutionality of the ATRC has never been tested,²⁰¹ the fact that many academics and lawmakers believe that its 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. As Professor Stephen Dycus observes, “[i]t may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it.”²⁰² 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.²⁰³

2. *Too Many Rights*

On the other hand, some commentators argue that the ATRC actually provides *too many* protections to aliens, thereby endangering national security. While the ATRC contains several procedural protections beyond traditional immigration proceedings, such as Article III judges and appointed counsel if the aliens cannot afford representation, the requirement of an unclassified summary, where possible, has resulted in substantial criticism. As one scholar notes, “[t]o the extent such a summary were accurate and precise [in order to allow the resident alien to test its veracity], it would run the risk of tipping off a

defense.” See 8 U.S.C. § 1534(e)(3)(C) (2006) (emphasis added). Rep. Bonior’s legislation would have essentially re-applied this previously rejected standard into the ATRC.

¹⁹⁸ See 8 U.S.C. § 1534(e)(3)(C) (emphasis added).

¹⁹⁹ H.R. REP. 106-981, at 6.

²⁰⁰ Snyder, *supra* note 105, at 477, (citing Secret Evidence Against Lawful Aliens Repeal Act of 2001, H.R. 2113, 107th Cong. § 3(a) (2001)).

²⁰¹ See Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1971 (2005) (“To date, . . . not a single case has been brought before the ATRC, and thus its constitutionality remains untested.”).

²⁰² STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 856 (4th ed. 2007).

²⁰³ See Niles, *supra* note 8. Niles argues that “although the provisions [of the ATRC] are constitutional on their face, they would be unconstitutional as applied in some circumstances.” *Id.* at 1833.

resident alien to the government’s actual confidential information as well as to that information’s source.”²⁰⁴ According to Stephen Valentine, a former Justice Department official who oversaw the Office of Immigration Litigation, the requirement for an unclassified summary makes the ATRC too “unworkable” and “effectively useless”:

One can easily understand the “Catch-22” situation in which this places the United States. If the government prepares an unclassified summary of the evidence that is too vague and general, it will not be approved by the Judge. If, on the other hand, the evidence is too clear and specific, the classified evidence itself will be effectively disclosed, thus harming national security by compromising sources and methods of intelligence gathering.²⁰⁵

In fact, Senator Bob Smith from New Hampshire was so concerned about the requirement for an unclassified summary that he proposed legislation in 2001 to remove the summary from the ATRC’s provisions.²⁰⁶ According to Sen. Smith, the ATRC’s non-use is directly attributable to the requirement for an unclassified summary:

The reason for [the ATRC’s non-use is that] we are required under the law to submit to the terrorists a summary of the intelligence we gathered on him and how we got it. Obviously, if the terrorist gets that information, then the people who provided that information are going to be killed or their lives will be at risk.²⁰⁷

During debate, Sen. Smith noted: “We created the court, and nobody used the court because of this business about the summary having to be provided under the law.”²⁰⁸ In a letter to former Attorney General John Ashcroft in support of his proposed legislation, Sen. Smith wrote:

The most glaring shortfall of the court is that too many rights are given to the accused alien terrorist. I have been informed that the notice requirements and other procedural obstacles that force the Federal government to disclose classified information render this court useless.²⁰⁹

Hence, Sen. Smith proposed allowing an independent federal judge to look at the classified information, but not requiring any kind of summary to be provided to the alien.²¹⁰

While Sen. Smith felt that the ATRC was not used because of the procedural protections afforded aliens, Senator Patrick Leahy from Vermont vehemently disagreed. As he countered:

²⁰⁴ *Id.* at 1857.

²⁰⁵ Valentine, *supra* note 4, at 1, 2.

²⁰⁶ *See* 147 CONG. REC. 22019 (2001).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 22020.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 22019.

The idea of having a quasi-secret court, and making only limited evidence available to the defendant, as is true under existing law, is constitutionally questionable enough. But to say that we will not tell the defendant any of the evidence against him in the court, as Senator Smith proposes, is the kind of thing we rail against when other countries do it.²¹¹

According to Leahy, the ATRC's non-use was due to "concerns within the Justice Department about constitutional challenges to the court itself Surely the Justice Department knows that if we approve this amendment those constitutional challenges will basically be irrefutable."²¹² Consequently, Sen. Smith's Alien Terrorist Removal Act of 2001 did not pass, largely due to constitutional concerns about the due process rights of aliens.²¹³

In sum, there appear to be two competing narratives about the ATRC's non-use. For some, the ATRC is unconstitutional because it does not provide enough due process protections for aliens. For others, it appears to be the exact flip of the coin: that the ATRC provides too many procedural protections and therefore endangers national security. The fact that two lawmakers, Rep. Bonior and Sen. Smith, proposed legislation with diametrically opposed assumptions about the reasons for the ATRC's non-use illustrates this problem. While Sen. Smith proposed to eliminate the unclassified summary as too unworkable and allow the government to remove terrorist aliens with no summary at all, Rep. Bonior sought to provide more due process protections for the accused alien terrorists on par with criminal proceedings. While both laws did not pass, their very different assumptions underlying the ATRC's non-use reflect the simultaneous narratives of providing both too few and too many rights to aliens. This resulting paralysis illustrates that the ATRC may have been compromised to death.

3. *Simply Not Needed*

Another possible reason for the ATRC's non-use may have nothing to do with its potential unlawfulness or the ostensibly damaging nature of the unclassified summary: it may simply be a tool that is not needed because alien terrorists can be removed without having to resort to using classified evidence in the case-in-chief. As explained *supra*, for aliens who are in the United States temporarily or illegally, it appears easier to rely on traditional grounds for removal and then to use classified evidence to deny discretionary relief. As Professor Martin informed the 9/11 Commission in 2003: "To date the ATRC has not been used, probably owing to the very narrow range of circumstances that come within its

²¹¹ *Id.* at 22024.

²¹² *Id.*

²¹³ Valentine, *supra* note 4, at 2. However, Sen. Smith ultimately "won passage of a provision in the intelligence authorization act for fiscal year 2002 that require[d] the Attorney General to report to Congress on why the 1996 Act ha[d] never been used and what should be done to make it a workable antiterrorism tool." *Id.*

jurisdiction—a statutory restriction that is not well understood.”²¹⁴ According to Martin, “[t]errorism charges pose . . . significant challenges of case management and proof,” and “[t]here is simply no point in adding those complications if there is another easily provable charge.”²¹⁵

DOJ attorney Kelley Brooke Snyder made the same observation:

[The ATRC’s] nonuse presumably stems from the fact that the executive branch has used other mechanisms to remove aliens effectively. For example, the executive may see the ATRC as both unnecessary and cumbersome in situations in which the alien is deportable on a visa infraction, and secret information is used in the discretionary relief phase.²¹⁶

Brookings scholar Benjamin Wittes agrees:

Not thinking about the system as a whole, Congress created rules for the court that were so much more generous to the accused than the rules governing the normal immigration system that since then the executive branch has always chosen to deport aliens suspected of being terrorists using the normal, permissive rules.²¹⁷

According to reporters Edward T. Pound and Chitra Ragavan, “[c]ivil libertarians say the department has found it easier to deport or imprison suspected terrorists through other administrative immigration proceedings.”²¹⁸ And, as explained *supra*, many immigration officials claim that secret evidence is only seldom employed.²¹⁹ In other words, Congress may have *overestimated* the need to remove alien terrorists based on classified information in the case-in-chief and passed a counterterrorism tool that was simply not warranted by the circumstances.²²⁰

Whatever the reasons for the ATRC’s non-use, it is not alone. Section 412 of the Patriot Act, also dealing with alien terrorists, has similarly never been used. As will be shown, it too suffers from competing

²¹⁴ Statement of David Martin to the 9/11 Comm’n, *supra* note 176.

²¹⁵ *Id.*

²¹⁶ See Snyder, *supra* note 105, at 455 n.58.

²¹⁷ BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO 114 (2011).

²¹⁸ See Edward T. Pound & Chitra Ragavan, *Finger-Pointing, Fingerprints: The Hunt for Evidence and, Hard on Its Heels, Charges about Who Screwed up*, U.S. NEWS & WORLD REP., Oct. 8, 2001 at 27, 30.

²¹⁹ *Id.*

²²⁰ In fact, the utility of the ATRC may have been further eroded in 2005 when Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, § 103(a), 119 Stat. 231, which made all of the terrorism-related inadmissibility grounds (8 U.S.C. § 1182(a)(3)(B) (2006)) applicable to aliens who have been admitted to the country (*Id.* § 1227(a)(4)(B)), including LPRs. Section 103 further expanded the terrorism grounds beyond what the USA PATRIOT Act did in Section 411. REAL ID Act of 2005 § 103(b). Hence, aliens can be removed based on the broadening of what constitutes terrorist activity without the need to resort to classified information. For an article discussing the breadth of these provisions, see Nicholas J. Perry, *supra* note 60.

simultaneous narratives of providing both too few and too many rights to aliens. It also may be an unnecessary counterterrorism tool, as the government appears to have used an alternative scheme to achieve the same objective of Section 412 (i.e. detention of alien terrorists) without having to abide by its procedural protections.

