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Reform of the Foreign Intelligence Surveillance Court (FISC): Selection of Judges

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May 7, 2014

Congressional Research Service

7-5700

www.crs.gov

R43534

Summary

In the past year, the decisions and functions of the courts established under the Foreign Intelligence Surveillance Act (FISA) have received much public attention. FISA established two courts—the Foreign Intelligence Surveillance Court (FISC) and the FISA Court of Review—which have jurisdiction to review government applications to conduct electronic surveillance for foreign intelligence purposes. Various proposals have been introduced in Congress to amend the law that authorizes such surveillance and to change the internal practices and procedures of the courts. This report focuses on those proposals that would amend the process for selecting the judges who serve on the FISC and FISA Court of Review.

Under the existing framework, the Chief Justice of the U.S. Supreme Court “designates” existing federal judges to serve on the FISA courts. While critics have argued that the current process is partisan and lacks political accountability, transparency, and oversight, the Director of the Administrative Office of the U.S. Courts, acting on behalf of the Chief Justice of the Supreme Court, has expressed concern regarding proposals that would change the existing framework. Proposals that would alter the process for selecting FISA judges include S. 1460, the FISA Judge Selection Reform Act, which would effectively shift authority to the chief judges of the circuit courts; H.R. 2761, the Presidential Appointment of FISA Court Judges Act, which would authorize the President to choose FISA judges with the advice and consent of the Senate; and H.R. 2586, the FISA Court Accountability Act, which would permit Members of Congress to select FISA judges.

To understand the potential legal issues implicated by these proposals, this report first briefly reviews the constitutional method for appointing federal judges. The report also surveys the process of “designation,” an alternative method used by Congress that allows current federal judges to serve temporarily on another federal court without undergoing a separate constitutional appointment. Lastly, the report explores how a reviewing court might evaluate the constitutionality of these proposals that would shift the authority to select FISA judges away from the Chief Justice alone, and vest it in other officials within the judicial, executive, and legislative branches.

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Introduction

In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA) after conducting sweeping investigations into perceived electronic surveillance abuses by the executive branch.¹ Among other things, FISA established the Foreign Intelligence Surveillance Court (FISC), which reviews government applications to conduct electronic surveillance for foreign intelligence purposes.² In the wake of revelations from June 2013 concerning the scope of orders issued by the FISC, many have questioned the current mechanism for reviewing the executive branch's intelligence gathering practices.³ Members of Congress have introduced various proposals that would amend FISA or amend the practices and procedures of the FISC. This report focuses on the proposals that would alter the process for selecting judges to serve on the FISA courts.⁴

Overview of FISA Courts and Selection of FISA Judges

Article III of the U.S. Constitution vests the “judicial power” of the United States in the Supreme Court and any inferior courts established by Congress.⁵ Judicial power entails a power to render final, “dispositive judgments” in particular cases and controversies.⁶ Federal judges, who preside over Article III courts, enjoy life tenure so long as they are in “good behaviour.”⁷ Moreover, their salaries cannot be diminished during their terms in office.⁸ The purpose of these provisions is to ensure that federal courts operate free from interference from the political branches in order to, in the words of Alexander Hamilton, “secure a steady, upright, and impartial administration of the laws.”⁹

¹ See Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783 (1978); see generally *Foreign Intelligence Surveillance Act of 1977, Hearings on S. 1566 Before the Subcomm. on Criminal Law and Procedures of the S. Comm. on the Judiciary*, 95th Cong. (1977); *Foreign Intelligence Surveillance Act of 1978: Hearings on S. 1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. (1978); *Foreign Intelligence Surveillance Act of 1976*, S.Rept. 94-1035 (1976); *Foreign Intelligence Surveillance Act of 1978*, H.Rept. 95-1283 (1978).

² See 50 U.S.C. §§1801-1881g.

³ See, e.g., Jonathan Weisman, *As Criticism Grows, Curtailing Surveillance Program Seems Unlikely*, N.Y. TIMES ONLINE, June 8, 2013; Jennifer Stisa Granick and Christopher Jon Sprigman, *The Criminal N.S.A.*, N.Y. TIMES OP-ED, June 27, 2013; Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 7, 2013, at A1.

⁴ For a discussion of other proposals that would amend FISA, such as introducing a public advocate into the FISA courts' adjudicatory process, 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; see also CRS Report R43134, *NSA Surveillance Leaks: Background and Issues for Congress*, by Catherine A. Theohary and Edward C. Liu.

