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Reform of the Foreign Intelligence Surveillance Courts: A Brief Overview

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Summary

In the wake of recent disclosures concerning various National Security Agency (NSA) surveillance and data collection programs, several legislative changes to the government's intelligence operations authority have been suggested. Under the Foreign Intelligence Surveillance Act of 1978 (FISA), the Foreign Intelligence Surveillance Court (FISC) reviews government applications to conduct surveillance and engage in data collection for foreign intelligence purposes, and the FISA Court of Review reviews rulings of the FISC. Some have proposed altering the underlying legal authorities relied on by the government when applying to the FISC, while others have suggested changes to the practices and procedures of the FISA Courts. This report provides a brief overview of the legal implications of the latter group of proposals.

Some have proposed establishing an office led by a “public advocate” who would represent the civil liberties interests of the general public and oppose the government's applications for foreign surveillance. This proposal raises several constitutional issues. For example, assuming the advocate is an agent of the government, depending on the scope of the authority provided and the amount of supervision placed over the FISA advocate's office, the lawyer who leads such an office may be a principal or inferior officer of the United States whose appointment must abide by the Appointments Clause's restrictions. Moreover, an advocate might not satisfy Article III of the Constitution's requirements for parties seeking relief. In contrast, proposals that would allow an advocate to generally share its views of the law as a friend of the court or *amicus curiae* are far less likely to run afoul of the Constitution's restrictions. In addition, Article III generally prevents the government from litigating against itself, making it potentially constitutionally problematic to have an intra-branch dispute over foreign surveillance resolved by a federal court. Likewise, Article III might be an impediment to efforts to make appeals of FISA Court decisions more frequent. In addition, one might argue that allowing a public advocate protected by “for cause” removal restrictions to seek judicial relief on an issue of national security could invade core executive branch prerogatives. Proposals to house an advocate in the judicial branch might implicate the separation of powers principle that no branch may aggrandize itself at the expense of a co-equal branch.

Another proposal seeks to increase the amount of judicial review given to FISA applications by requiring that the FISC sit *en banc*. This does not appear to raise major constitutional questions as such a proposal would likely not hinder the FISC from performing its core constitutional functions. There have also been calls to alter the voting rules of the FISA Courts, although the legal implications of such proposals are less clear.

Aside from altering the procedures of the FISA Courts, other proposals focus on how judges are chosen. Some have suggested permitting the chief judges of the circuit courts, the President with Senate confirmation, or the congressional leadership to designate judges to the FISA Courts. Due to the novelty of these proposals, the legal implications of extending delegation authority to the President or lower federal courts are unclear. However, proposals that allow congressional leadership to appoint FISA Court judges are likely to raise constitutional questions.

Finally, because most FISA opinions are classified by the executive branch, some have raised concerns that this practice permits the government to rely upon “secret law” to justify its activities, and have proposed requiring the public release of FISA opinions. Proposals that allow the executive branch to first redact classified information from FISA opinions before public

release appear to be on firm constitutional ground, while a proposal that mandated all past FISA opinions be released in their entirety—without any redactions by the executive branch—might raise a separation of powers issue.

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Introduction

Recent disclosures of various National Security Agency (NSA) surveillance and data collection programs have prompted increased attention on the government's collection of foreign intelligence. Pursuant to the Foreign Intelligence Surveillance Act (FISA) of 1978,¹ the Foreign Intelligence Surveillance Court (FISC) reviews government applications to conduct electronic surveillance for foreign intelligence purposes and the Foreign Intelligence Surveillance Court of Review (FISA Court of Review) reviews decisions of the FISC.² Due to concerns about the size and scope of the foreign intelligence collection programs authorized by orders of the FISC, many have suggested substantive changes to the underlying legal authorities relied on by the government to collect foreign intelligence,³ while others have proposed altering the practices and procedures of the FISA Courts. After a short overview of the FISA judicial review process, this report will briefly analyze the latter set of proposals.⁴ First, this report examines proposals to introduce a public advocate into FISA Court proceedings, a third party who would argue against the government's application to the FISC.⁵ Second, the report explores various other proposals that would alter the procedural and operational mechanisms of the FISA Courts, such as appointing an *amicus curiae*, or friend of the court, to assist the court in addressing novel legal issues.⁶ Third, the report will consider measures designed to displace the authority to designate judges to the FISA Court. Finally, the last section discusses the legal implications of proposals that would require the executive branch to release FISA Court opinions.⁷

A Brief Overview of the FISA Courts

The FISC is an Article III court⁸ composed of 11 district court judges selected by the Chief Justice of the Supreme Court from at least seven of the regional judicial circuits.⁹ While judges of traditional Article III courts are selected via presidential appointment and Senate confirmation,¹⁰ FISC and FISA Court of Review judges are “designated” to the court by the Chief Justice.¹¹ The FISC's jurisdiction is limited to hearing applications and granting orders for “the collection of

¹ See Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783.

² See 50 U.S.C. §§1801-1181g.

³ CRS Report R43134, *NSA Surveillance Leaks: Background and Issues for Congress*, by Catherine A. Theohary and Edward C. Liu.

⁴ This report is not meant to serve as an exhaustive legal analysis of each subject; rather, the report briefly summarizes the important issues surrounding the various proposals with reference to separate CRS reports that offer a more thorough treatment.

⁵ See CRS Report R43260, *Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate*, by Andrew Nolan, Richard M. Thompson II, and Vivian S. Chu.