B. Section 412 of the Patriot Act

1. Constitutionality: Use It and Lose It

As with the ATRC, one reason for Section 412's non-use may be a fear that it is unconstitutional in light of the Supreme Court's *Zadvydas v. Davis* decision concerning indefinite detention of aliens. As immigration experts Lawrence M. Lebowitz and Ira L. Podheiser observe, "[i]t seems fairly certain that the mandatory detention provisions [of Section 412] of the USA Patriot Act will face challenges to its constitutionality."²²¹ Similarly, another commentator posits that "[i]t is not a matter of if, but instead a question of when, the power to potentially indefinitely detain a noncitizen found under [S]ection 412 of the Patriot Act will be challenged in the U.S. Supreme Court as a violation of the noncitizen's Fifth Amendment due process rights."²²² As explained *supra*, while the purpose of this Article is not to conclude one way or the other whether Section 412 is constitutional, the fact that there are diametrically opposed views of its constitutionality is explored as a reason for its non-use.

Critics of Section 412 argue that the dictum in *Zadvydas* does not allow a special exception for terrorists in the absence of "strong procedural protections."²²³ According to the American Civil Liberties Union (ACLU), "what amounts to a life sentence should be at minimum based on clear proof at a hearing, not on a certification of merely the level of suspicion that normally allows only a brief stop and frisk on the street."²²⁴ According to scholar Shirin Sinnar, Section 412's "provisions for certification and mandatory detention contravene the Fifth Amendment's guarantee of due process of law."²²⁵ As she argues, by denying aliens "the opportunity for meaningful review of the certification decision, and by authorizing the detention of aliens on substantively inadequate grounds, the USA Patriot Act raises serious constitutional concerns under both the procedural and substantive prongs of the Due

²²¹ Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873, 880 (2002).

²²² Keith, *supra* note 90, at 456.

²²³ Bastian, *supra* note 82, at 410.

²²⁴ *Id.* at 410 (footnote omitted) (quoting *How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants*, ACLU (Oct. 23, 2001), <http://www.aclu.org/print/immigrants-rights/how-anti-terrorism-bill-permits-indefinite-detention-immigrants>).

²²⁵ Shirin Sinnar, Note, *Patriotic or Unconstitutional?: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419, 1421 (2003).

Process Clause.”²²⁶ Sinnar explains that, before the passage of Section 412, aliens suspected of involvement in terrorist activities would be arrested on the basis of terrorism or immigration charges, and then granted or denied bail based upon the discretion of the INS (now ICE).²²⁷ She claims that the fundamental change that Section 412 introduced is the certification process that “triggers mandatory detention.”²²⁸ Before passage of Section 412, the INS denied bail after a hearing when it was found that the alien posed a threat to national security or would fail to appear for removal proceedings. Section 412, however, “introduces an irrebuttable presumption that aliens subject to certification are unfit for release.”²²⁹ As such, she claims that a certification, and hence mandatory detention, would apply to an alien “whose sole offense was a donation to an undesignated organization intended for charitable purposes, and who neither presents a danger to the public nor appears likely to abscond.”²³⁰

Similarly, the editors of the Harvard Law Review argue that Section 412 is likely unconstitutional. While they acknowledge that Congress included limits on the executive branch’s authority to detain aliens, they nonetheless conclude that “even with the safeguards included by Congress, the USA PATRIOT Act raises serious constitutional concerns.”²³¹ Specifically, they posit that “allowing the Attorney General to detain a noncitizen based on a reasonable suspicion of ‘terrorist activity’ broadly conceived . . . appears impermissibly vague.”²³² Furthermore, they criticize Section 412’s broadening of what constitutes “terrorist activity” to include “a bar room brawl in which one party threatens another with a broken beer bottle,”²³³ and lament the expansion of the description of “terrorist organizations” to include “two

²²⁶ *Id.*

²²⁷ *Id.* at 1426. The AEDPA and the IIRIRA of 1996 amended the INA to subject a broader category of aliens to mandatory detention during removal proceedings. 8 U.S.C. § 1226(c) (2006). Section 236(c) of the INA requires the detention of aliens removable on terrorist grounds, as well as of those convicted of crimes of moral turpitude, aggravated felonies, drug-related offenses, firearms offenses, and a catchall category of “miscellaneous crimes.” *Id.* § 1226(c)(1). However, the federal government allows exceptions in narrow circumstances such as aliens who do not pose flight or security risks. *Id.* § 1226(c)(2). Section 412, in contrast, would eliminate any and all discretion unless the certification was revoked. (While not pertinent to this Article, some courts have invalidated the no-bail provision of the INA as it applies to lawful permanent residents. *See* Hoang v. Comfort, 282 F.3d 1247, 1260 (10th Cir. 2002); Kim v. Ziglar, 276 F.3d 523, 535 (9th Cir. 2002)).

²²⁸ Sinnar, *supra* note 225, at 1426.

²²⁹ *Id.* at 1427.

²³⁰ *Id.* at 1426.

²³¹ *Developments in the Law, supra* note 87, at 1934.

²³² *Id.*

²³³ *Id.* at 1935 (quoting *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm on the Constitution, Federalism, & Prop. Rights of the S. Comm. on the Judiciary*, 107th Cong. 47 (2001) (statement of David Cole, Professor of Law, Georgetown University Law Center)).

or more individuals, whether organized or not,” even if these organizations were “never officially designated as ‘terrorist’ in the Federal Register.”²³⁴ Hence, they argue that Section 412 likely violates due process as it allows the indefinite detention of aliens who “unwittingly commit a deportable offense by associating with certain organizations.”²³⁵ While they acknowledge that *Zadvydas* mentions indefinite detention under special circumstances for national security reasons, they maintain that such language “though suggestive—was dictum, and it remains to be seen what level of deference the Court will afford the political branches in such circumstances.”²³⁶ Furthermore, they explain that any preventive detention scheme based on dangerousness must be “limited to specially dangerous individuals” and subjected “to strong procedural protections.”²³⁷ As they observe, Section 412 “does not target a small set of highly dangerous persons, but instead captures a broad range of individuals by adopting an expansive definition of ‘terrorist activity.’”²³⁸ They also criticize the low evidentiary standard for detention (i.e. “reasonable grounds”), which is invariably less than the probable cause standard for arrest, and express concerns about the Attorney General’s ability to certify an alien based “on secret evidence unavailable to the detainee.”²³⁹ Hence, they do not feel that Section 412 is lawful or a responsible codification of the *Zadvydas* exception.

Yet, commentator Mark Bastian vehemently disagrees and argues that Section 412 falls squarely within the *Zadvydas* exception as “the war on terrorism represents a ‘special circumstance’ that may necessitate preventative detention.”²⁴⁰ According to Bastian, the critical difference between 8 U.S.C. § 1231’s “may be detained” language that the Court found problematic and section 412(a)(6) of the Patriot Act “lies in the specificity of the alien detention guidelines.”²⁴¹ While the Supreme Court maintained that the “may be detained” language was too ambiguous, Bastian posits that section 412(a)(6)’s requirements are better defined and therefore would withstand constitutional scrutiny. As he explains, under Section 412 “there is no longer an undefined period as to which aliens may be detained, but rather, a specified length of time of six months provided in the statute.”²⁴² Bastian further argues that Section 412 “ensures that the terrorist suspect will be present at future deportation hearings” and is a proper exercise of Congress’s plenary

²³⁴ *Id.* (internal quotation marks omitted).

²³⁵ *Id.*

²³⁶ *Id.* at 1936.

²³⁷ *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001)).

²³⁸ *Id.*

²³⁹ *Id.* at 1936–37.

²⁴⁰ Bastian, *supra* note 82, at 396.

²⁴¹ *Id.* at 411.

²⁴² *Id.* at 412.

power over immigration.²⁴³ He relies on a Government Accounting Office study finding that 77% of aliens fail to appear for their immigration hearing and that “[t]his must not be allowed to happen with potential terrorists.”²⁴⁴ Dana Keith makes a similar argument. In fact, she maintains that “the detention provisions of the Act *exceed* the *Zadyvdas* standard regarding suspected terrorists held on an indefinite basis.”²⁴⁵ According to Keith, Section 412 expressly provides for judicial review through habeas petitions and prescribes fixed time limits for review of the Attorney General’s initial certification, which must be reviewed every six months. Furthermore, the Attorney General must initiate removal proceedings or bring criminal charges within seven days of the commencement of detention or the alien shall be released. Therefore, she concludes that “if the Court stands by its decision in *Zadyvdas* and follows precedent of this decision and other decisions passed down in times of crisis, it is unlikely that the detention provisions of the Patriot Act will be struck down as an unconstitutional infringement on the rights of noncitizens.”²⁴⁶

The Supreme Court has also suggested in dicta that Section 412 may be a proper codification of the *Zadyvdas* dictum. In *Clark v. Martinez*, the Court held that the *Zadyvdas* decision concerning post-removal detention applies to inadmissible aliens as well as removable ones.²⁴⁷ In responding to a Government argument that the “security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed,” the Court explicitly noted that Congress had the ability to address such fears as it had done with Section 412 of the Patriot Act.²⁴⁸

In sum, as with the ATRC, there are conflicting views on Section 412’s constitutionality and the exact impact of the *Zadyvdas* dictum. While some feel that Section 412 violates fundamental due process protections, others feel that it appropriately responds to and codifies the exceptions delineated in *Zadyvdas*.

2. Too Many Rights

On the other side of the spectrum, Section 412’s non-use may be attributable to the amount of due process protections it actually affords terrorist aliens. As Professor David Cole notes, “[t]he statute does provide for immediate habeas corpus review of the detention, and perhaps for

²⁴³ *Id.* at 416.

²⁴⁴ *Id.*

²⁴⁵ Keith, *supra* note 90, at 463 (emphasis added).

²⁴⁶ *Id.*

²⁴⁷ *Clark v. Martinez*, 543 U.S. 371, 377–78 (2005).

