COMMENTS

RUBBER-STAMPING: LEGISLATIVE, EXECUTIVE, AND JUDICIAL RESPONSES TO CRITIQUES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT ONE YEAR AFTER THE 2013 NSA LEAKS

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INTRODUCTION

> The Constitutional system of checks and balances has not adequately controlled intelligence activities. Until recently the Executive branch has neither delineated the scope of permissible activities nor established procedures for supervising intelligence agencies. Congress has failed to exercise sufficient oversight, seldom questioning the use to which its [appropriations] were being put. Most domestic intelligence issues have not reached the courts, and in those cases when they have reached the courts, the judiciary has been reluctant to grapple with them.
>
> —Church Committee Reports, 1976[1]

In the summer of 2013, the most expansive and comprehensive system of American foreign and domestic surveillance programs was propelled into the public spotlight by the revelations and disclosures of a National Security Agency (NSA) contractor named Edward Snowden. Snowden brought the constitutional implications of the programs to the forefront of the American political and social debate, with many politicians calling for a complete overhaul of the intelligence and surveillance programs. At the center of the debate were the Foreign Intelligence Surveillance Act (FISA)[2] and the court that it established, the Foreign Intelligence Surveillance Court (FISC).[3]

On June 5, 2013, *The Guardian* reported that "The National Security Agency is currently collecting the telephone records of millions of U.S. customers of Verizon . . . under a top secret court order issued in April."[4] The Order referred to was the Secondary Order issued by the FISC on April 25, 2013[5] that required that Verizon's Custodian of Records provide the NSA with "telephony metadata" from communications between the United States and abroad and completely within the United States.[6] The

1. INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, FINAL REP. OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, Book II, at 6 (1976) [hereinafter CHURCH COMMITTEE REPORTS].

2. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C. (2006)).

3. *See id.* § 1803.

4. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order?CMP=twt_fd.

5. Foreign Intelligence Surveillance Court (FISC) Secondary Order, BR 13–80, Judge Roger Vinson (Apr. 25, 2013), *available at* http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

6. *Id.* at 2. The Secondary Order stated that telephony metadata included

article immediately sparked fears in the American people by describing how the collection of such data "would allow the NSA to build easily a comprehensive picture of who any individual contacted, how and when, and possibly from where, retrospectively."[7]

A few days after the release of the original *Guardian* article, the source of the documents concerning the NSA surveillance programs was revealed to be twenty-nine-year-old Snowden, a former technical assistant for the Central Intelligence Agency (CIA) and an employee of Booz Allen Hamilton, a NSA defense contractor.[8] Snowden claimed that his motivation behind the leaks was to expose the "surveillance state," with his goal being transparency.[9] He feared that if he had gone through the internal reporting mechanisms, "his efforts 'would have been buried forever,' and he would 'have been discredited and ruined.'"[10]

In the aftermath of the leaks that shocked both the American and global conscience,[11] numerous reforms were proposed in both the U.S. Senate and House of Representatives with the goal of gaining control over the surveillance programs through legislative amendments to FISA. The

"comprehensive communications routing information, including but not limited to session identifying information . . . trunk identifier, telephone calling card numbers, and time and duration of call." *Id.* The order specifically stated that telephony metadata did not include the substantive content of any of the communications of the Verizon customers or any personal information from the customers. *Id.*

7. Greenwald, *supra* note 4.

8. *See* Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN, June 9, 2013, http://www.theguardian.com/world/2013/jun/09/ edward-snowden-nsa-whistleblower-surveillance. Snowden never actually worked for the American government.

9. Barton Gellman & Jerry Markon, *Edward Snowden Says Motive Behind Leaks Was to Expose 'Surveillance State'*, WASH. POST, June 9, 2013, http://www.washingtonpost.com/politics/edward-snowden-says-motive-behind-leaks-was-to-expose-surveillance-state/2013/06/09/aa3f0804-d13b-11e2-a73e-826d299ff459_story.html. Edward Snowden included a note with the first set of documents he handed over to the media, stating: "As I advanced and learned the dangerous truth behind the U.S. policies that seek to develop secret, irresistible powers and concentrate them in the hands of an unaccountable few, human weakness haunted me. . . . As I worked in secret to resist them, selfish fear questioned if the stone thrown by a single man could justify the loss of everything he loves. I have come to my answer." *Id.*

10. James Risen, *Snowden Says He Took No Secret Files to Russia*, N.Y. TIMES, Oct. 17, 2013, http://www.nytimes.com/2013/10/18/world/snowden-says-he-took-no-secret-files-to-russia.html?hp&_r=0%20.