⁶ See CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by Andrew Nolan and Richard M. Thompson II.

⁷ See CRS Report R43404, *Reform of the Foreign Intelligence Surveillance Courts: Disclosure of FISA Opinions*, by Jared P. Cole.

⁸ See *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.).

⁹ 50 U.S.C. §1803(a)(1).

¹⁰ U.S. Const., art. II, §2, cl. 2.

¹¹ 50 U.S.C. §§1803(a)(1); 1803(d).

foreign intelligence by the federal government.”¹² This includes four types of investigative methods: (1) electronic surveillance; (2) physical searches; (3) pen register/trap and trace surveillance; and (4) orders to compel the production of tangible things.¹³ The government may appeal a denial of an application to the FISA Court of Review.¹⁴

The FISC is also authorized to review the government’s certifications, minimization, and targeting procedures concerning targeting of non-U.S. persons reasonably believed to be abroad.¹⁵ The FISA Court of Review has jurisdiction to review FISC decisions to modify or set aside directives and decisions to compel compliance with them.¹⁶ Additionally, the FISC may, on its own initiative, or upon the request of the government in any proceeding, or a party in any proceeding under Section 215 of the USA PATRIOT Act or Section 702 of FISA, hold a hearing or rehearing *en banc*.¹⁷ An *en banc* panel consists of all the judges who constitute the FISC.¹⁸

In light of the sensitive national security concerns respecting its docket, the FISA Courts operate largely in secret and in a non-adversarial fashion.¹⁹ Court sessions are conducted in secret, are generally held *ex parte* with the government as the only party presenting arguments to the court, and the court’s opinions are rarely released.²⁰ As noted by the FISC, whereas “[o]ther courts operate primarily in public, with secrecy the exception[,] the FISC operates primarily in secret, with public access the exception.”²¹ However, recipients of production orders under Section 215 of the USA PATRIOT Act and directives under Section 702 of FISA may challenge the legality of orders by petitioning the court.²² In the event of a contested hearing, FISA permits *in camera* review—private review by a court without the challenging party receiving access—of classified information upon motion by the government.²³ The executive branch classifies most filings made to the FISC as Secret or Top Secret before they are sent to the court, and the FISC’s opinions and orders in the possession of the executive branch are similarly classified.²⁴ The executive branch can choose to declassify portions of opinions, or entire opinions and release them to the public. It has done so a number of times since the disclosure of the NSA data collection programs.²⁵

¹² *In re* Release of Court Records, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).

¹³ See 50 U.S.C. §1803(a) (electronic surveillance); *Id.* §1822(c) (physical searches); *Id.* §1842(a)(1) (pen registers); *Id.* §1861(b)(1) (tangible things). Under the FISA Amendments Act of 2008 (FAA), the FISC is authorized to review applications for targeting U.S. persons reasonably believed to be abroad. *Id.* §1881b(a).

¹⁴ *Id.* §1803(b); §1822(d); §1861(f)(3).

¹⁵ *Id.* §1881a.

¹⁶ *Id.* §1881a(h)(6)(A).

¹⁷ *Id.* §1803(a)(2)(A).

¹⁸ *Id.* §1803(a)(2)(C).

¹⁹ See 50 U.S.C. §1805(a) (mandating that FISC orders are issued *ex parte*).

²⁰ *In re* Release of Court Records, 526 F. Supp. 2d 484, 488 (FISA Ct. 2007).

²¹ *Id.*

²² 50 U.S.C. §1861(f)(2)(a)(i) [§215 of the USA PATRIOT Act]; 50 USC §1881a(h)(4)(A) [§702 of FISA].

²³ See 50 U.S.C. §§1803(e)(2), 1805b(j)-(k).

²⁴ RICHARD A. CLARKE, ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD, REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 206 (2013).

²⁵ See, e.g., Press Release, Office of the Director of National Intelligence, DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (November 18, 2013).

Introducing a Public Advocate into the FISA Courts

Some critics of the FISA process have noted the infrequency of FISC rejections of the government's surveillance requests and suggested that the lack of an adversarial process prevents the court from adequately scrutinizing the government's position.²⁶ Accordingly, a number of legislative proposals seek to allow another attorney to challenge the government's FISA requests in order to protect civil liberty interests.²⁷ These proposals have varied according to nomenclature, the structural placement of a potential advocate, and the appointing authority. Nonetheless, most proposals embody three unifying themes. First, an advocate would oppose the government's request for FISA orders on behalf of the privacy and civil liberties interests of the public.²⁸ Second, an advocate would take on a robust role in FISA Court proceedings.²⁹ While the various proposals differ at the margins, public advocate measures generally envision the advocate having a range of responsibilities, such as being able to intervene in ongoing cases, brief the FISC on relevant matters, conduct some forms of discovery, file motions seeking discrete forms of relief from the court, move the court to reconsider past orders, or even appeal an adverse ruling.³⁰ Finally, proposals envision giving the advocate a measure of independence from the President so as to enjoy unfettered discretion to oppose the government's applications.³¹

Role of a Public Advocate

Before examining the constitutional implications of the establishment of a public advocate, a threshold matter is whether an advocate is a government actor subject to the constraints of the Constitution. The determination ultimately depends on whether the advocate is a permanently constituted entity.³² At the onset, Congress's labeling of an entity as non-governmental is not determinative.³³ Instead, courts will examine a number of factors, including whether establishing a public advocate furthers a government objective.³⁴ A permanently constituted advocate seeking injunctive relief based on a violation of law in the interest of the general public might be viewed as engaging in a government function;³⁵ while a private party appointed temporarily to litigate on behalf of the public might not be considered an arm of the government.