⁵ U.S. Const., art. III, §1.

⁶ See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219 (1995) (quoting Frank Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

⁷ The Constitution provides that “all civil Officers of the United States,” which includes federal judges, “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. Const., art. II, §4.

⁸ U.S. Const., art. III, §1.

⁹ The Federalist No. 78; see also *N. Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 60 (1982) (“[O]ur Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent judiciary. It commands that the independence of the Judiciary be jealously guarded, and it (continued...)”).

In FISA, Congress established the FISC, an Article III court.¹⁰ Overall, the FISC is authorized to issue orders related to foreign intelligence investigations. Upon a proper showing made in an application by a federal officer, the FISC may issue an order approving electronic surveillance, certain physical searches, the use of a pen register or a trap and trace device, or access to certain business records.¹¹ FISA also established the FISA Court of Review, which has jurisdiction to review the denial of any application by the FISC.¹²

FISA authorizes the Chief Justice of the U.S. Supreme Court to “designate” the federal judges to serve on the FISC and FISA Court of Review.¹³ Judges of both courts serve seven-year terms and are not eligible for a second term.¹⁴ The FISC is currently composed of 11 district court judges who must be selected from at least seven of the regional judicial circuits, with one of the eleven serving as the presiding judge.¹⁵ The FISA Court of Review is composed of three judges who may be selected from either the district courts or circuit courts of appeal, with one serving as the presiding judge.¹⁶

Some have argued that the authority to select judges should not reside solely with one unelected official, that is, the Chief Justice of the Supreme Court, and others have commented that the process is too partisan.¹⁷ With these criticisms in mind, several bills have been introduced in the 113th Congress to alter the process for selecting FISA judges. Proposals to alter the selection

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provides clear institutional protections for that independence.”). For further discussion on Article III courts and Congress’s ability to regulate them, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by Andrew Nolan and Richard M. Thompson II, at 6-9.

¹⁰ See *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.) (“[Appellant] ... appears to suggest that the FISA court is not properly constituted under [A]rticle III because the statute does not provide for life tenure on the FISA court. This argument has been raised in a number of cases and has been rejected by the courts. We reject it as well.”); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (“The FISA court is wholly composed of United States District Court judges, who have been appointed for life by the President, with the advice and consent of the Senate, and whose salaries cannot be reduced. The defendants’ contentions that because of their limited term on the FISA court, these judges lose their Article III status, has no merit.”); *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1180) (same); *United States v. Falvey*, 540 F. Supp. 1306, 1313 n.16 (E.D.N.Y. 1982) (same); cf. *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. 2002) (“In light of *Morrison v. Olson* and *Mistretta v. United States*, we do not think there is much left to an argument made by an opponent of FISA in 1978 that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities of federal judges because of the secret, non-adversary process.”).

¹¹ See 50 U.S.C. §1804 (electronic surveillances); 50 U.S.C. §1824 (physical searches); 50 U.S.C. §1843 (pen register or trap and trace devices); 50 U.S.C. §1861 (business records).

¹² 50 U.S.C. §1803. For more discussion on the operation of FISA courts, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by Andrew Nolan and Richard M. Thompson II at 4-5.

¹³ 50 U.S.C. §1803(a), (b).

¹⁴ 50 U.S.C. §1803(d).

¹⁵ 50 U.S.C. §§1803(a)(1), (e). No fewer than three of the designated FISC judges must reside within 20 miles of the District of Columbia. *Id.* There are 13 judicial circuits. 28 U.S.C. §41.

¹⁶ 50 U.S.C. §1803(d).

¹⁷ See, e.g., Ezra Klein, *Chief Justice Roberts Is Awesome Power Behind FISA Court*, BLOOMBERG OPINION, July 2, 2013, available at <http://www.bloomberg.com/news/2013-07-02/chief-justice-roberts-is-awesome-power-behind-fisa-court.html>; Linda Greenhouse, *Too Much Work?*, NY TIMES ONLINE, August 7, 2013, available at http://opinionator.blogs.nytimes.com/2013/08/07/too-much-work/?_php=true&_type=blogs&_r=0; Garrett Epps, *Chief Justice Roberts Appointed Every Judge on the FISA Court: Is that Too Much Power for One Person?*, NATIONAL JOURNAL, August 12, 2013, available at <http://www.nationaljournal.com/nationalsecurity/chief-justice-john-roberts-appointed-every-judge-on-the-fisa-court-20130812>.