11. For a far-reaching chronicling of the Snowden NSA disclosures, see *Catalog of the Snowden Revelations*, LAWFARE, http://www.lawfareblog.com/catalog-of-the-snowden-revelations/#at_pco=tcb-1.0&at_tot=5&at_ab=-&at_pos=1 (last visited May 9, 2014); *Foreign Intelligence Surveillance Act: 2013 Leaks and Declassifications*, LAWFARE (Oct. 1, 2013, 4:13 PM), http://www.lawfareblog.com/wiki/nsa-papers/#.Uwf4IvldU6Y.

amendments were structured to change the way the NSA and the other intelligence agencies conducted surveillance, as well as the structure of the FISC. The proposed reforms attempted to achieve greater oversight of the intelligence agencies in conducting their surveillance and to reel in what the media portrayed as the "kangaroo court,"[12] known as the FISC. In the midst of the proposed reforms, the House of Representatives narrowly voted against ending the blanket collection of records under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[13]

A number of modest proposals to amend FISA were introduced in Congress in the first few months following the Snowden leaks, with some calling for new procedures to appoint the FISC judges,[14] some calling for the declassification of FISC orders and opinions,[15] and others pushing for the inclusion of a privacy advocate before the FISC proceedings.[16] The Obama Administration also recommended its own reforms.[17] At the

12. Spencer Ackerman, *FISA Chief Judge Defends Integrity of Court over Verizon Records Collection*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/fisa-court-judge-verizon-records-surveillance (quoting former National Security Agency (NSA) analyst Russell Tice).

13. *See* 159 CONG. REC. H5023–29 (daily ed. July 24, 2013). The Amendment, proposed by Rep. Amash, R-Mich., failed by a vote of 205–207.

14. *See, e.g.*, FISA Court Accountability Act, H.R. 2586, 113th Cong. (2013) (allowing the FISC judges to be appointed as follows: three appointed by the Chief Justice and two each appointed by the Speaker of the House, the Senate Majority Leader, and the Minority Leaders of the House and Senate; the judges of the FISA Court of Review would be selected by Congress) (proposed by Rep. Cohen, D-Tenn.); Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (2013) (requiring that the FISC judges be nominated by the President and confirmed by the Senate) (proposed by Rep. Schiff, D-Cal.).

15. *See, e.g.*, House Ending Secret Law Act, H.R. 2475, 113th Cong. (2013) (requiring the Attorney General to declassify significant FISC opinions) (proposed by Reps. Schiff, D-Cal., & Rokita, R-Ind.); Senate Ending Secret Law Act, S. 1130, 113th Cong. (2013) (same) (proposed by Sen. Merkley, D-Or.). Senator Merkley proposed very similar legislation in December 2012 during the debate over the reauthorization of the FISA Amendments Act of 2008; the Senate failed to pass the amendment. *See* Press Release, Sen. Jeff Merkley, Merkley: We Must Put an End to "Secret Law" (Dec. 27, 2012), *available at* http://www.merkley.senate.gov/newsroom/press/release/?id=d4f492e5-1a19-4060-b6aa34acb889577d.

16. *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013) (injecting nongovernmental attorneys into FISC proceedings to participate as Public Interest Advocates) (proposed by Rep. Schiff, D-Cal.).