Appointment of a Public Advocate

Assuming a public advocate who is permanently constituted is an arm of the government and subject to constitutional constraints, the proposed agency must comply with the Appointments

²⁶ For a more in-depth discussion of the legal implications of introducing a public advocate into FISA proceedings, see CRS Report R43260, *supra* note 5.

²⁷ See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013).

²⁸ See e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. §2(b) (1st Sess. 2013).

²⁹ See, e.g., *Id.* at §2(b)(3).

³⁰ See CRS Report R43260, *supra* note 5, at 5-7.

³¹ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. §901(a) (1st Sess. 2013).

³² See *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 396-97 (1995).

³³ *Id.* at 397.

³⁴ *Id.* at 400.

³⁵ *Ernst v. Rising*, 427 F.3d 351, 377 n.2 (6th Cir. 2005) (quoting BLACK'S LAW DICTIONARY (7th ed.1999)).

Clause of Article II of the Constitution.³⁶ Under its terms, principal officers must be appointed by the President subject to Senate confirmation; Congress may vest the appointment of inferior officers in the President, the courts, or in department heads. In contrast, employees are not subject to the Appointments Clause, as they are “lesser functionaries subordinate to the officers of the United States.”³⁷ Accordingly, the first relevant issue is whether a public advocate would be an officer of the United States.

The Supreme Court has held that the term officer encompasses “any appointee exercising *significant authority* pursuant to the laws of the United States.”³⁸ The Court did not extensively analyze what constitutes significant authority, although the Department of Justice’s (DOJ’s) Office of Legal Counsel (OLC) has argued that this definition includes (1) the “delegation of a sovereign authority” that includes “a legal power which may be rightfully exercised, and in its effects will bind the rights of others”³⁹ and (2) a “continuing” position.⁴⁰

Accordingly, a permanent public advocate could be viewed as an officer, especially if he has the power to seek judicial relief on behalf of the public. The Supreme Court has found that an entity with “primary responsibility” to conduct “civil litigation in the courts of the United States for vindicating public rights ... may be discharged only by ... ‘Officers of the United States’ within the language of [the Appointments Clause.]”⁴¹ In contrast, proposals that permit private attorneys to be appointed for a single case or permit *amici* to offer advisory briefs to the court would likely not require adherence to the requirements of the Appointments Clause.⁴²

Assuming a public advocate is an officer, the next question would be whether an advocate is a principal or inferior officer, because principal officers must be appointed by the President with the Senate’s confirmation. The relevant test for distinguishing an inferior officer is the ability of a principal officer—appointed by the President and confirmed by the Senate—to control the officer’s conduct.⁴³ The proposals that create an advocate largely do not establish an advocate who would be “directed and supervised at some level by” another principal officer, and thus appear to create an office headed by a principal officer.⁴⁴

Article III Issues Raised by a FISA Public Advocate

Leaving aside Appointments Clause concerns, utilizing a public advocate in FISA proceedings might also raise Article III issues. Federal courts are limited to adjudicating cases and

³⁶ U.S. CONST., art. II, §2, cl. 2.

³⁷ *Buckley v. Valeo*, 424 U.S. 1, 126 n. 162. (1976) (per curiam).

³⁸ *Id.* at 126 (emphasis added).

³⁹ See *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459 at *17 (OLC) (April 16, 2007).

⁴⁰ *Id.* at *30 (internal quotations omitted).

⁴¹ *Buckley*, 424 U.S. at 140 (emphasis added).

⁴² See, e.g., *Ensuring Adversarial Process in the FISA Court Act*, H.R. 3159, 113th Cong. §2(b) (1st Sess. 2013).

⁴³ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3139, 3162-63 (2010); *Edmond v. United States*, 520 U.S. 651, 662-63 (1997); *but see Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (employing a more functional test that examined the nature of the officer’s duties to determine whether the position was a principal or inferior officer).

⁴⁴ See *Edmond*, 520 U.S. at 661.

controversies, which requires a live dispute that is “definite and concrete.”⁴⁵ Some commentators have questioned whether allowing the government—through DOJ and the public advocate—to “literally argue both sides of a legal case” satisfies the requirement that courts adjudicate live cases and controversies.⁴⁶ There are two possible answers to this question, which largely depend on (1) a determination of what the FISC’s role is in approving FISA applications and (2) what the role of the FISA advocate is.

***Morrison and Mistretta* “Incidental” Argument**

One might argue that the role of the judiciary in FISA proceedings is *incidental* to the exercise of the judicial function and therefore FISA proceedings need not satisfy the case or controversy requirement. This reasoning derives from *Morrison v. Olson*⁴⁷ and *Mistretta v. United States*,⁴⁸ where the Supreme Court suggested that federal courts may engage in certain non-adjudicatory, non-adversarial activities without violating Article III’s restrictions. Specifically, these opinions indicate that Article III courts may perform a variety of non-adversarial tasks, such as approving search warrants and wiretaps, because they are incidental to an adversarial proceeding that does meet Article III requirements.⁴⁹ The FISA Court of Review may have adopted this line of reasoning in rejecting an Article III challenge to FISA proceedings.⁵⁰

If this line of argumentation is controlling, there is at least some authority for the notion that FISA proceedings are incidental to the judiciary’s powers. In incidental matters, none of the usual Article III restrictions, such as standing, mootness, and ripeness, would seem to apply. Therefore, if FISA proceedings are a non-adjudicatory function of the FISC and do not have to abide by Article III’s restrictions, then permitting a public advocate to appear before the FISC would not raise constitutional issues. However, the argument that FISA proceedings are incidental to the judicial power assumes that such proceedings are analogous to traditional warrant applications. Whereas the proceedings typically considered to be incidental such as an ordinary warrant are usually connected to a clear case or controversy, that might not be the case within FISA proceedings—which rarely result in later contested cases.