²⁴⁸ *Id.* at 386 & n.8; *see also id.* at 387 (O’Connor, J., concurring) (pointing out that the Executive “has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks,” including Section 412 of the Patriot Act).

that reason, the government has yet to invoke this authority.”²⁴⁹ In fact, Cole suggests that the reason the government did not use Section 412 after September 11 was that it was easier to abuse existing immigration law than have to conform with the procedural protections afforded to aliens under Section 412:

But perhaps because the law included such safeguards as immediate access to federal court and a strict seven-day time limit on detention without charges (adopted over the administration’s objections), the government never used it. It found that it could lock up literally thousands of foreign nationals, often for longer than seven days, by abusing existing immigration laws, obstructing detainees’ access to court, and keeping them locked up even after judges had ordered their release.²⁵⁰

As with the ATRC, it may be that Section 412 was simply not needed as a counterterrorism tool because the administration found other methods to detain aliens without the added procedural protections required by the Patriot Act. Until late 2001, INS regulations required the government to release an alien within twenty-four hours unless charges were filed.²⁵¹ A week after September 11, however, the regulation was amended to extend the period to forty-eight hours.²⁵² Moreover, the amended regulation provides a significant exception in the event of “an emergency or other extraordinary circumstance,” in which case the forty-eight hour determination can be extended for “an additional reasonable period of time.”²⁵³ The regulation does not define “extraordinary circumstances” or “reasonable period of time.”²⁵⁴ “The INS stated that the [amendment] was needed ‘to ensure that the Service has sufficient time, personnel and resources to process cases—including establishing true identities’ in connection with the September 11th, 2001 attacks.”²⁵⁵ According to the American Immigration Lawyers Association, under these amended regulations, a non-citizen may be detained indefinitely even if the “emergency or other extraordinary circumstance” has no relation to the detainee’s particular situation.²⁵⁶ For these reasons, the Harvard Law Review expressed that the “regulation runs counter to [Section 412’s] principles and Attorney General Ashcroft should rescind it.”²⁵⁷ But quite to the contrary, the administration used the regulation *in*

²⁴⁹ Cole, *supra* note 82, at 702.

²⁵⁰ *Id.* at 748.

²⁵¹ See Statement of David Martin to the 9/11 Comm’n, *supra* note 176.

²⁵² *Id.*; see also AILA/AILF Comment on INS Custody Regulation, AILA INFONET (Nov. 20, 2001), <http://www.aila.org/content/default.aspx?docid=2127>.

²⁵³ 8 C.F.R. § 287.3(d) (2011).

²⁵⁴ *Developments in the Law*, *supra* note 87, at 1938.

²⁵⁵ Bastian, *supra* note 82, at 399 n.23.

²⁵⁶ Lebowitz & Podheiser, *supra* note 221, at 880 (citing AILA/AILF Comment on INS Custody Regulation, *supra* note 252).

²⁵⁷ *Developments in the Law*, *supra* note 87, at 1938.

lieu of Section 412’s detention provisions and its procedural requirements.

After September 11, the administration rounded up hundreds of aliens and used this amended regulation to prolong the filing of charges, not bothering to use the provisions of Section 412 of the Patriot Act. According to a subsequent Inspector General (IG) report, in the 11 months after the September 11 attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses.²⁵⁸ This IG report found several instances in which aliens remained detained for more than a month without charges being filed.²⁵⁹ Had Section 412 been used, the government would have had to charge an alien within seven days or release him. As Mark Bastian noted, “though the Department of Justice gained broad powers under the USA Patriot Act, it also became constrained by a new seven-day limit on detentions.”²⁶⁰ Therefore, at the front end, the amended regulation with its vague and undefined terms of “reasonable period of time” and “extraordinary circumstance” provided more flexibility than Section 412’s seven-day time frame for filing charges.

At the back end, it appears that the Justice Department also created an interim rule that would comply with *Zadvydas*’s exception for “special circumstances” to allow certain aliens to be held longer than the presumptive limit of six months. According to the interim rule, which was effective as of November 14, 2001, the “special circumstances” that would allow longer than six months of post-order removal detention are: (1) aliens who have highly contagious diseases that pose a danger to the public; (2) aliens who pose foreign policy concerns; (3) aliens who pose national security and terrorism concerns; and (4) individuals who are specially dangerous due to a mental condition or personality disorder.²⁶¹ Under this rule, immigration judges and the Board of Immigration Appeals are permitted to review any determination that continued detention is necessary because the alien is considered “especially dangerous.”²⁶² No such review is allowed, however, in cases where the Attorney General has certified that an alien should not be released on account of contagion, serious adverse foreign policy consequences, or terrorism or security concerns.²⁶³ Hence, at the back end, the government developed a way to potentially hold terrorist aliens indefinitely without having to resort to Section 412, which requires high-level Attorney

²⁵⁸ See OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES CONNECTED WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 5 (2004).

²⁵⁹ *Id.* at 35.

²⁶⁰ Bastian, *supra* note 82, at 399 n.23.

²⁶¹ 8 C.F.R. § 241.14 (2011); see also *Justice Department Implements Zadvydas v. Davis Supreme Court Decision*, DEP’T OF JUSTICE (Nov. 14, 2001), http://www.justice.gov/opa/pr/2001/November/01_ins_595.htm.

²⁶² 8 C.F.R. § 241.14(f)–(i).

²⁶³ *Id.* § 241.14(b)–(d).

General (or his Deputy's) certification and other procedural requirements.

In fact, it appears the government went to great lengths to avoid having to use Section 412. In 2003, the government designated Ali Saleh Kahlah al-Marri, an alien who arrived on a student visa from Qatar and arrested in Illinois, as an "enemy combatant" and held him for almost six years without criminal charge or trial.²⁶⁴ When his case reached federal court on a habeas petition, Judge Diana Motz from the Fourth Circuit held that al-Marri was a civilian arrested far away from a zone of combat and must be charged and tried for alleged crimes in traditional courts and not held indefinitely as an "enemy combatant."²⁶⁵ Furthermore, she observed that Congress had specially addressed the detention of domestic terrorism suspects with Section 412 of the Patriot Act, which required that alien terrorists be charged within *seven* days of arrest and detained pending removal or trial, not held indefinitely without being charged.²⁶⁶ Indeed, the Bush administration had initially sought to detain alien terrorists indefinitely, but Congress ultimately rejected that proposal when it enacted Section 412.²⁶⁷ As Professor Jonathan Hafetz notes, "[b]y relabeling al-Marri an 'enemy combatant,' the administration had therefore thwarted not only the Constitution but

²⁶⁴ John Schwartz, *Plea Deal Reached with Agent for Al-Qaeda*, N.Y. TIMES (April 30, 2009), <http://www.nytimes.com/2009/05/01/us/01marri.html?ref=global-home>.

²⁶⁵ *al-Marri v. Wright*, 487 F.3d 160, 186 (4th Cir. 2007) ("Allegations of criminal activity in association with a terrorist organization . . . do not permit the Government to transform a civilian into an enemy combatant subject to indefinite military detention . . ."), *rev'd en banc sub nom. al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated as moot sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). Ultimately, the Fourth Circuit held (5-4) in an en banc ruling that the government may hold al-Marri in military detention as an enemy combatant if the allegations against him could be adequately demonstrated, but maintained that those allegations had not been tested by sufficient due process, hence requiring a remand for evidentiary purposes. *See al-Marri (en banc)*, 534 F.3d at 217-18. While his case was pending an interlocutory appeal before the Supreme Court, the Obama administration transferred him to the criminal justice system where he ultimately pled guilty in April 2009 to one count of conspiracy to provide material support to a foreign terrorist organization and was sentenced to eight years in prison. John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES (Oct. 29, 2009), <http://www.nytimes.com/2009/10/30/us/30marri.html>. Hence, the Supreme Court never addressed the substantive issue of whether the government can detain U.S. persons captured in peaceful civilian areas within the U.S. as "enemy combatants." For a description of the legal issues in the *al-Marri* case, see generally Stephanie Cooper Blum, *The Why and How of Preventive Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51, 101-04 (2009).

²⁶⁶ *al-Marri*, 487 F.3d at 189-91 ("Thus, the Patriot Act expressly prohibits unlimited 'indefinite detention;' instead it requires the Attorney General either to begin 'removal proceedings' or to 'charge the alien with a criminal offense' 'not later than 7 days after the commencement of such detention.' . . . But no provision of the Patriot Act allows for unlimited indefinite detention.") (quoting USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001)).

²⁶⁷ Reply Brief of Appellants at 17, *al-Marri v. Wright*, 534 F.3d 213 (4th Cir. 2008) (No. 06-7427).

Congress as well.”²⁶⁸ Again, it seems that the government did not want to be locked into the procedural requirements of Section 412, so it developed alternative ways to achieve its objectives.

During testimony before the 9/11 Commission in 2003, Professor Martin speculated that Section 412 was never used because “normal detention and release procedures [proved] adequate, in a way that might well have been doubted as of October 2001 when the law was passed.”²⁶⁹ Similarly, Benjamin Wittes observes that Section 412 has never been invoked because “it’s so easy to lock up immigrants under other immigration authorities that it actually added little to the government’s arsenal.”²⁷⁰ Again, it appears Congress may have provided a counterterrorism tool that was too cumbersome and simply not warranted given alternative tools that accomplished the same objective.