method include one that would effectively transfer selection authority to the chief judges of the circuit courts, as the bill would require the Chief Justice to designate judges who are recommended by the chief judges.¹⁸ Another bill would authorize the President to choose FISA judges with Senate advice and consent,¹⁹ while another proposal would place this authority with congressional leadership.²⁰ The principal issue that may be raised by these proposals is whether designation by a certain branch of government would be constitutionally permissible. Notably, the judicial branch issued comments in January 2014 and expressed concern with proposals to shift selection of FISA judges away from the Chief Justice.²¹

This report first briefly reviews the constitutional method for appointing Article III judges. It then surveys the process of “designation,” an alternative method used by Congress that allows current federal judges to serve temporarily on another federal court without undergoing a separate constitutional appointment. Lastly, the report explores how a reviewing court might assess the constitutionality of some of these proposals that shift designation authority away from the Chief Justice alone and vest it in other officials within the judicial, executive, and legislative branches.

Constitutional Appointment or Designation of Article III Judges

The Appointments Clause of the U.S. Constitution prescribes the manner in which certain government officials must be appointed.²² Principal officers, such as “Judges of the supreme Court,” must be appointed by the President with the advice and consent of the Senate.²³ The Supreme Court has also indicated that all other “Article III circuit and district judges ... are principal officers.”²⁴ Accordingly, the initial appointment of an Article III judge generally must

¹⁸ FISA Judge Selection Reform Act of 2013, S. 1460, 113th Cong. (1st Sess. 2013).

¹⁹ Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (1st Sess. 2013).

²⁰ FISA Court Accountability Act, H.R. 2586, 113th Cong. (1st Sess. 2013).

²¹ The Chief Justice of the U.S. Supreme Court asked the Director of the Administrative Office of the U.S. Courts to act as a liaison for the judicial branch on matters concerning FISA. On January 13, 2014, the Director issued a letter and accompanying memoranda with comments conveying the concerns of the judiciary regarding certain proposals to amend FISA and proceedings before the FISC and FISA Court of Review. See Administrative Office of the U.S. Courts, *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act*, at 12-13 (January 13, 2014), available at <http://www.feinstein.senate.gov/public/index.cfm/2014/1/former-fisa-court-judge-outlines-views-on-fisa-reform>. See *infra* note 51.

²² U.S. Const., art. II, §2, cl. 2. The President “shall nominate, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law... .”

²³ U.S. Const., art. II, §2, cl. 2. “The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. ‘[B]ut,’ the Appointments Clause continues, ‘the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.’” *Edmond v. United States*, 520 U.S. 651, 660 (1997) (citing U.S. Const., art. II, §2, cl. 2).

²⁴ *Weiss v. United States*, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring). In *Weiss*, Justice Souter argued that the Court’s decision in *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991), implicitly accepted that all lower federal court judges, and not solely the Supreme Court justices, should be considered principal officers. In *Freytag*, the Court had replaced the phrase “judges of the supreme Court” with “judges” when describing the category of individuals who are principal officers under the Appointments Clause. But see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 369 (2004) (noting that the excepting clause of the Appointments Clause could provide some textual support for the Chief Justice to “appoint” judges to other federal courts if judges are treated as “inferior officers,” in which case their appointment may be vested “in the President alone, in the Courts of Law, or in (continued...)”).

adhere to the strictures of the Appointments Clause because he is a principal officer exercising “significant authority pursuant to the laws of the United States.”²⁵

However, if Congress subsequently expands the duties of an office for which one must be constitutionally appointed, the Court has concluded that it may not be necessary for an incumbent to receive a second appointment, if the additional duties are germane to the official’s original government post.²⁶ For instance, in *Weiss v. United States*, the Supreme Court held that military officers, who must be appointed by the President with the advice and consent of the Senate, could be *designated* to serve on a military court without a second constitutional appointment.²⁷ Guided by the principle of “germaneness” established in *Shoemaker v. United States*,²⁸ the *Weiss* Court reiterated “[i]t cannot be doubted ... that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should again be nominated and appointed.”²⁹ Based on this precedent, it appears there is generally no violation of the Appointments Clause when Congress permits the designation of an existing federal judge to serve in a separate position in a related Article III capacity.