The Traditional Argument and the Role of a Public Advocate

A second argument for allowing a public advocate in FISA proceedings derives from a more traditional understanding of Article III. According to this argument, a public advocate can participate in FISA proceedings as long he satisfies the necessary requirements to seek relief from a court, such as standing. During the debates over passage of FISA in the 1970s, the Department of Justice argued that two parties are not required in every case; instead, there need only be “adversity in fact”⁵¹ or “possible adverse parties.”⁵² Accordingly, the adverse interests of the

⁴⁵ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). See *Muskrat v. United States*, 219 U.S. 346 (1911).

⁴⁶ See, e.g., David S. Kris, *On the Bulk Collection of Tangible Things*, Vol. 1, No. 4 LAWFARE RESEARCH PAPER SERIES 38 (September 29, 2013).

⁴⁷ 487 U.S. 654, 654 (1988).

⁴⁸ 488 U.S. 361, 385 (1989).

⁴⁹ *Id.* at 389-90 n.16.

⁵⁰ *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002).

⁵¹ See *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 28 (1978) (continued...)

potential target and the United States were sufficient to satisfy Article III's requirements. It appears that at least two district courts⁵³ and the FISA Court of Review have accepted this argument.⁵⁴

Assuming that FISA proceedings require adherence to Article III's case or controversy requirement, the remaining concern is whether a public advocate may participate in the proceedings. In general, whenever a party "invo[kes] ... [a] federal court[']s jurisdiction" and requests an Article III court to exercise its "remedial powers on his behalf,"⁵⁵ the Supreme Court requires a party to show that he has personally suffered an "actual or threatened injury."⁵⁶ This injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."⁵⁷ Further, standing also requires a "causal connection" between the injury and the conduct in question—in other words, the injury must be "fairly traceable" to the challenged action.⁵⁸ In addition, it must be likely that the injury will be redressed by a favorable decision by the court.⁵⁹

Nevertheless, if one party already has met Article III's standing requirements, a third party may sometimes seek identical relief.⁶⁰ In addition, an *amicus*, or friend of the court, may brief the court on a legal issue without needing to satisfy standing requirements.⁶¹ In order for a public advocate to engage in proceedings beyond the traditional role of a third party *amicus* and seek judicial relief, an advocate would likely need to satisfy the constitutional requirements of standing. For example, in a recent FISC opinion, the court granted the motion of a public interest group to submit an *amicus* brief, but denied its motions to (1) reconsider a previous order; (2) establish a docket pertaining to the collection of bulk telephony metadata; (3) require the government to release information about the bulk metadata program; and (4) order an *en banc* hearing to reconsider the government's application for metadata collection.⁶² The court ruled that

(...continued)

(statement of John M. Harmon, Asst. Att'y Gen., Office of Legal Counsel) (citing 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE §3530 (1975)).

⁵² *Id.* (citing *Muskrat v. United States*, 219 U.S. 346, 357 (1911)) (emphasis added).

⁵³ *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y.1982); *In re Kevork*, 634 F. Supp. 1002, 1014 (S.D. Cal. 1985).

⁵⁴ *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002).

⁵⁵ *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

⁵⁶ *See Diamond v. Charles*, 476 U.S. 54, 62 (1986).

⁵⁷ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The Supreme Court has indicated that the "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," thus permitting a party without standing to participate in the proceeding. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); CRS Report R43260, *supra* note 5, at 22-28.

⁶¹ Federal courts have recognized a broad role for *amici*, and the Supreme Court has noted the power of Article III courts to appoint *amicus curiae* to "represent the public interest." *See Universal Oil Products Co. v. Root Rfg. Co.*, 328 U.S. 575, 581 (1946) (Frankfurter, J.); *see* CRS Report R43362, *supra* note 6, at 9-15.

⁶² *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things*, No. BR 13-158 at *1-2 (FISA Ct. December 18, 2013), *available at* <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf>.

the interest group had “no standing” to motion for such relief.⁶³ In short, in order for a public advocate to be able to seek judicial relief, such as move for a judgment, move for the reconsideration of past orders, or file an appeal, the advocate would most likely need to satisfy the standing requirements of Article III.

It is at least questionable whether a public advocate would have personally suffered a non-generalized injury as a result of the government’s surveillance activity in order to seek relief from a FISA Court. Unless the advocate himself is the subject of the order and can demonstrate with specificity that a future injury to him as a result of the application was certainly impending, the advocate would not appear to have standing in his individual capacity.⁶⁴ Moreover, no proposal envisions an advocate challenging an application in his individual capacity; instead, he would be litigating on behalf of the general public.