C. Lone-Wolf Amendment

As with the ATRC and Section 412 of the Patriot Act, the lone-wolf amendment, passed initially in 2004, has never been used. Unlike the ATRC and Section 412, the lone-wolf amendment, as it stands now, requires continual congressional authorization as it has been subject to repeated sunset provisions. In fact, as of this writing, it will expire in June 2015 unless it is reauthorized.²⁷¹

1. Constitutionality: Use It and Lose It

The lone-wolf amendment sparks divisive debates. As explained in Part IV, its advocates argue it is an essential counterterrorism tool.²⁷² Its critics argue that, at worst, it violates the Fourth Amendment and, at best, it is not needed and dilutes civil liberties protections.²⁷³ As with the ATRC and Section 412 of the Patriot Act, the purpose of this Article is not to determine whether the lone-wolf provision is constitutional or even prudent policy. Rather, these areas are explored as a possible reason for its non-use.

Some critics argue that the lone-wolf provision violates the Fourth Amendment by allowing the government to spy on individuals without probable cause that they have committed a crime *and* without establishing they are connected to a foreign power (which was the compromise struck by FISA). While the lone-wolf amendment was enacted as the “Moussaoui fix” to address the FBI’s failure to seek a FISA warrant in the weeks before 9/11, critics contend that the FBI could have searched Moussaoui’s laptop by obtaining a traditional criminal warrant

²⁶⁸ JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* 206 (2011).

²⁶⁹ Statement of David Martin to the 9/11 Comm’n, *supra* note 176.

²⁷⁰ WITTES, *supra* note 217, at 115.

²⁷¹ *See supra* note 112.

²⁷² *See supra* notes 113–22 and accompanying text.

²⁷³ *See supra* notes 130–32 and accompanying text.

under Title III and did not need to resort to FISA.²⁷⁴ Alternatively, they argue that the FBI had probable cause (a relatively low standard, especially in the FISA context) and should have sought a FISA warrant.²⁷⁵ As they posit, elimination of the connection to a foreign power allows the government to cast a wider net and conduct surveillance over individuals involved solely in domestic terrorism without having to obtain a criminal warrant with its more exacting requirements.²⁷⁶ Hence, according to critics, the underlying reasons for the lone-wolf amendment are suspect (Moussaoui as it turned out was not even a lone wolf), and its passage is just an excuse to undermine civil liberties by avoiding the more demanding requirements of obtaining a traditional criminal warrant.

In fact, according to Spaulding, the lone-wolf amendment jeopardizes the whole foundational justification for FISA:

The Department of Justice in its letter to the Congress last week stated that this Lone Wolf authority had never been used but argued that we should keep it in FISA just in case. The problem with this reasoning is that it comes at a high cost. In addition to being unnecessary, *the Lone Wolf provision—by extending FISA’s application to an individual acting entirely on their own—undermines the policy and constitutional justification for the entire FISA statute.*²⁷⁷

As she explains, when Congress enacted FISA, it carefully limited its application to address “the difficulties of investigating activities planned, directed, and supported from abroad by *foreign intelligence services and foreign-based terrorist groups.*”²⁷⁸ She further recounts how subsequent court cases have found “this limited and extraordinary exception from the normal criminal warrant requirements [to be] justified only when dealing with foreign powers or their agents.”²⁷⁹ In 2002, for instance, the FISA Court of Review cited FISA’s purpose as “to protect the nation against terrorists and espionage threats directed by foreign powers” when it concluded that “FISA searches, while clearly not meeting ‘minimum Fourth Amendment warrant standards,’ were “nevertheless

²⁷⁴ See S. REP. NO. 108-40, at 10–13, 30–41 (2003) (views of Senator Leahy and Senator Feingold on a similar “lone wolf” provision in S. 113, 108th Cong. § 1 (2003)).

²⁷⁵ *Id.* at 35–40; see also *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 127 (testimony of Suzanne Spaulding) (testifying that the Judiciary Committee Report pointed out that “probable cause” does not mean “more likely than not” or “an over 51% chance,” but “only the probability and not a prima facie showing.” Also noting that “there appears to have been sufficient evidence in the possession of the FBI which satisfied the FISA requirements for the Moussaoui application” and thus concluding that “no ‘fix’ was required to search Moussaoui’s computer.”).

²⁷⁶ See *infra* notes 277–82, 289–93 and accompanying text.

²⁷⁷ See *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 128 (testimony of Suzanne Spaulding) (emphasis added).

²⁷⁸ *Id.* (quoting S. REP. NO. 95-701, at 14 (1978)).

²⁷⁹ *Id.*

reasonable.”²⁸⁰ As she attests, “[i]ndividuals acting entirely on their own simply do not implicate the level of foreign and military affairs that courts have found justify the use of this extraordinary foreign intelligence tool.”²⁸¹ Analogizing the lone-wolf provision to Humpty Dumpty, she concludes that “[i]f its use against a true Lone Wolf is ever challenged in court, FISA, too, may have a great fall.”²⁸² Therefore, one reason for the lone-wolf amendment’s non-use could be apprehension that it would be stuck down as unconstitutional if ever challenged in court.²⁸³

Professor Bellia shares Spaulding’s concerns but does not believe that the lone-wolf amendment will be found to be unconstitutional. While concluding that there is no “definitive jurisprudential answer” to whether the lone-wolf amendment is constitutional,²⁸⁴ she notes that “[o]ne argument for the unreasonableness of lone wolf surveillance might be that, when a judge must consider only the activities of a single individual to find probable cause, some of the factors distinguishing security surveillance from surveillance of ordinary crime—particularly the investigative challenges—do not apply.”²⁸⁵ Nonetheless, she concludes from a purely predictive point of view that “it seems unlikely that a court (either the FISC itself, or a federal court considering a challenge to FISA-derived evidence) would invalidate use of the lone wolf authorization on Fourth Amendment grounds.”²⁸⁶ She cautions, however, that her analysis is based on the “statutory and practical limits on judicial involvement in the FISA process”²⁸⁷ and not based on a normative analysis, which she acknowledges is “quite complicated.”²⁸⁸ She clearly expresses concerns with the lone-wolf amendment’s distancing itself from FISA’s underlying foreign nexus requirements.

Michael German, Senior Policy Counsel for the ACLU and former FBI agent, similarly articulates concerns with the lone-wolf amendment. He testified to Congress in March 2011 that the government has justified the use of the provision solely “by imagining a hypothetical . . . [with] little evidence to suggest this imaginary construct ha[s] any basis in reality.”²⁸⁹ As he explains, “since terrorism is a crime, there is no reason to

²⁸⁰ *Id.* (quoting *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002)).

²⁸¹ *Id.* at 129.

²⁸² *Id.* at 130.

²⁸³ Unlike Title III, where the target ultimately gets notice of the surveillance, under FISA, the surveillance is secret unless it is used in court. Because the purpose of FISA is to gather foreign intelligence, and FISA evidence is infrequently used in a court of law, opportunities for challenging the lone-wolf amendment, should it ever be used, would presumably be rare.

²⁸⁴ Bellia, *supra* note 111, at 458 (quoting *In re Sealed Case*, 310 F.3d at 746).

²⁸⁵ *Id.* at 457.

²⁸⁶ *Id.* at 458.

²⁸⁷ *Id.* at 459.

²⁸⁸ *Id.* at 458.

²⁸⁹ *Permanent Provisions of the PATRIOT Act: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 39 (2011).

believe that the government could not obtain a Title III surveillance order from a criminal court if the government had probable cause to believe an individual was planning an act of terrorism.”²⁹⁰ He concludes that “this provision allows the government to avoid the more exacting standards for obtaining electronic surveillance orders from criminal courts” and that its constitutionality “remains dubious.”²⁹¹ Similarly, in 2010, Rep. Jerrold Nadler had urged Congress not to renew the lone-wolf amendment stating “there is no reason why such a person could not be subject to a normal Title III wiretap.”²⁹² And in 2003, before its initial passage, Senator Feingold cautioned that the lone-wolf amendment “writes out of [FISA] a key requirement necessary to the lawfulness of such searches.”²⁹³

The government rejects the supposition that it could have sought a criminal warrant under Title III, with no adverse consequences, in the Moussaoui matter. Had the FBI been turned down for a criminal warrant under Title III, the government claims that it would have been difficult to obtain a FISA warrant at a later point, even if a connection to a foreign power ultimately did materialize.²⁹⁴ Under FISA at the time, in order to obtain a FISA warrant, the Attorney General had to certify that the government’s “purpose” (interpreted to be “primary purpose”) for the surveillance was to gather foreign intelligence.²⁹⁵ The concern was that if the government unsuccessfully sought a criminal warrant, then it would be difficult to argue later, when it sought a FISA warrant, that its primary purpose was to gather foreign intelligence (instead of developing a criminal matter). While this argument may have been valid at the time, it is considerably weaker now given that the Patriot Act changed the certification requirement for seeking a FISA warrant from the “primary purpose” to just a “significant purpose.”²⁹⁶ Now, as long as a significant purpose is foreign intelligence, its primary purpose can still be criminal. In fact, in 2002, the FISA Court of Review upheld the “significant purpose” test against a constitutional challenge, arguing that counterterrorism and criminal prosecution are often intertwined and that criminal prosecution is one way to halt espionage or terrorism.²⁹⁷

²⁹⁰ *Id.* at 39–40.

²⁹¹ *Id.* at 40.

²⁹² 156 CONG. REC. H897 (daily ed. Feb. 25, 2010).

²⁹³ *See* S. REP. NO. 108-40, at 6 n.3.

²⁹⁴ *See* OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI’S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS 128–30 (2004), at <http://www.justice.gov/oig/special/s0606/final.pdf>.

²⁹⁵ *See* Bellia, *supra* note 111, at 446–55 (discussing how the statutory language of “purpose” became interpreted to be “primary purpose”).