The Supreme Court also has had occasion to specifically address the constitutionality of the designation process within the judicial branch. Notably, Congress has long employed designations for Article III courts and has vested the Chief Justice with authority to temporarily assign federal judges to serve on other federal courts, including specialized tribunals.³⁰ The creation of the now-defunct Commerce Court is one of the earliest instances where Congress vested the Chief Justice with authority to designate federal judges to a special tribunal.³¹ The first set of judges to this court was appointed by the President with the advice and consent of the Senate, and subsequent judges were “designated” by the Chief Justice from among the judges of the circuit courts.³² The Commerce Court’s Chief Justice-based designation process became a

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the Heads of Departments”).

²⁵ *Buckley v. Valeo*, 424 U.S.1, 126 (1976). In *Edmond* the Court stated that the exercise of “significant authority” does not mark the line between principal and inferior officer, but observed that that “‘inferior officer[s]’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond*, 520 U.S. at 663.

²⁶ See *Weiss v. United States*, 510 U.S. 163 (1994); *Shoemaker v. United States*, 147 U.S. 282 (1893).

²⁷ *Weiss*, 510 U.S. at 175-6 (declaring “the role of military judge is ‘germane’ to that of military officer” such that “the Appointments Clause by its own force does not require a second appointment before [a] military officer[] discharge[s] the duties of a military judge”). The Court reasoned that those designated to be a military judge “have no more authority than any other military officer” until assigned to a specific military court. *Id.* at 175 (citing *Weiss v. United States*, 36 M.J. 224, 228 (C.M.A. 1992)).

²⁸ *Shoemaker*, 147 U.S. at 301 (concluding it was not necessary for two members of a newly established commission to receive a separate appointment simply because “additional duties, germane to the offices already held by them, were devolved upon them by the act”).

²⁹ *Weiss*, 510 U.S. at 174 (citing *Shoemaker*, 147 U.S. at 301).

³⁰ The Chief Justice’s authority dates back to the 19th century. See, e.g., Act of July 29, 1850, ch. 30, 9 Stat. 442 (amended 10 Stat. 5 (1852) (authorizing circuit judge and the Chief Justice of the Supreme Court to “designate and appoint” a district judge from the same or an adjoining circuit to serve in the place of the disabled judge, or as later amended, for reasons of accumulation or urgency of judicial business)). An earlier statute had conferred a similar form of designation authority on circuit courts. See Judiciary Act of 1801, ch. 4, §25, 2 Stat. 89, 97 (repealed 1802). The Chief Justice’s authority currently includes, for example, designating circuit court judges to serve temporarily in other circuit courts and designating district court judges to serve temporarily in other district and circuit courts. 28 U.S.C. §291(a), §292(d).

³¹ 36 Stat. 539 (1910). See also Ruger, *supra* note 24, at 347.

³² 36 Stat. 539, 540. Some Members of Congress expressed concern about leaving “the designation of the members of (continued...)”

model for future specialized courts, many of which operated for numerous years, or are still in existence, such as the FISA courts.³³ Congress has also vested lower federal court judges with designation authority as well.³⁴

Where the Supreme Court has reviewed designations within the judicial branch, it has upheld them. In *McDowell v. United States*, for example, the Court stated that the resolution of whether a circuit court judge validly designated a district court judge “presents a mere matter of statutory construction, for the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district cannot be doubted.”³⁵ No constitutional questions were addressed in *McDowell* because the designation process “involves no trespass upon the executive power of appointment. . . . District Courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is absolutely to the control of Congress.”³⁶ The Court in *Lamar v. United States* similarly dismissed a constitutional challenge to the Chief Justice’s designation authority with respect to district court judges.³⁷ In a one-sentence analysis, the Court rejected the defendant’s argument that the designation violated the Appointments Clause and declared “merely to state [such argument] suffices to demonstrate its absolute unsoundness.”³⁸

The few courts that have addressed the designation of FISA judges also have upheld the constitutionality of this process. In *United States v. Cavanagh*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) rejected an argument that the FISC violates the Appointments Clause because judges are designated by the Chief Justice rather than appointed by the President with Senate confirmation.³⁹ The Ninth Circuit believed this argument was foreclosed by *Lamar v. United States*, which had upheld the temporary assignment of district court judges by the Chief Justice. The court stated that there was “substantial precedent for the temporary assignment of lower federal judges by the Chief Justice to serve on specialized courts.”⁴⁰ Similarly, district courts, in upholding the FISA designation process, have noted that FISA judges, though term

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the [Commerce Court] in the hands of one man, the Chief Justice of the Supreme Court,” but this view did not prevail. 45 Cong. Rec. 7347 (1910) (statement of Sen. LaFollette).