There are, however, doctrines of standing that allow parties without standing to seek judicial relief on behalf of others. The doctrine of “representational standing” allows “particular relationships” to sometimes “rebut the background presumption ... that litigants may not assert the rights of absent third parties.”⁶⁵ For example, next friend standing and its legal analogues⁶⁶ incorporate the notion that in certain situations a party may assert claims as a “next friend” on behalf of a party with standing. In order to invoke the doctrine, a next friend must demonstrate that the actual party cannot appear on his own behalf, generally for reasons such as inaccessibility, incompetence, or some other disability;⁶⁷ as well as be dedicated to their interests, typically by showing a “significant relationship.”⁶⁸ This doctrine may prove difficult to provide standing for a public advocate because the real party in interest must still suffer injury-in-fact.⁶⁹ Moreover, the real parties the public advocate would be representing might be capable of asserting their own rights in the first place. In addition, it is unclear how a public advocate would show a “significant relationship” between the parties in interest—the general public—and himself. Finally, the types of parties determined to have next friend standing usually maintain some traditional legal obligation to the party in interest, while a public advocate does not appear to owe any such obligation to members of the public.⁷⁰

Of course, one might argue that statutory authorization compelling a public advocate to represent the public bestows him with the necessary legal obligation to vindicate their rights in court. However, the Supreme Court has explained that limits on the doctrine of next friend standing are necessary to prevent a “litigant asserting only a generalized interest in constitutional governance

⁶³ *Id.* at *6.

⁶⁴ See *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1149 n.4 (noting that the burden is on the plaintiff to “prove their standing by pointing to specific facts.”).

⁶⁵ *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 557 (1996).

⁶⁶ Next friend standing is generally used in the context of *habeas corpus* proceedings. *United States v. Ken Int’l Co.*, 897 F. Supp. 462, 464 (D. Nev. 1995). Nonetheless, in *Whitmore v. Arkansas*, the Court suggested there are other contexts where next friend standing can be relevant. 495 U.S. 149, 162 n.4 (1990) (noting that some courts have “permitted ‘next friends’ to prosecute actions outside the *habeas corpus* context on behalf of infants, other minors, and adult mental incompetents.”). See *Morgan v. Potter*, 157 U.S. 195, 198 (1895) (explaining that a “Next Friend” is “neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem*, by whom a suit is brought or defended in behalf of another”).

⁶⁷ *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

⁶⁸ *Id.* at 163-64.

⁶⁹ See CRS Report R43260, *supra* note 5, at 29-34.

⁷⁰ See *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008).

[from] circumvent[ing] the jurisdictional limits of [Article] III by simply assuming the mantle of ‘next friend.’”⁷¹ The reference to a “generalized interest” draws a comparison to FISA reform proposals that direct a public advocate to represent the rights of the public at large, and allowing a statute to override core constitutional standing requirements could allow Congress to make an end run around Article III’s limitations.⁷²

In addition to next friend standing, there is also some authority indicating that an advocate may seek relief in federal court if he is authorized to appear as the agent of a party with standing.⁷³ To do so, an advocate must be authorized by a third party such that the litigant’s interest is not divorced from the principal.⁷⁴ In order for a litigant to seek relief for an absent party he must be officially authorized to do so and the advocate’s relationship with the third party must exhibit some of the “most basic features of an agency relationship.”⁷⁵ In the context of a FISA proceeding, it does not appear that an advocate would be “authorized” in any official sense by those targeted by the government. In addition, the typical elements of an agency relationship that the Supreme Court has identified as necessary—namely, the ability to control litigation and remove the advocate⁷⁶—would not appear to be present.

On the other hand, these agency cases may be distinguished as relating to the rights of private parties, whereas in the FISA context, an argument could be made that an advocate could be seen as an agent of the *government*. When federal officials seek relief pursuant to statute, the government’s standing to litigate on behalf of the general public is “easily recognized.”⁷⁷ However, such an argument may be inappropriate given that most FISA proposals envision a substantially independent advocate litigating *against* the government, rather than acting as its agent. In addition, there may be a distinction between the government litigating to enforce *public* rights and the ability of a government agent to seek judicial relief on behalf of the *personal* rights of someone outside the government.⁷⁸

Even if a public advocate can be viewed as an agent of the government, separate constitutional concerns could arise. For example, the constitutional requirement of a case or controversy prevents a party, including the government, from litigating against itself.⁷⁹ The Supreme Court has taken a functional approach to this principle, however, and looked beyond the mere labels of litigating parties.⁸⁰ For example, the Supreme Court has found certain apparently intra-branch conflicts to be justiciable—including when a government agency is acting as a market participant,⁸¹ cases arising out of a criminal prosecution,⁸² and when the government is

⁷¹ *Whitmore*, 495 U.S. at 164.

⁷² Congress may not simply circumvent standing requirements by authorizing via statute the ability to engage in litigation. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

⁷³ *See Karcher v. May*, 484 U. S. 72, 84 (1987) (White, J., concurring).

⁷⁴ *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

⁷⁵ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013).

⁷⁶ *Id.* at 2666-2667.

⁷⁷ 13B WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE §3531.11.

⁷⁸ *See United States v. Hickey*, 185 F.3d 1064, 1066 (9th Cir. 1999) (discussing the limits of the ability of the government to assert the rights of members of the public in litigation); *see generally Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (“Fourth Amendment rights are personal rights that may not be asserted vicariously.”).

⁷⁹ *See United States v. ICC*, 337 U.S. 426, 430 (1949).