²⁹⁶ *See* 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2006).

²⁹⁷ As the FISC explained: “[The primary purpose] analysis, in our view, rested on a false premise and the line the court sought to draw was inherently unstable, unrealistic, and confusing. The false premise was the assertion that once the government moves to criminal prosecution, its ‘foreign policy concerns’ recede. . . .

Accordingly, the government no longer has to fear that pursuing a criminal warrant under Title III will automatically preclude its ability to seek a FISA warrant at a subsequent time.

Proponents further discount critics' claims that the lone-wolf amendment will cause a run around the more exacting requirements of Title III. They explain that there still must be probable cause that the non-U.S. person is engaging or preparing to engage in “international terrorism,” which is defined as activities that involve violent, criminal acts intended to intimidate or coerce a population or a government and that occur totally outside of the United States or transcend national boundaries.²⁹⁸ Furthermore, a significant purpose of FISA must be to obtain “foreign intelligence information,” which is defined as “information that relates to . . . the ability of the United States to protect against . . . actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power” or “sabotage” or “international terrorism.”²⁹⁹ Therefore, proponents attest that there still remains a foreign nexus under the lone-wolf provision. As the former head of DOJ's National Security Division David Kris testified before Congress in 2009:

The definition is quite narrow: it applies only to non-United States persons; the activities of the person must meet the FISA definition of “international terrorism”; and the information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of “international terrorism”), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.³⁰⁰

Therefore, proponents of the lone-wolf amendment reject the assertion that it will be broadly used to gather intelligence on solely domestic terrorists in order to avoid Title III's more onerous requirements.

In response, critics do not find the “international terrorism” connection to be reassuring. As they explain, “international terrorism” does not require any connection to a foreign terrorist group or foreign power. Rather, it:

merely requires a violent act intended to intimidate a civilian population or government that occurs totally outside the United

[T]hat is simply not true as it relates to counterintelligence. In that field the government's primary purpose is to halt the espionage or terrorism efforts, and criminal prosecutions can be, and usually are, interrelated with other techniques used to frustrate a foreign power's efforts.” *In re Sealed Case*, 310 F.3d 717, 743 (FISA Ct. Rev. 2002). The court did note, however, that the crimes would need to be related to foreign intelligence or terrorism and that FISA surveillance could not be used for solely “ordinary” crimes. *Id.* at 746.

²⁹⁸ 50 U.S.C. § 1801(c).

²⁹⁹ *Id.* § 1801(e).

³⁰⁰ See *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 111.

States, or transcends national boundaries in terms of the means by which it is accomplished, the persons it appears intended to coerce or intimidate, or the locale in which the perpetrators operate or seek asylum.³⁰¹

As Spaulding testified, “[t]his would cover an individual inside the US who buys a gun from Mexico . . . to threaten a teacher in a misguided attempt to get the government to change its policies on mandatory testing in schools.”³⁰²

In sum, as with the ATRC and Section 412 of the Patriot Act, the underlying constitutionality of the lone-wolf amendment remains in question. While this uncertainty could be playing a role in its non-use, it may also be that the lone-wolf amendment is simply not needed as a counterterrorism tool in that Title III is able to adequately handle lone wolves, who are both U.S. persons and non-U.S. persons. It may also be that a large percentage of the lone wolves are, indeed, U.S. persons and so the lone-wolf provision by its very terms does not apply. These issues are addressed next.

2. *Simply Not Needed or Needs to be Expanded?*

The threat posed by lone wolves only seems to be increasing since the lone-wolf amendment’s passage in 2004. In February 2010, then-CIA Director Leon Panetta stated, “[i]t’s the lone-wolf strategy that I think we have to pay attention to as the main threat to this country.”³⁰³ Professor Kenneth Anderson observed in 2009 that “Islamist terror appears to be fragmenting into loose networks of shared ideology and aspiration rather than tightly vertical organizations linked by command and control.”³⁰⁴ Professor Nathan Sales testified in 2011 that “[s]olitary actors who are inspired by al Qaeda are on the rise, and they are capable of causing just as much death and just as much destruction as those who are formally members of that group.”³⁰⁵ According to terrorism expert Bruce Hoffman, al Qaeda’s current strategy is “to empower and motivate individuals to commit acts of violence completely outside any terrorist chain of command.”³⁰⁶ And a 2004 FBI strategic planning document

³⁰¹ *Id.* at 129 (testimony of Suzanne Spaulding).

³⁰² *Id.*

³⁰³ Raffaello Pantucci, *A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists* 3 (Int’l Centre for the Study of Radicalisation & Pol. Violence, 2011), available at http://icsr.info/publications/papers/1302002992ICSRPaper_ATypologyofLoneWolves_Pantucci.pdf.

³⁰⁴ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 4 (Brookings Inst., Georgetown Univ. Law Ctr. & Hoover Inst., Series on Counterterrorism & Am. Statutory Law Working Paper No. 9, 2009), available at http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx.

³⁰⁵ *Reauthorization of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 25 (2011) (statement by Nathan A. Sales, Assistant Professor of Law, George Mason University).

³⁰⁶ See Pantucci, *supra* note 303, at 7, (quoting Nancy Gibbs, *Terrified . . . Or Terrorist?*, TIME, Nov. 23, 2009, at 27, 28).

describes lone wolves as the “most significant domestic terrorism threat’ that the United States faces.”³⁰⁷

Yet, even where the lone wolf is a non-U.S. person—and hence the lone-wolf provision would apply—the government has not used it, relying on other counterterrorism tools such as Title III or (presumably) undercover operations. For instance, in February 2011, Khalid Ali-M Aldawsari, a Saudi citizen, was arrested in Texas for attempting to build and use a weapon of mass destruction. Although he was a non-U.S. person and appears to be unconnected to any known terrorist organizations, the government did not use the lone-wolf amendment, but did use electronic surveillance under Title III to search his emails, which were used to indict him.³⁰⁸ Similarly, in 2009, the government arrested Hosam Smadi, a 20-year-old Jordanian, who attempted to use a weapon of mass destruction to blow up a Dallas skyscraper. Three undercover FBI agents had monitored him for nine months in a sting operation after encountering him on an Islamist extremist online forum, but it does not appear as if he was connected to any known terrorist organization.³⁰⁹ Again, the lone-wolf amendment was not used.

Despite the passionate rhetoric from its proponents that it is an essential counterterrorism tool and closes a critical gap in intelligence, it becomes difficult to evaluate the truth of such an assertion when lone wolves seem to be proliferating while the government does not use the very tool created for this purpose. As Spaulding testified in 2009, “[t]he Administration’s admission that they have never once used the authority seems to provide compelling evidence that it was not needed and is not an essential counterterrorism tool.”³¹⁰ For her, it clearly is a case of “use it or lose it.” If you are not using the tool, although lone wolves abound, you clearly do not need it. Yet, the administration vehemently disagrees. As Kris explains, just because the government has not used the tool *yet*, does not mean that the tool is unnecessary. As he informed Congress in 2009, the scenario where a terrorist severs his connections to a known terrorist group, perhaps because of an internal disagreement, does not mean that the individual is no longer an “international terrorist.” He emphasized that these “scenarios are not remote hypotheticals; they are based on trends we observe in current intelligence reporting.”³¹¹ As he testified, “[w]hile we cannot predict the frequency with which it may be

³⁰⁷ BRUCE HOFFMAN, *INSIDE TERRORISM: REVISED AND EXPANDED EDITION* 40 (2006) (quoting FEDERAL BUREAU OF INVESTIGATION, STRATEGIC PLAN 2004–2009, at 15 (2004)).

³⁰⁸ See *Texas Resident Arrested on Charge of Attempted Use of Weapon of Mass Destruction*, FBI DALLAS DIV. (Feb. 24, 2011), <http://dallas.fbi.gov/dojpressrel/pressrel11/dl022411.htm>.

³⁰⁹ Jason Trahan, *Dallas Bombing Plotter Hosam Smadi Sentenced to 24 Years in Prison*, DALLAS MORNING NEWS (Oct. 20, 2010), <http://www.dallasnews.com/news/local-news/20101020-Dallas-bombing-plotter-Hosam-Smadi-sentenced-4943.ece>.

³¹⁰ *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 126 (testimony of Suzanne Spaulding).

³¹¹ *Id.* at 112 (testimony of David Kris, Asst. Att’y Gen.).

used, we can foresee situations in which it would be the only avenue to effect surveillance.”³¹² While he concedes the tool may be used for the “rare situation,” he urges that it is better to have the necessary tool available “than to delay surveillance of a terrorist in the hopes that the necessary links are established or even to forego it entirely because such links cannot be established.”³¹³ Robert Litt, General Counsel of the Office of Director of National Intelligence, testified in March 2011 that, although the lone-wolf amendment has never been used, it remains an “important tool to have in our toolbox in light of the constantly evolving terrorism threat that we face.”³¹⁴ Senator Bond noted in 2009: “It is kind of like those ‘in case of emergency, break glass’ boxes that cover certain fire alarms and equipment. We need to keep these tools available for the rare situations where they would be needed.”³¹⁵ FBI director Robert Mueller predicts that “with the profusion of lone-wolf cases domestically and, indeed, some internationally, my expectation is we will be using this in the future.”³¹⁶ In fact, in March 2011 he acknowledged that the government has come “close” to using it in several cases.³¹⁷

This discussion about the necessity of the lone-wolf amendment—to keep ahead of evolving threats—raises an interesting question: To what extent, if any, is the threat posed by a U.S. person who self-radicalizes less than a non-U.S. person who similarly self-radicalizes? In 2009, Rep. Lamar Smith stated that “[i]t is imperative that such an out-dated definition [under traditional FISA] does not impede our ability to gather intelligence about perhaps the most dangerous terrorists operating today.”³¹⁸ But is his concern limited to just non-U.S. persons who self-radicalize? This question is not fanciful. After the tragedy at Fort Hood, caused by a lone-wolf who was a U.S. citizen, Rep. Daniel Lundgren lamented that the lone-wolf provision Congress was debating could not have been used to avert this tragedy:

Irony it is that on the very day that our committee considered the lone wolf provision and decided because it had not been used before we should withdraw it, we had . . . [the] terrible terrorist attack at Fort Hood. *Within hours of us rejecting the notion that we needed a lone wolf provision, we had a domestic lone wolf.*³¹⁹

According to the Anti-Defamation League’s 2011 trend reporting, “[o]ne of the most striking elements of today’s domestic threat picture is

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See *Reauthorization of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 16 (2011).