17. *See* Scott Wilson & Zachary A. Goldfarb, *Obama Announces Proposals to Reform NSA Surveillance*, WASH. POST, Aug. 9, 2013, http://www.washingtonpost.com/politics/obama-to-announce-proposals-to-reform-nsa-surveillance/2013/08/09/ee3d6762-011a-11e3-9711-3708310f6f4d_story.html (discussing how President Obama announced his intentions to work with Congress to include an adversarial voice to the FISC proceedings, to make changes to § 215 of the Uniting and Strengthening America by Providing Appropriate Tools

beginning of August 2013, Senator Richard Blumenthal of Connecticut proposed the most comprehensive legislation intended to substantially overhaul the FISC and its proceedings.[18] Senator Blumenthal's proposed amendments combined many aspects of the prior proposed legislation into two more expansive bills. Additionally, reforms concentrating jointly on the NSA surveillance programs and the proceedings before the FISC were proposed in September and October 2013. These reforms, however, did not address how FISC judges are appointed, but rather focused on the NSA bulk collection methods and the creation of a special advocate to represent privacy interests before the FISC.[19]

As the Legislative Branch was submitting its proposals during the summer and fall of 2013, the other branches and government actors were playing their own parts. President Obama authorized the creation of a new review body to determine what changes needed to be made to the govevernment surveillance programs and to the proceedings and operations of the FISC. As this presidential review was taking place, another independent reviewing body, led by an Executive Branch agency under the

Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), and to create a panel of outsiders to review the surveillance programs).

18. *See* Press Release, Sen. Richard Blumenthal, Blumenthal Unveils Major Legislation to Reform FISA Courts (Aug. 1, 2013), *available at* http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-unveils-major-legislation-to-reform-fisa-courts.

19. *See, e.g.*, Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013) (prohibiting bulk collection of Americans' records and installing a constitutional advocate to argue before the FISC in significant cases) (proposed by Sens. Wyden, D-Or., Udall, D-Colo., Blumenthal, D-Conn., & Paul, R-Ky.); Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and Online Monitoring Act (USA FREEDOM Act), H.R. 3361, 113th Cong. (2013) (ending the dragnet collection of phone records under the USA PATRIOT Act and providing for the creation of a Special Advocate) (proposed by Rep. Sensenbrenner, R-Wis., & Sen. Leahy, D-Vt.). Interestingly, Representative Sensenbrenner was one of the co-authors of the USA PATRIOT Act in 2001. *See* Dan Roberts, *Patriot Act Author Prepares Bill to Put NSA Bulk Collection 'Out of Business'*, THE GUARDIAN, Oct. 10, 2013, http://www.theguardian.com/world/2013/oct/10/nsa-surveillance-patriot-act-author-bill. On October 31, 2013, the Senate Intelligence Committee approved, by a vote of 11–4, the FISA Improvements Act, which, among other provisions, would prohibit the collection of bulk communication records and the bulk collection of the content of communications, and would prohibit the review of bulk communication records unless there is reasonable articulable suspicion that an association with international terrorism exists. *See* S. 1631, 113th Cong. (2013) (proposed by Sen. Feinstein, D-Cal.); *see also* Press Release, Sen. Dianne Feinstein, Senate Intelligence Committee Approves FISA Improvements Act (Oct. 31, 2013), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=3aa4ed70-e80b-4c2b-afd6-dc2e5bc75a7b. The Act would also allow the FISC to designate amicus curiae "to provide independent perspectives and assist the court in reviewing matters that present a novel or significant interpretation of the law." *Id.*

auspices of Congress, was appraising the reform proposals and making its own recommendations. In the midst of these reviews, members of the judiciary gave their own perspective on the reforms and the implications for the functioning of the FISC. By the end of 2013 and the beginning of 2014, President Obama, after assessing the reviewing bodies' conclusions, was prepared to offer the Executive Branch's own initiative to address the best way to curtail the government surveillance programs and reform the FISC.

Part I of this Comment provides background on the history of FISA and its subsequent amendments. Part II examines the criticism of the FISC and concludes that the FISC is not simply a rubber stamp that allows the American government to spy on its own citizens or citizens from around the world. Part III then takes a deeper look into some of the reforms that were proposed by the Legislative Branch following the leaks, with particular emphasis on the bills introduced by Senator Richard Blumenthal,[20] and discusses some of the drawbacks of such reforms. Part IV analyzes the President's Review Group Report on the reform proposals, which was released in December 2013. Part V then evaluates the Privacy and Civil Liberties Oversight Board's January 2014 independent review of the surveillance programs. Part VI investigates the role of the Judicial Branch in the saga by considering its practical thoughts on reforming the FISC. Part VII then questions where we stand with the reforms to the government surveillance programs and the FISC by examining President Obama's speech from January 2014. Finally, Part VIII concludes by suggesting that, although reforming FISA and the FISC are potentially viable methods for curtailing the extent of government surveillance, the proposed reforms may not be the perfect means of doing so and it is unclear in which direction the government will proceed.