⁸⁰ *Id.*

⁸¹ *United States v. ICC*, 337 U.S. 426, 430 (1949); *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. (continued...)

representing a real party in interest.⁸³ While no formal test to determine when such litigation is permitted has been delineated by the Court, a dispute between a public advocate and the DOJ might be distinguishable from these limited situations. Such litigation appears to be centered on a dispute with respect to the relative importance of two conflicting sovereign interests—the need to engage in foreign surveillance to protect national security versus the need to protect the privacy rights of the public. Having a federal court serve as the arbiter of such a dispute may ultimately run afoul of the principle that an Article III court does not adjudicate a dispute between a solitary legal entity.⁸⁴

Moreover, allowing two entities within the executive branch to come to two opposite conclusions on how the law should be executed might raise issues under Article II’s vesting clause of the Executive power in the President.⁸⁵ While the Supreme Court has upheld “for cause” removal restrictions on independent agencies headed by principal officers, the relevant case law relies on a distinction between when Congress may direct “quasi-legislative and quasi-judicial” bodies, as opposed to “purely executive” agencies, “to act ... independently of executive control.”⁸⁶ Empowering an *independent agency* to seek judicial relief that would functionally override or prevent a particular foreign intelligence operation sought by the President could be viewed as an impermissible interference with a core Executive power.⁸⁷

Housing the Advocate in the Judicial Branch

In contrast to proposals placing a public advocate in the executive branch, other measures would house the public advocate within the judiciary.⁸⁸ These proposals might also raise a distinct separation of powers question. The Supreme Court has explained that creating an independent agency in the judicial branch would raise constitutional concerns in two situations: if the agency united the judicial branch with a political power; or if it “undermin[ed] the integrity of the Judicial Branch.”⁸⁹ Granting a judicial agency power to exercise typical executive branch functions—such as seeking relief in aid of the United States’ legal interests—might run afoul of these restrictions. In addition, requiring an agency in the judicial branch to litigate against the government risks casting the judicial branch as an advocate, rather than a neutral arbiter.⁹⁰

(...continued)

122, 128 (1995).

⁸² See *United States v. Nixon*, 418 U.S. 683, 695-97 (1974).

⁸³ See, e.g., *IRS v. FLRA*, 494 U.S. 922 (1990).

⁸⁴ See *ICC*, 337 U.S. at 430.

⁸⁵ See U.S. CONST. Art. II, §1, Cl. 1.

⁸⁶ *Humphrey’s Executor v. United States*, 295 U.S. 602, 627-29 (1935); see also *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3152 (2010).

⁸⁷ See CRS Report R43260, *supra* note 5, at 41-44.

⁸⁸ See, e.g., Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. §402(a) (1st Sess. 2013).

⁸⁹ *Mistretta*, 488 U.S. at 393.

⁹⁰ See CRS Report R43260, *supra* note 5, at 44-46.

Increasing Appeals of FISA Court Decisions

Another suggestion for the FISA Courts is to require that final decisions of the FISC be reviewed automatically by the FISA Court of Review or the Supreme Court.⁹¹ While such a proposal seems relatively novel, it appears questionable whether a federal court can hear an appeal in a case in which no party has requested review.⁹² Further, if the effect of such an appeal would be to stay the FISC's ruling until affirmed by a higher court, this might conflict with an Article III court's power to decide cases via "dispositive judgments."⁹³ Other proposals would allow the FISC to certify, upon a request from the public advocate, questions of law or an entire case to the FISA Court of Review or the Supreme Court.⁹⁴ Aside from concerns that such a practice could result in federal courts issuing advisory opinions,⁹⁵ such a proposal appears to provide a means to grant judicial relief to a party without standing.⁹⁶

Procedural and Operational Changes

Amicus Curiae

One alternative to creating a permanent public advocate is to establish a formal mechanism through which the FISC could solicit the views of an *amicus curiae* who could brief the court on a discrete legal issue in a given case.⁹⁷ Pursuant to Congress's broad power to regulate the federal courts, authorizing the FISC to hear from *amici* via statute does not appear to raise any serious constitutional questions. In fact, Congress has enacted similar legislation in the past.⁹⁸ Indeed, such a provision might not be needed as a legal matter. Courts have long exercised the power to appoint *amici* independent of congressional authorization,⁹⁹ and both the FISC¹⁰⁰ and the FISA Court of Review¹⁰¹ have done so already in several cases.

While there does not appear to be a constitutional issue with permitting the FISC to appoint *amici* who would provide views on civil liberties to the court, several proposals *require* the FISA Courts

⁹¹ See, e.g., Marty Lederman and Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* November 4, 2013, <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/>.

⁹² See *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

⁹³ See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219 (1995) (emphasis in original) (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

⁹⁴ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. §2(b)(i)(4) (1st Sess. 2013); Privacy and Civil Liberties Oversight Board, REPORT ON THE TELEPHONE RECORD PROGRAM CONDUCT UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 183-87 (2014).

⁹⁵ See CRS Report R43362, *supra* note 5, at 46-49.

⁹⁶ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

⁹⁷ See FISA Improvements Act of 2013, S. 1631, 113th Cong. §4 (1st Sess. 2013). For a detailed discussion of proposals to make additional procedural and operational changes to the FISA Courts see CRS Report R43362, *supra* note 6.

⁹⁸ See, e.g., 5 U.S.C. §612(b).

⁹⁹ See *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988).

¹⁰⁰ See, e.g., *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. 13-02, (FISA Ct. December 5, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-02-08-09-order-131205.pdf>.