³¹⁵ 155 CONG. REC. S10931 (daily ed. Oct. 29, 2009).

³¹⁶ *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 11 (2011).

³¹⁷ *Id.*

³¹⁸ 155 CONG. REC. E663 (daily ed. Mar. 12, 2009).

³¹⁹ 156 CONG. REC. H898 (daily ed. Feb. 25, 2010) (emphasis added).

the role that a growing number of American citizens and residents motivated by radical interpretations of Islam have played in criminal plots to attack Americans in the U.S. and abroad.”³²⁰ And U.S. citizens (unlike LPRs and non-U.S. persons) have U.S. passports and may be less suspicious at the outset and hence arguably more dangerous. As the ADL points out, “the failed attempt to bomb Times Square in 2010 [by Faisal Shazad], as well as the foiled plot to detonate homemade explosives on New York City subways in 2009 [by Najibullah Zazi], were conceived by Americans who received training from Islamic terrorist groups overseas before returning to the U.S.”³²¹ The ADL explains how “the media wing of Al Qaeda in the Arabian Peninsula (AQAP), Al Qaeda’s affiliate in Yemen and Saudi Arabia, has deliberately designed a portion of its propaganda to appeal to, engage and recruit sympathizers in the U.S.”³²² In fact, Mohamed Osman Mohamud, a U.S. citizen who was “arrested in November 2010 for attempting to blow up a Christmas tree lighting with a car bomb in Portland, Oregon,” had AQAP propaganda in his possession. And Zachary Chesser, Antonio Martinez, Ahmed Farooque, and Abdulahakim Mujahid Muhammad were all U.S. citizens arrested in 2009 or 2010 for various terrorist attempts such as trying to detonate a car bomb at a Maryland Army recruiting center, plotting attacks against Metro stations in the Washington Metropolitan Area, or shooting two uniformed American soldiers at a military recruiting center in Arkansas.”³²³ All these individuals are U.S. persons who were influenced by overseas extremist materials and took steps to wreak havoc on our nation. According to DHS Secretary Janet Napolitano, “[o]ne of the most striking elements of today’s threat picture is that plots to attack America increasingly involve American residents and citizens. Indeed, since 2009 more than two dozen Americans have been arrested on terrorism-related charges.”³²⁴ Secretary Napolitano observed that “[t]hese plots are *often harder for authorities to identify* because they present fewer opportunities for disruption by intelligence or law enforcement than more elaborate, large-scale plots by foreign-based terrorists.”³²⁵

If U.S. persons are just as dangerous (if not more) than non-U.S. persons, and Title III is a sufficient tool to deal with U.S. persons, it is fair to ponder why Title III is not similarly sufficient for non-U.S. persons. While Title III requires probable cause of a crime, it does not require any connection to a foreign power. If the government believes it needs the

³²⁰ *Trend Analysis and Resources: Radical Interpretations of Islam and the Homegrown Extremist Threat*, ANTI-DEFAMATION LEAGUE (Mar. 9, 2011), http://www.adl.org/main_Terrorism/homegrown_extremist_threat.htm.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ Janet Napolitano, *Partnering with Communities to Counter Violent Extremism*, THE BLOG @ HOMELAND SECURITY (Mar. 6, 2011), <http://blog.dhs.gov/2011/03/partnering-with-communities-to-counter.html>.

³²⁵ *Id.* (emphasis added).

lone-wolf amendment to deal with non-U.S. persons who self-radicalize or sever connections with known terrorist groups—that it closes a critical intelligence gap that could save thousands of lives—what tools are being developed to close the supposedly similar intelligence gap for U.S. persons? Again, Title III can be applied to *both* U.S. persons and non-U.S. persons so if the government feels, based on trends in intelligence reporting, that it needs a special, more flexible tool to deal with non-U.S. persons, what tools are being considered to deal with lone wolves who are U.S. persons? And if the answer is that Title III *is* adequate to handle U.S. persons who are lone wolves, it really calls into question whether we need the lone-wolf amendment for non-U.S. persons. Are they really more dangerous?

Certainly, when FISA was enacted in 1978, it was premised on the notion that aliens in the United States who are officers or employees of a foreign power are likely sources of foreign intelligence information³²⁶ and that less intrusive investigative techniques may not be able to obtain sufficient information about persons visiting here only for a limited time.³²⁷ But that reasoning no longer applies to the threat posed by lone wolves. By the amendment's very premise, lone wolves are not officers or employees of a foreign power. Perhaps, the argument is that we need to protect sources and methods, which we can do more easily with FISA surveillance than with Title III wiretaps (which ultimately have to be disclosed to the target).³²⁸ While this argument may have merit (although secrecy is needed in plenty of criminal matters involving espionage, treasons and sabotage),³²⁹ it does not adequately address why sources and methods would not similarly need to be protected for U.S. persons who are lone wolves. Perhaps the argument is that while the threats posed by both groups are daunting, the government should take advantage of its abilities to (presumably) relax requirements when dealing with non-U.S. persons.³³⁰ In other words, just because it would arguably be unlawful to apply the lone-wolf provision to U.S. persons, does not mean that the government should not apply it where it arguably can: to non-U.S. persons who become lone wolves. But is the dichotomy between U.S.

³²⁶ See Hund, *supra* note 110 at 171 n.13 (quoting S. REP. NO. 95-604, at 20 (1977)).

³²⁷ *Id.* at 205 n.204, (quoting S. REP. NO. 95-604 at 21 (1977)).

³²⁸ See *Reauthorization of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 17 (2011) (statement by Robert Litt, General Counsel at Office of the Director of National Intelligence).

³²⁹ In *Keith*, the Supreme Court explained that plenty of criminal matters require secrecy that can be accommodated under Title III: "The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases." *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320–21 (1972).

³³⁰ It is not at all clear why limiting the lone-wolf amendment to non-U.S. persons changes the constitutional analysis. See *infra* notes 357–64 and accompanying text.

persons and non-U.S. persons justified in the context of lone wolves? And, relatedly, as a matter of law, could the lone-wolf amendment apply to U.S. persons so that both U.S. persons and non-U.S. persons are treated the same? It may be that an analysis of why the lone-wolf amendment has not been used will lead to the conclusion that it needs to be expanded to encompass U.S. persons, or be discontinued if the dichotomy between U.S. persons and non-U.S. persons cannot be justified.

Hence, it seems that one of two approaches is warranted: (1) if, for the reasons explained above, the lone-wolf amendment is truly needed for non-U.S. persons, then we must seriously scrutinize whether we have the right tools to deal with U.S. persons, who can similarly self-radicalize and cause just as much damage to national security. Or (2), if Title III is satisfactorily able to handle U.S. persons who are lone wolves, it really calls into question whether we need the lone-wolf amendment to handle non-U.S. persons who are planning to engage in international terrorism (a crime covered by Title III). The only untenable position seems to be the status quo: to insist on national security grounds that we need the lone-wolf amendment to deal with non-U.S. persons while not addressing lone wolves who are U.S. persons and who have actually succeeded in completing a terrorist attack in the United States (e.g., Fort Hood). Consequently, an analysis about an unused counterterrorism tool highlights a potential gap in security: do we have sufficient tools to deal with U.S. persons who become lone wolves? This idea is discussed more in Part VI, which offers insights into future counterterrorism policies.

VI. IMPLICATIONS FOR THE FUTURE

It is a fair question to ponder: what are the implications when the executive branch fails to use legislative tools passed by the Congress? Certainly, Congress and state legislatures enact numerous laws that are underutilized or not enforced at all by the executive branches, such as jaywalking, blue laws, and prohibitions against adultery, just to name a few. But terrorism is a significant threat facing this nation, and if Congress is spending time and resources enacting laws premised on this threat but the executive branch fails to use them, it calls into question whether the government understands the threat and the tools needed to combat it (or is, perhaps, overestimating the threat). There is a fundamental disconnect when counterterrorism tools are passed and then not used.

In his 2009 speech at the National Archives, President Obama stated that we need to “update our institutions” to deal with the threat posed by al Qaeda and its affiliates.³³¹ Similarly, in 2009, Spaulding testified that “we have learned a great deal about the nature of the terrorist threat”

³³¹ Remarks at the National Archives and Records Administration, 1 PUB. PAPERS 691 (May 21, 2009).

since 9/11 and that “[a]rmed with that wisdom,” it is incumbent on us to “continue to *reexamine our response*.”³³² Scholar Rashad Hussain has noted that if “another terrorist attack takes place on American soil, lawmakers will be called upon to determine whether the attack occurred because law enforcement personnel *were not given adequate tools* to prevent it, or because those tools were used ineffectively.”³³³ While other scholarship has analyzed the effectiveness of various counterterrorism tools that have been used (e.g., national security letters, material support statutes, targeted killing, detention),³³⁴ there is a dearth of scholarship analyzing the tools that are not used. What, if anything, does it mean when we do not use a counterterrorism tool? Here are some observations to start the conversation.