³³ See, e.g., the Emergency Court of Appeals (56 Stat. 23 (1942)) (operated from 1942 to 1961, see Order of Chief Justice Albert B. Maris, 299 F.2d 1, 20 (1961)); the Temporary Emergency Court of Appeals (85 Stat. 743, 748 (1971)) (operated from 1971 to 1992, see P.L. 105-572 (1992)); the Judicial Panel on Multidistrict Litigation (82 Stat. 109 (1968)); the Special Division of the District of Columbia Circuit (92 Stat. 1824, 1873 (1978)); the Alien Terrorist Removal Court (8 U.S.C. §1532).

³⁴ See, e.g., 28 U.S.C. §291(b) (chief judges of circuit courts can assign other circuit judges to sit on district courts within the circuit); 28 U.S.C. §292(a)-(b) (chief judges of circuit courts may move district court judges up to the appeals court within the circuit, or move court judges to any other district court within the circuit).

³⁵ *McDowell v. United States*, 159 U.S. 596, 598 (1895) (referencing 16 Stat. 494 (1871)).

³⁶ *Id.* at 598-99.

³⁷ *Lamar v. United States*, 241 U.S. 103 (1916) (referencing 38 Stat. 203 (1913)). See also *Donegan v. Dyson*, 269 U.S. 49, 54 (1925) (resolving authority of the Chief Justice to make a designation of a former Commerce Court judge based on statutory interpretation of Judicial Code as amended (42 Stat. 837 (1922)). Similarly, in *United States v. Claiborne*, 870 F.2d 1463, 1468 (9th Cir. 1989), the court dismissed a challenge to the Chief Justice’s authority to designate district court judges to sit on district courts in a different circuit based on a statutory interpretation of 28 U.S.C. §46(b), 291(a).

³⁸ *Lamar*, 241 U.S. at 118.

³⁹ *United States v. Cavanagh*, 807 F.2d 787, 792 (9th Cir. 1987).

⁴⁰ *Id.*

limited, are not distinguishable from other federal judges who are designated to temporarily serve on other courts.⁴¹

Proposals to Alter the Selecting Authority of FISA Judges

As mentioned above, the central issue that may be raised by the various proposals that seek to alter who selects FISA judges is whether designation by certain individuals within the different branches of government would be constitutionally permissible. The FISA Judge Selection Reform Act (S. 1460), for example, would maintain designation authority within the judicial branch, but it would disperse the selection process for the FISC between the 13 chief judges of the circuit courts and the Chief Justice.⁴² Under the proposal, the number of FISC judges would increase from 11 to 13, with one designated from each judicial circuit.⁴³ The Chief Justice would be directed to designate to the FISC the district court judge proposed by the chief judge of the circuit from which a vacancy arises. If the Chief Justice does not designate the first proposed district court judge, the chief judge of the circuit court would propose two other district court judges, one of whom the Chief Justice must designate.⁴⁴ For the FISA Court of Review, S. 1460 would require that at least five associate justices of the Supreme Court concur in the Chief Justice's designation. Although chief judges of the circuit courts and associate justices of the Supreme Court would have a role in the designation process, the Chief Justice would still be charged with the final act of designating a judge to the FISA courts under this proposal.⁴⁵

⁴¹ See, e.g., *In re Kevork*, 634 F. Supp. at 1014 (observing that “[f]ederal judges often serve on brief temporary assignments to fulfill the responsibilities of the Judicial Branch, and there is substantial precedent for specialized courts such as the FISC”); *Megahey*, 553 F. Supp. at 1197 (addressing an Article III challenge to the FISC by noting that “FISC judges do not differ from other federal judges who sit from time to time when the need arises on courts other than that to which they are appointed”); see also *United States v. Falvey*, 540 F. Supp. 1306, 1313 n.16 (E.D.N.Y. 1982).