¹⁰¹ See, e.g., *In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002).

to appoint an *amicus curiae*,¹⁰² possibly implicating constitutional concerns. On the one hand, such a requirement could conflict with the principle that Article III courts must maintain independence to control their own internal processes.¹⁰³ Further, mandating an *amicus* may be seen as elevating the traditional status of *amici*—individuals heard at the discretion of the court—to a party who has an absolute right to be heard. One might argue that this forces the judiciary to rule in a matter outside of a true case or controversy.¹⁰⁴ On the other hand, requiring the court to hear from *amici* does not force the judiciary to rule in a particular manner, nor does it establish a right to seek relief from the court in violation of standing requirements.¹⁰⁵

En Banc Panels

The FISC is currently permitted via statute to hold a hearing or rehearing *en banc*—a panel that includes all of the FISC judges.¹⁰⁶ At least one commentator has suggested requiring the FISC to sit *en banc* during certain proceedings.¹⁰⁷ Legislation requiring a federal court to sit *en banc* in specific situations does not appear to raise major constitutional questions. In the past, Congress has mandated that three-judge panels adjudicate a variety of cases. Certain claims under the Civil Rights Act of 1964, for example, are still adjudicated in this manner.¹⁰⁸

Voting Rules

Another proposal aims to change the voting rules of the FISA Courts in order to encourage further scrutiny of the FISC’s orders.¹⁰⁹ One bill would require that in order for an *en banc* panel to act, it must have the concurrence of 60% of the judges; and any decision made by FISA Court of Review in favor of the government must be made unanimously.¹¹⁰ Congress has never directly set the voting rules of federal courts, but has extensively regulated the lower federal courts and has established the number of Supreme Court justices and the number required for a quorum.¹¹¹ Because of the dearth of past legislation on this precise matter, it is unclear exactly whether Congress has the power to set judicial voting rules. The constitutionality of such a measure may turn on the degree of interference any rule would have on the judicial function. In *United States v. Klein*, the Supreme Court refused to allow a statute to “prescribe rules of decision” to the judiciary.¹¹² A generally accepted interpretation of this case is that Congress may not dictate substantive outcomes of the federal courts.¹¹³ Accordingly, requiring a 60% concurrence in *en banc* proceedings, for example, might not improperly intrude on the judicial function. It does not

¹⁰² See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), §5(a)(5)(A).

¹⁰³ See CRS Report R43260, *supra* note 5, at 12-16.

¹⁰⁴ See *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991).

¹⁰⁵ Cf. *Klein*, 80 U.S. at 146.

¹⁰⁶ FISA Amendments Act of 2008, P.L. 110-261, §109, 122 Stat. 2436, 2464 (codified at 50 U.S.C. §1803(a)(2)(A)).

¹⁰⁷ Bruce Ackerman, *Surveillance and the FISA Court*, LOS ANGELES TIMES, (September 24, 2013) <http://articles.latimes.com/2013/sep/24/opinion/la-oe-ackerman-fisa-reform-20130924>.

¹⁰⁸ See 42 U.S.C. §2000a-5(b); 42 U.S.C. §2000e-6(b).

¹⁰⁹ See CRS Report R43362, *supra* note 6, at 19-22.

¹¹⁰ FISA Court Accountability Act, H.R. 2586, 113th Cong. (1st Sess. 2013).

¹¹¹ 28 U.S.C. §1; S. CT. RULE 4.2.

¹¹² *United States v. Klein*, 80 U.S. 128, 146 (1872).

¹¹³ ERWIN CHEREMINSKY, FEDERAL JURISDICTION §3.2 (4th ed. 2003).

appear to favor a particular result and permits judges to independently adjudicate the matter before them. In contrast, a unanimity requirement for the FISA Court of Review seems more likely to interfere with the court's independence, as it might prevent the court from issuing a ruling.

Selection of FISA Court Judges

Aside from altering the procedures of the FISA Courts, some have suggested modifying how its judges are chosen. Currently, the FISC is composed of 11 district court judges from at least seven of the regional judicial circuits.¹¹⁴ While judges of traditional Article III courts are “appointed” by the President with Senate confirmation, FISA Court judges are “designated” to their position by the Chief Justice.¹¹⁵ The Chief Justice also designates 3 district court or court of appeals judges to the FISA Court of Review.¹¹⁶ FISA Court judges serve terms of seven years and are not eligible for a second term.¹¹⁷ In response to concerns that allowing the Chief Justice to select all the FISA Court judges improperly concentrates an important power in one unelected official,¹¹⁸ some have proposed to disperse this authority among the chief judges of the circuit courts.¹¹⁹ Other measures would authorize the President to choose FISA Court judges with Senate confirmation,¹²⁰ and some would leave this choice with the congressional leadership.¹²¹

These proposals appear to raise several novel legal issues. The Chief Justice's authority to designate federal judges to temporarily sit on other federal courts,¹²² including specialized Article III tribunals such as the FISA Court,¹²³ and circuit court judges' authority to designate district judges within their circuit,¹²⁴ have been upheld against legal challenge. However, extending similar designating authority to the President or to a lower federal court over a court it does not oversee has never been resolved as a constitutional matter. The issue has not come up, in large part, because Congress has apparently never vested similar designating authority over federal judges beyond the Chief Justice and the chief judge of each judicial circuit.¹²⁵ Beyond historical precedent, Supreme Court case law provides little guidance in this area. However, proposals that vest the designation authority in Congress may raise a separate constitutional question. The Supreme Court has made clear that legislative acts which “alter[] the legal rights, duties, and

¹¹⁴ 50 U.S.C. §1803(a)(1).