A. *Insight 1: Political Responses*

First, it may be that the tools were passed more for political reasons than as any meaningful response to counterterrorism. For instance, one commentator has noted that the ATRC was a “hyper-response to the terrorist threat posed against the United States” and cautions that “the gravest danger terrorism poses is the risk that democratic societies will overestimate the magnitude of the threat and authorize measures violating fundamental norms of human rights and threatening the democratic principles we hold so dear.”³³⁵ Yet others have speculated that the ATRC’s non-use is a result of heightened political correctness or other political factors. According to Bill West, former chief of the National Security Section for Immigration and Customs Enforcement, the ATRC’s “lack of utilization is likely more the result of misplaced

³³² See *Reauthorizing the USA PATRIOT Act*, *supra* note 118, at 117 (testimony of Suzanne Spaulding) (emphasis added).

³³³ Rashad Hussain, Policy Comment, *Security with Transparency: Judicial Review in “Special Interest” Immigration Proceedings*, 113 YALE L.J. 1333, 1333 (2004) (emphasis added).

³³⁴ See, e.g., STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR (2008) (detention); WITTES, *supra* note 217 (detention); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145, (2010) (targeted killing); Robert M. Chesney, *Optimizing Criminal Prosecution as a Counterterrorism Tool* (Brookings Inst., Georgetown Univ. Law Ctr. & Hoover Inst., Series on Counterterrorism & Am. Statutory Law Working Paper, 2008) (criminal justice system); Patrick P. Garlinger, Note, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105, (2009) (national security letters); Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, (2007–2008) (material support statutes).

³³⁵ See Zachery, *supra* note 10, at 293, (quoting Michael A. Grimaldi, Reporter, *Human Rights v. New Initiatives in the Control of Terrorism*, 79 AM. SOC’Y INT’L L. PROC. 288, 296 (1985) (remarks of John F. Murphy)).

political correctness at the highest levels of our political leadership.”³³⁶ West observes:

In the hue and cry of the late 1990s over the use of “secret” evidence in immigration proceedings, the same Clinton Administration that supported the creation of the ATRC chose the politically expedient avenue of not sending any cases to it. Similarly, if perhaps inexplicably, the Bush Administration did not refer any cases to the ATRC, even after the 9/11 attacks.³³⁷

Along these same lines, a retired supervisory special agent from the INS told Congress in 2004 that the government is “caving into political correctness at the expense of security” by its “virtual abandonment” of the ATRC, noting that the ATRC is “being ignored because special interest groups and certain media have mischaracterized” it.³³⁸ Therefore, it could be that the ATRC was both created and then not used for political expediency. It looked good to the American public to pass legislation purporting to be tough on alien terrorists, but the government then balked at employing the ATRC’s provisions, perhaps because of political correctness or perhaps out of a recognition that a “hyper” response looked favorable on paper without the complications that could arise from actually using the tool.

Similarly, the lone-wolf amendment may have been passed to make people *feel* safer because Moussaoui—the alleged 20th hijacker—was in our custody on September 11, but the government had not sought any kind of warrant to search his computer, despite having suspicions. According to Senators Russ Feingold and Patrick Leahy, “catchy monikers like the ‘Moussaoui fix’ and ‘lone wolf’ bill [are] aimed at making Americans feel safer, but [do] not address the chronic problems that actually plague the effectiveness of our intelligence gatherers.”³³⁹ Professor Bellia observes, “it could be argued that the lone wolf amendment itself was an unnecessary legislative response to purely bureaucratic problems.”³⁴⁰ In other words, it could be that the lone-wolf amendment was more of a cosmetic response rather than an essential counterterrorism tool. In sum, political considerations may help explain the non-use of a counterterrorism tool; at least it is an issue worthy of further exploration.

³³⁶ Bill West, *National Security Court? We Already Have One*, IPT NEWS (Jan. 26, 2009), <http://www.investigativeproject.org/984/national-security-court-we-already-have-one>.

³³⁷ *Id.*

³³⁸ *Preventing the Entry of Terrorists into the United States. Hearing Before the Subcomm. on Int’l Terrorism, Nonproliferation and Human Rights of the H. Comm. on Int’l Relations*, 108th Cong. 46 (2004) (statement of Bill West, Consultant, The Investigative Project).

³³⁹ S. REP. NO. 108-40, at 11.

³⁴⁰ Bellia, *supra* note 111, at 469.

B. Insight 2: Judicial Branch Using the Laws

A second insight is that it may be a misnomer to assume that just because the executive branch has not used a counterterrorism tool that it is “unused” in every fashion. There are several examples of judges relying on these unused counterterrorism provisions in narrowing the scope of other counterterrorism measures. For instance, in *Hamdi v. Rumsfeld*, a plurality of the Supreme Court held that Hamdi, a U.S. citizen arrested on a battlefield in Afghanistan and held indefinitely as an “enemy combatant,” was entitled to some meaningful opportunity to challenge his designation before a neutral forum.³⁴¹ In his concurrence, Justice Souter noted that it “is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil [with Section 412] would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.”³⁴² Similarly, in another “enemy combatant” case discussed *supra* at note 265, a judge found that al-Marri’s indefinite detention as an “enemy combatant” was unlawful, particularly because Congress had specifically enacted provisions dealing with the detention of alien terrorists through Section 412. In fact, in the en banc review of that case, this judge scrutinized the legislative history of Section 412 and explained that members of both parties “fiercely objected” to indefinite detention of alien terrorists and prescribed limits with Section 412.³⁴³ And the Ninth Circuit relied on both Section 412 and the ATRC in deciding that an alien held for five years needed to be released: “Our conclusion that the general detention statutes cannot be read as authorizing indefinite detention is bolstered by considering the immigration statutes as a whole.”³⁴⁴ It then specifically analyzed Section 412 and the ATRC to conclude that “both statutory provisions for the detention of suspected terrorists require that the Attorney General ‘certify’ the case before such detention begins,” and that such certifications had not occurred in this case.³⁴⁵

Therefore, although the executive branch has never actually used Section 412 or the ATRC, one perhaps unintended consequence is that the judiciary can still rely on them in interpreting and narrowing the scope of other governmental regulations or policies. In this respect, an

³⁴¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁴² *Id.* at 551 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

³⁴³ *al-Marri v. Pucciarelli*, 534 F.3d 213, 240 n. 21 (4th Cir. 2008) (Motz, J., concurring) *vacated as moot sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); *see also* *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 85 (D.D.C. 2008) (noting that although Section 412 requires that non-citizens receive a probable cause hearing within seven days, it was not clearly established that a citizen was entitled to a prompt probable cause hearing when detained in a war zone).

³⁴⁴ *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006).

³⁴⁵ *Id.* at 1079.

unused tool’s biggest influence may be the effect it has on *other* counterterrorism tools that are frequently used. This phenomenon is not necessarily negative, unwelcome, or even surprising; yet, if the executive branch is not using a counterterrorism tool for its *intended* purpose, Congress should scrutinize whether the tool is nonetheless having effects on how the judicial branch interprets the scope of other counterterrorism tools. At a minimum, how these unused tools affect the judiciary’s interpretation of other counterterrorism measures should be part of the conversation.

C. Insight 3: Gap in Security

A third insight stems from the fact that all three tools discussed in this Article deal with aliens, and there is a legitimate recognition, although it is by no means clear, that by using these tools they may be challenged and found to be unconstitutional. It may be that constitutional law concerning aliens is much more underdeveloped than it is for U.S. citizens.³⁴⁶ Consequently, there is a genuine fear of using the tools—it may really be a case of use it *and* lose it. It also may be the case that the threat is so severe that Congress is willing to pass questionable legislation (that may ultimately be found to be unconstitutional) in case the government needs it. In other words, it is willing to push the envelope when it comes to national security by having an arsenal of counterterrorism tools ready if circumstances warrant.

On the other hand, maybe these tools, especially Section 412 and the ATRC, provide too many rights to aliens and the government found more flexible ways to accomplish its goals. It appears that the ATRC and Section 412 may not have been used because the government had more effective and narrowly tailored tools that would allow it to accomplish its mission without having to abide by stringent procedural requirements that possibly could undermine national security.³⁴⁷ Since 1996, alien terrorists have been removed, and in a handful of cases, the government has used classified information in denying discretionary relief.³⁴⁸ Similarly, with respect to Section 412, the government rounded up hundreds of aliens after 9/11 on immigration charges and held some

³⁴⁶ See generally Martin, *supra* note 19, at 49 (“Perhaps one important barrier to the development of usable gradations for constitutional purposes [for aliens] has been confusion caused by the complexities of immigration law.”). Additionally, the Supreme Court has explicitly reserved the question of whether illegal aliens have Fourth Amendment rights on U.S. soil. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (stating that *dicta* in a previous case are “not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us”); see also *Lynch v. Cannatella*, 810 F.2d 1363, 1373(5th Cir. 1987) (“The due process clause does not guarantee aliens, whether present legally or illegally, the same rights as citizens.”).

³⁴⁷ See *supra* notes 204–13, 249–70 and accompanying text.

³⁴⁸ See *supra* notes 60–73 and accompanying text.

longer than seven days before bringing the required Notice to Appear.³⁴⁹ In other words, the government accomplished the underlying objectives of both the ATRC and Section 412 without having to actually use these tools.