⁴² The FISA Judge Selection Reform Act, S. 1460, 113th Cong. (1st Sess. 2013).

⁴³ To implement the changes, the Chief Justice would designate the two new judges for the FISC: one district court judge from the District of Columbia circuit and one district court judge from the Federal circuit.

⁴⁴ Requiring the Chief Justice to appoint the individual recommended by the relevant chief judge of a circuit court could arguably raise constitutional concerns similar to those that are potentially implicated when Congress requires the President to appoint an individual from a list provided by congressional leadership. Although no court has squarely addressed the issue, jurisprudence suggests that requiring the President to make an appointment in this manner could be viewed by the courts as an enhancement of congressional power and possibly an invalid effort by Congress to involve itself in the process of selecting presidential appointees. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *Wash. Airports Auth. v. Noise Abatement Citizens*, 501 U.S. 252 (1991). It is unclear if this constitutional concern would extend to a measure that would similarly constrain the Chief Justice's selection authority, given that Congress would not be involved in the selection process of FISA judges and the chief judge making the recommendation has been appointed separately by the President with the advice and consent of the Senate.

⁴⁵ However, others have opined that the chief judges of the circuit courts or the associate justices of Supreme Court should have the authority to directly designate a judge to the surveillance court. See Editorial, *More Independence for the FISA Court*, NY TIMES, July 29, 2013, at A16 (“One idea worth considering ... is for each of the chief judges of the federal appeals courts to select one judge for the surveillance court. ... A further step might be to require the chief judges' choices to be submitted for approval to a board consisting of members of Congress with experience in intelligence matters and experts with experience in protecting civil liberties.”). See also *Liberty and Security in a Changing World: Report and Recommendations of the President's Group on Intelligence and Communications Technologies*, at 207-08 (December 12, 2013), available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

With respect to authorizing others within the judicial branch to designate the FISA judges, the limited judicial precedent available would appear to indicate that such an arrangement could pass constitutional muster. Turning to the decision in *McDowell*, discussed above, the Court suggested that it is “absolutely to the control of Congress” how and where a judge may exercise jurisdiction.⁴⁶ The *McDowell* Court further declared: “the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district cannot be doubted.”⁴⁷ This principle seems premised upon Congress’s power to establish the courts and the absence of a constitutional provision that restricts the authority of a “District Judge to any particular territorial limit.”⁴⁸ Based on these declarations, a reviewing court may conclude that nothing expressly precludes Congress from vesting chief judges with broad authority to designate a judge from within their circuits to serve on the FISA courts. However, the *McDowell* holding was based on an 1871 statute⁴⁹ that seems to be a precursor to the modern-day statutes that limit a chief judge’s designation authority.⁵⁰ Given that Congress has consistently chosen to regulate chief judges in this manner, it is conceivable that a reviewing court could view *McDowell* under a narrow lens and find insufficient support for providing chief judges with broader designation authority.⁵¹

Other proposals would shift authority to designate FISA court judges to the President. For example, the Presidential Appointment of FISA Court Judges Act (H.R. 2761) would authorize the President, by and with the advice and consent of the Senate, to “designate” judges for both the FISC and FISA Court of Review.⁵² This type of proposal could be viewed as the equivalent of requiring, and constituting, a second constitutional appointment,⁵³ notwithstanding the use of the

⁴⁶ *McDowell*, 159 U.S. at 598-99.

⁴⁷ *Id.* at 598.

⁴⁸ *Id.*

⁴⁹ Rev. Stat. §596; 16 Stat. 494 (1871) (“It shall be the duty of every Circuit Judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section 591, the District Judge of any judicial district within his circuit to hold a District or Circuit Court in the place or aid of any other District Judge within the same Circuit.”).

⁵⁰ *E.g.*, 28 U.S.C. §§291(b), 292(a)-(b), 294(c).

⁵¹ *See also supra* note 21, at 12-13. Addressing proposals to alter the selection of FISA judges, the report from the judiciary stated:

[P]roposals to disperse the selection authority among the associate justices of the Supreme Court or chief judges of the federal circuits ignore the Chief Justice’s unique role in the Judicial Branch. The Chief Justice is the President of the Judicial Conference of the United States, which includes the responsibility to assign federal judges across the country to the various Conference committees and other tasks, including service on special courts such as the Judicial Panel on Multidistrict Litigation. The Chief Justice is therefore uniquely positioned, with the assistance of the Director of the Administrative Office of the United States Courts, to review the federal judiciary and select qualified judges for additional work on the FISC or the Court of the Review.