¹¹⁵ *Id.* §1803(a)(1).

¹¹⁶ *Id.* §1803(d).

¹¹⁷ *Id.* §1803(d).

¹¹⁸ See, e.g., Garrett Epps, Chief Justice John Roberts Appointed Every Judge on the FISA Court: Is That Too Much Power for One Person?, NATIONAL JOURNAL (Aug. 12, 2013), available at <http://www.nationaljournal.com/nationalsecurity/chief-justice-john-roberts-appointed-every-judge-on-the-fisa-court-20130812>.

¹¹⁹ See, e.g., FISA Judge Selection Reform Act of 2013, S. 1460, 113th Cong. (1st Sess. 2013).

¹²⁰ See, e.g., Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (1st Sess. 2013).

¹²¹ See, e.g., FISA Court Accountability Act, H.R. 2586, 113th Cong. (1st Sess. 2013).

¹²² *Lamar v. United States*, 241 U.S. 103 (1916) (referencing 38 Stat. 203 (1913)).

¹²³ *United States v. Cavanagh*, 807 F.2d 787, 792 (9th Cir. 1987). See also *Matter of Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985).

¹²⁴ *McDowell v. United States*, 159 U.S. 596, 598 (1895) (referencing 16 Stat. 494 (1871)).

¹²⁵ See, e.g., 28 U.S.C. §291(a) (Chief Justice's authority to designate circuit court judges); *id.* §292 (chief justice of a circuit court's authority to designate district court judges); 50 U.S.C. §1803(a) (Chief Justice's authority to designate district judges to serve on FISA Court).

relations of persons” outside the Legislative Branch must satisfy the constitutional requirements of bicameralism and presentment.¹²⁶ Vesting the authority to designate Article III judges to serve on a FISA Court solely with Congress would appear to violate this principle.

Disclosure of FISA Court Opinions

Several other FISA proposals seek to reduce the secretive nature of the FISA Courts by requiring the public disclosure of FISA opinions.¹²⁷ Such legislation might raise separation of powers questions because both Congress and the executive branch claim some power in this area. The central question to resolve is the extent to which Congress may regulate control over national security information, including requiring the executive branch to disclose specific documents—a question not definitively resolved by the courts.¹²⁸

Legislation compelling the executive branch to release FISA opinions directs the President to release information he may intend to keep secret and thus implicates the President’s power under Article II of the Constitution.¹²⁹ On the one hand, the Supreme Court has explicitly recognized Congress’s power to require the “mandatory disclosure of documents in the possession of the Executive Branch.”¹³⁰ However, the executive branch has argued that the Commander-in-Chief Clause of Article II bestows upon the President independent power to control access to national security information.¹³¹ As such, according to this line of reasoning, Congress’s generally broad ability to require disclosure of agency documents may be constrained when it implicates national security.¹³² The executive branch has typically exercised discretion to determine what particular information should be classified; and the Supreme Court has observed in dicta that the President is Commander in Chief, and his “authority to classify and control access to information bearing on national security ... flows primarily from this Constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”¹³³ In addition, courts have crafted common law privileges that protect the executive branch from revealing certain military secrets.¹³⁴

Nonetheless, Supreme Court jurisprudence does not establish *absolute* power by any branch over classified information¹³⁵ and recognizes room for Congress to impose classification procedures.¹³⁶

¹²⁶ *I.N.S. v. Chadha* 462 U.S. 919, 958 (1983) (explaining that such legislative acts must pass both houses of Congress and be signed by the President).

¹²⁷ For an in-depth analysis of the legal implications of requiring the disclosure of FISA Court opinions see CRS Report R43404, *supra* note 7.

¹²⁸ See CRS Report R43404, *supra* note 7, at 5-11.

¹²⁹ *Id.* at 5.

¹³⁰ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 445 (1977).

¹³¹ Letter from Michael Mukasey, Att’y Gen., to Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary 2–3 (Mar. 31, 2008).

¹³² See CRS Report R43404, *supra* note 7, at 14-15.

¹³³ *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988).

¹³⁴ *E.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

¹³⁵ See *Dep’t of Navy v. Egan*, 484 U.S. 518 (1988); *Nixon v. General Services Administration*, 433 U.S. 425 (1977); *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

¹³⁶ *EPA v. Mink*, 410 U.S. 73, 83 (1973).

Moreover, Congress, pursuant to its oversight function, requires consistent disclosure of sensitive national security information to the relevant intelligence and defense committees and has regulated control over access to national security information.¹³⁷ Pursuant to these statutes, courts have required the executive branch to disclose information to the public and the judiciary.¹³⁸ Consequently, proposals that allow the executive branch to first redact classified information from FISA opinions before public release appear to be on firm constitutional ground; while a proposal that mandated all past FISA opinions be released in their entirety—without any redactions by the executive branch—might raise a separation of powers issue.

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¹³⁷ *See, e.g.*, Classified Information Procedures Act, 18 U.S.C. app. 3 §§1–16 (2006); FISA, 50 U.S.C. §§1801–1811; Freedom of Information Act, 5 U.S.C. §552.

¹³⁸ *See, e.g.*, United States v. Hanna, 661 F.3d 271, 280 (6th Cir. 2011) (CIPA); United States v. Ott, 827 F.2d 473, 476 (9th Cir. 1987) (FISA); Silets v. Fed. Bureau of Investigation, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (FOIA).