It may be a similar case with the lone-wolf amendment. Perhaps, it has not been used because Title III is an effective tool in that international terrorism is a crime.³⁵⁰ It may also be the case (although we have no way of knowing) that the government has wanted to employ it at times but could not because the target was a U.S. person. Nonetheless, the government asserts it is a critical tool, and if we are to stay ahead of an evolving threat, there does not seem to be any compelling reason not to renew it. Assuming it is constitutional, there is arguably no harm in having a tool ready in case it is warranted. But in analyzing the lone-wolf amendment, and why it has never been used, another more pressing question has arisen: do we have sufficient tools to deal with U.S. persons who self-radicalize and become domestic lone wolves?

There is an argument to be made that the lone-wolf amendment could be expanded to encompass U.S. persons, although it would certainly be met with strenuous opposition. FISA is riddled with more relaxed standards for non-U.S. persons as compared to U.S. persons. According to one scholar, “[s]ince the phrase ‘United States person’ is used over sixty times in FISA, the examples of disparate treatment of the two groups is abundant.”³⁵¹ The most significant differences are that, for U.S. persons, the government must provide probable cause that the target has been or is about to be involved in the commission of a crime while there is no criminal standard for non-U.S. persons.³⁵² FISA also requires minimization procedures for U.S. persons but not non-U.S. persons.³⁵³ While it is settled law that the government can lawfully make distinctions between U.S. citizens and aliens³⁵⁴ (and moreover between

³⁴⁹ See *supra* notes 258–60 and accompanying text.

³⁵⁰ During congressional testimony in March 2011, upon questioning, Hinnen acknowledged that international terrorism is a crime and that a criminal warrant under Title III would be sufficient in most cases. See *Reauthorization of the PATRIOT Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 46–47 (2011).

³⁵¹ See Hund, *supra* note 110, at 205.

³⁵² 50 U.S.C. § 1801(b)(2)(A) (2006). Therefore, while suspicion of illegal activity is not required for non-U.S. persons—membership in a terrorist group or being an agent of a foreign power is enough—for U.S. persons there must be the additional linkage to criminal activity.

³⁵³ *Id.* § 1806(a) (2006).

³⁵⁴ S. REP. NO. 95-604 at 21 (1977) (“[W]here there are compelling considerations of national security, alienage distinctions are clearly lawful.”) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1976)); see also *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (“The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’”).

permanent residents and aliens),³⁵⁵ and it is understandable, certainly legally required in some cases, to provide additional protections for U.S. persons,³⁵⁶ the question remains whether the lone-wolf amendment itself could apply to U.S. persons. Given the passionate opposition it has garnered when its terms only have been applied to non-U.S. persons, it is understandable that individuals (this author included) may be reluctant to suggest its expansion. But it is a fair question, especially in the context of analyzing why it has never been used.

Professor Bellia notes this very point: “[I]f the Fourth Amendment applies within the United States to U.S. persons and non-U.S. persons alike, it is unclear why the lone wolf amendment’s focus on non-U.S. persons makes the provision any more constitutional than it otherwise might be.”³⁵⁷ In other words, it is not at all clear why limiting the lone-wolf amendment to non-U.S. persons changes the constitutional analysis. Certainly if the lone-wolf amendment were to be found unconstitutional as applied to non-U.S. persons, that would end the inquiry as applied to U.S. persons. But there is an argument that it would be constitutional as applied to both groups.

In the seminal case *Keith*, while the Supreme Court held that domestic surveillance for security threats—with no connection to a foreign power—required a warrant based on probable cause, it explicitly noted that the same standards that apply in criminal cases “may not necessarily be appropriate or required in national security cases, even investigations involving *purely domestic threats*.”³⁵⁸ The Court noted that “domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime’” and explained that “the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.”³⁵⁹ It therefore suggested that “Congress may wish to consider protective standards [for domestic security] which differ from those already prescribed for specified crimes in Title III.”³⁶⁰ Significantly, it noted that that “[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our

³⁵⁵ See *LeClerc v. Webb*, 419 F.3d 405, 419 (5th Cir. 2005) (“[T]here is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class”); *Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004) (“[D]iscrimination among subclassifications of aliens is not based on a suspect classification (such as alienage).”); *Azizi v. Thornburgh*, 908 F.2d 1130, 1138 (2d Cir. 1990) (“Congress may select practically any criteria to create different *classes of aliens* as long as its choice is rationally related to a legitimate government interest.” (emphasis added)).

³⁵⁶ See *generally* Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 8, 1981) (requiring protections for U.S. persons).

³⁵⁷ See Bellia, *supra* note 111, at 458 (citation omitted).

³⁵⁸ *Id.* at 435 (emphasis added).

³⁵⁹ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322 (1972).

³⁶⁰ *Id.*

citizens.”³⁶¹ In fact, the Court opined that Congress could enact another statutory scheme to deal with domestic security threats that “need not follow the exact requirements of [Title III] but should allege other circumstances more appropriate to domestic security cases.”³⁶² The Court emphasized that it *was* requiring prior judicial approval for domestic security surveillance (as it had in the *Keith* case itself) but that “such approval may be made in accordance with such reasonable standards as the Congress may prescribe.”³⁶³ It even suggested that a “specially designated court” could be used for domestic security cases.³⁶⁴

After this case, Congress enacted FISA and a specially designated court (the FISC) to deal with *foreign* threats,³⁶⁵ but the language in *Keith* clearly is applicable to domestic threats as well. *Keith* explicitly notes that Congress could create a framework for modifying the probable cause standard under Title III to allow more flexibility for dealing with national security threats that implicate different concerns than ordinary crime. While Congress chose to focus on foreign threats with FISA, there is an argument that an alternative statutory scheme does not need to be solely premised on a foreign nexus. Therefore, there could be room for Congress to apply the lone-wolf provision (which still requires a foreign nexus (e.g., international terrorism)) to U.S. persons. Importantly, the lone-wolf amendment still requires probable cause and a warrant (the requirements of *Keith*)—just not an agency relationship to a foreign power. And since *Keith* explicitly noted that domestic security surveillance could be subjected to different standards than Title III criminal matters, there is an argument that, as a matter of law, the lone-wolf provision as applied to U.S. persons would be constitutional.

Again, this Article is not advocating that we necessarily should expand the lone-wolf provision to encompass U.S. persons. Rather, it suggests that the dichotomy between U.S. persons and non-U.S. persons in the context of lone wolves does not seem compelling. If the threat posed by non-U.S. persons who are lone wolves in America is not more daunting than that of U.S. persons (and there is an argument that they are actually less threatening as non-citizens do not have passports, etc.), then it makes little sense to continually renew a counterterrorism tool (that we are not even using) to address one aspect of a threat while ignoring the other side of the same threat. It may very well be that Title III is sufficient to encompass both U.S. persons and non-U.S. persons (after all, terrorism is a crime), or it may be that the reasons articulated

³⁶¹ *Id.* at 322–23.

³⁶² *Id.* at 323.

³⁶³ *Id.* at 324.

³⁶⁴ *Id.* at 323.

³⁶⁵ See Bellia, *supra* note 111, at 436 (“Legislating in the shadow of the *Keith* case, Congress tied the availability of surveillance under FISA to the Government’s ability to show that the target was a ‘foreign power’ or an ‘agent of a foreign power,’ and set forth procedures differing from those in Title III.”).

for the lone-wolf amendment—that we need to stay ahead of an evolving threat—are just as applicable, if not more, to U.S. persons. It is the status quo position that seems so unsatisfying from a legal and policy perspective.

Interestingly, unlike the ATRC and Section 412 of the Patriot Act, where the government has been able to use other tools to accomplish the same objectives, it may be that the lone-wolf provision *is* needed to stay ahead of an evolving threat, but that it only addresses part of the problem. Hence, the debate about the lone-wolf amendment may really serve as a way to open the conversation to discuss whether the government needs more narrowly tailored tools to deal with U.S. persons who become lone wolves. Indeed, Raffaello Pantucci, Associate Fellow at the International Centre for the Study of Radicalisation, published a 2011 report discussing the typologies of lone wolves, specifically noting that this group deserves more attention due to “the increasing ease with which individuals can build viable devices of varying yields using readily available items to attempt terrorist attacks.”³⁶⁶ He even states that “Al Qaeda and affiliated movements are attempting to co-opt the notion of the Lone Attacker into their notion of a ‘borderless idea.’”³⁶⁷ While this Article does not offer a definitive answer to whether the lone-wolf amendment should be expanded to encompass U.S. persons, it intimates that this question should be part of the ongoing conversation concerning the lone-wolf amendment. On a broader scale, this Article suggests that, in the process of reevaluating and updating our counterterrorism tools, analyzing such tools that have *never* been used can perhaps ironically identify a potential gap in security. In this way, an exploration of unused counterterrorism tools can prove just as insightful and helpful an exercise as the more traditional analysis of frequently employed counterterrorism measures.

³⁶⁶ See Pantucci, *supra* note 303, at 3. *But see* CHARLIE SZROM & CHRIS HARNISCH, AL QAEDA’S OPERATING ENVIRONMENTS: A NEW APPROACH TO THE WAR ON TERROR 26 (Am. Enter. Inst., 2011), *available at* http://www.criticalthreats.org/sites/default/files/pdf_upload/analysis/AQAM-final.pdf (“Individuals and cells by themselves, without operational or strategic depth, present much less of a threat, especially over the long term.”).

³⁶⁷ See Pantucci, *supra* note 303, at 3–4.