See generally James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the “Court of Law Requirement*, 107 NW. U. L. REV. 1125, 1158 (2013) (discussing shift to Chief Justice based designations).

⁵² Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (1st Sess. 2013). As with the current process, judges designated for the FISC would be chosen from existing district court judges and judges for the FISA Court of Review would be chosen from existing district court and circuit court judges. They would complete their terms pursuant to current law—that is, one term of seven years.

⁵³ Notably, there are two significant examples of positions where the statute provides for “presidential designation with the advice and consent of the Senate.” Neither of these positions has been challenged on constitutional grounds due to this statutory language, and individuals nominated to these positions have undergone the traditional appointment and confirmation process. *See* 12 U.S.C. §242 (of the members appointed to Board of Governors for the Federal Reserve System, the Chairman and Vice Chairmen are to be “designated” by the President with Senate confirmation); *see also* (continued...)

term “designate” rather than “appoint.” Such an arrangement would abide by the strictures of the Appointments Clause.⁵⁴ However, a separate constitutional appointment could call into question the FISA courts’ status as Article III courts. Whereas judges appointed to Article III courts must have life tenure,⁵⁵ FISA judges are appointed to seven-year terms. Based on available precedent,⁵⁶ however, it would appear that a reviewing court could reasonably construe that life tenure protects a judge’s overall position on the federal judiciary and not the particular court to which he is appointed.⁵⁷ Just as courts have found that judges designated to serve on other special judicial panels for a finite period do not “lose their Article III status,”⁵⁸ so too a reviewing court may determine that a federal judge, first appointed to a district or circuit court, does not lose his overall Article III status or its accompanying protections if separately appointed to serve on the FISA courts for a fixed term.⁵⁹

In contrast, a proposal that would vest authority in the President alone to select an existing federal judge to serve on the FISA courts,⁶⁰ could arguably raise separation-of-powers concerns on grounds that the exercise of such authority would constitute executive encroachment upon the province of the judiciary that could undermine judicial independence.⁶¹ However, the Court in

(...continued)

12 U.S.C. §1812 (regarding “designation” of Chair and Vice Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation).

⁵⁴ Alternatively, a court may view a presidential “designation” as legally distinct from an “appointment,” just as the Court in *Weiss* determined that Congress did not intend a second appointment when it used the terms “detail” and “assign” rather than “appointment” in the statute. If a designation is treated as legally distinct and the Senate alone approves of the President’s judicial designee, this may be viewed as a legislative act because it alters the “legal rights, duties, and relations of persons ... all outside the Legislative Branch.” The Supreme Court has held that such acts must satisfy the bicameralism and presentment requirements of the Constitution. *I.N.S. v. Chadha*, 462 U.S. 919, 958 (1983). However, the concerns expressed in *Chadha* may not be applicable if a court were to consider the proposed designation the equivalent of a constitutional appointment, or a *de minimis* intrusion of separation of powers.

⁵⁵ U.S. Const. art. III, §1. *See Stern v. Marshall*, 131 S.Ct. 2594 (2011) (holding that bankruptcy court was not established under Article III of the Constitution because its judges are not subject to the constitutional assurances of independence and declaring “Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article.” *Id.* at 2620).

⁵⁶ *See Glidden Co. v. Zdanok*, 370 U.S. 530, 540-41 (1962) (“[T]he constitutional quality of tenure and compensation extended [to judges] at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed). *See also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 864 (2006).

⁵⁷ *But see* Calabresi & Lindgren, *supra* note 56, at 865 (noting that another plausible interpretation of Article III is that it “requires life tenure to be guaranteed to Supreme Court Justices, as well as to lower federal judges, in distinct capacities”).

⁵⁸ *In re Kevork*, 634 F. Supp. at 1014 (“The defendants’ contentions that because of their limited term on the FISA court, these judges lose their Article III status, has no merit.”); *Megahey*, 553 F. Supp. at 1197.

⁵⁹ For example, individuals who are recess appointed to Article III courts are still considered to be legitimate Article III judges even though the Recess Appointments Clause, U.S. Const. art. II, §2, cl. 3, restricts their service until the end of the Senate’s next session. *See, e.g., United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1984) (en banc) (“A recess appointee lacks life tenure and is not protected from salary diminution. As a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed. ... We must therefore view the recess appointee not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of [A]rticle III.”).

⁶⁰ Under the Appointments Clause, Congress “may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone....” U.S. Const., art. II, §2, cl. 2.

⁶¹ *N. Pipeline Const. Co.*, 458 U.S. at 58 (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.”).

Mistretta v. United States concluded that the separation-of-powers doctrine does not preclude the President from appointing judges to serve on the U.S. Sentencing Commission, an independent agency within the judicial branch performing nonadjudicatory functions.⁶² Even though the President has limited power to remove a judge from the commission,⁶³ the Court concluded that the President “has no power to affect the tenure or compensation of Article III judges ... [nor does he have] power to coerce the judges in the exercise of their judicial duties.”⁶⁴ Similarly, assuming the President may remove a federal judge from serving on the FISA courts before the end of a seven-year term,⁶⁵ the judge would continue to be an Article III judge serving on the district or circuit court to which she was initially appointed.⁶⁶ On the other hand, the judges in *Mistretta* were acting in an extrajudicial capacity and not exercising judicial power,⁶⁷ whereas FISA judges are exercising judicial powers on an Article III court. It is therefore conceivable that a court may conclude that selection of FISA judges by the President alone raises separation-of-powers concerns, if it determines that the President’s power to remove judges from the FISA courts could have a coercive influence and compromise the impartiality of judges as they serve on the FISA courts.

Lastly, there are proposals that would vest designation authority with congressional leadership. The FISA Court Accountability Act (H.R. 2586), for example, would allow both the Chief Justice and congressional leadership to make designations to the FISC and FISA Court of Review.⁶⁸ Generally, these types of proposals would appear to be potentially problematic under the Appointments Clause and general separation-of-powers principles. While Congress has authority to select individuals to serve on entities that aid Congress in its legislative function,⁶⁹ Congress has no authority under the Appointments Clause to directly select appointees that exercise significant authority pursuant to the laws of the United States.⁷⁰ Secondly, congressional designations may raise legal concerns under the principles announced in *I.N.S. v. Chadha*.⁷¹ The Court in *Chadha* declared that that legislative acts, which have the “purpose and effect of altering the legal rights, duties, and relations of persons” outside the Legislative Branch, must satisfy the bicameralism and presentment requirements of the Constitution.⁷² Accordingly, congressional

⁶² *Mistretta v. United States*, 488 U.S. 361, 371-412 (1989).

⁶³ The U.S. Sentencing Commission consists of seven voting members. At least three members are to be federal judges, who are appointed by the President with the advice and consent of the Senate. The President may remove members of the commission only for neglect of duty, malfeasance in office, or other good cause. 28 U.S.C. §991(a).

⁶⁴ *Mistretta*, 488 U.S. at 411.

⁶⁵ See *Myers v. United States*, 272 U.S. 52, 122 (“The power of removal is incident to the power of appointment ...”).

⁶⁶ *Mistretta*, 488 U.S. at 360.

⁶⁷ *Id.* at 361.

⁶⁸ With respect to the FISC, H.R. 2586 provides that the Chief Justice would designate three judges, and the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the Majority Leader of the Senate, and the Minority Leader of the Senate would each designate two judges. With respect to the FISA Court of Review, H.R. 2586 would permit the Chief Justice, the Speaker of the House, and the Majority Leader of the Senate to each designate a judge. If the Majority Leader of the Senate is of the same party as the Speaker of the House, the designation would fall to the Minority Leader of the Senate.

⁶⁹ See, e.g., Congressional Award Board (2 U.S.C. §803); Dwight D. Eisenhower Memorial Commission (16 U.S.C. §431 note); Advisory Committee on the Records of Congress (44 U.S.C. §270).

⁷⁰ *Buckley*, 424 U.S. 113-41. The Court held that Congress could not make appointments of individuals who exercise substantial power beyond those “Congress might delegate to one of its own committees” without running afoul of the strictures of the Appointments Clause, which requires those who qualify as “Officers of the United States” to be appointed in a manner prescribed by the Clause. *Id.* at 137-39.

⁷¹ *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

⁷² *Id.* at 958.

designation made to the judiciary by the leadership of each house without the approval of the other, or the President, would seem to implicate the principles established in *Chadha*.

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