An ongoing, and likely larger and more well-known, debate on this topic concerns the actual legality (or illegality) of the government surveillance programs. Although the extent of this aspect of the NSA controversy is beyond the scope of this Comment, it is important to understand that, as it currently stands, the NSA surveillance programs have been declared illegal by one district court[21] and legal by another district court.[22] It is yet to be

20. The bills proposed by Senator Blumenthal will be the focus since they were the first all-encompassing reform proposals for the FISC. The more recent reform proposals are more comprehensive and include reforms to the proceedings before the FISC and the authorizations for the NSA surveillance programs under FISA, but they do not contain provisions for reforming the selection of FISC judges. *See supra* note 19 (describing the proposals announced in September and October 2013).

21. *See* Klayman v. Obama, No. 13–0881(RJL), 2013 WL 6598728 at *25 (D.D.C. Dec. 16, 2013). The Honorable Richard J. Leon entered an order "(1) bar[ring] the

seen which one of these post-Snowden interpretations of FISA and Fourth Amendment jurisprudence will dominate this legal arena and whether the Supreme Court will address the controversy.

I. HISTORY OF FISA AND STRUCTURE OF THE FISC[23]

A. The Origins of FISA—Pre-1978

The United States Supreme Court held in 1967 in *Katz v. United States*[24] that the Fourth Amendment provisions concerning unreasonable searches and seizures applied to electronic surveillance, were not limited to physical trespass, and warrantless searches were "per se" unreasonable,[25] overturning prior Supreme Court precedent.[26] The Court explicitly declined to extend its holding to the national security realm.[27]

The *Katz* decision led Congress to enact legislation in 1968 regulating

Government from collecting, as part of the NSA's Bulk Telephony Metadata Program, any telephony metadata associated with [the plaintiffs'] personal Verizon accounts and (2) requir[ing] the Government to destroy any such metadata in its possession that was collected through the bulk collection program." *Id.* Judge Leon, however, "in light of the significant national security interests at stake in this case and the novelty of the constitutional issues," stayed his order pending appeal. *Id.* at *26.

22. *See* American Civil Liberties Union (ACLU) v. Clapper, 959 F.Supp. 2d 724, 757 (S.D.N.Y. 2013). The Honorable William H. Pauley III concluded, in granting the government's motion to dismiss, that "There is no evidence that the Government has used any of the bulk telephony metadata it collected for any purpose other than investigating and disrupting terrorist attacks. . . . [T]he bulk telephony metadata collection program is subject to executive and congressional oversight, as well as continual monitoring by a dedicated group of judges who serve on the [FISC]. . . . For all of these reasons, the NSA's bulk telephony metadata program is lawful." *Id.*

23. This section is not intended to be an exhaustive analysis of all of the mechanisms that contributed to the adoption of FISA and its subsequent amendments. It is also not intended to be a complete examination of all of FISA's provisions or a detailed description of the government surveillance programs. For more comprehensive and thoughtful discussions of FISA's structure, see generally DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS §§ 4:1–19:15 (2d ed. 2012).

24. 389 U.S. 347, 357 (1967).

25. *Id.* at 353 ("[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . . .' [T]he Fourth Amendment protects people—and not simply 'areas.'") (citation omitted).

26. *See* Olmstead v. United States, 277 U.S. 438, 469 (1928) (holding that the use as evidence of private telephone conversations that have been acquired through wiretapping does not violate the Fourth Amendment); Goldman v. United States, 316 U.S. 129 (1942).

27. *Katz*, 389 U.S. at 358, n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

wiretapping and electronic surveillance use in criminal but not national security investigations.[28] Section 2511(3) of the legislation recognized the President's authority "to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, [and] to protect national security information against foreign intelligence activities," as well as the President's power "to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."[29] The first sentence of this provision "covered the President's power to deal with foreign threats to national security," and the second sentence "cover[ed] the President's power to deal with domestic threats to national security."[30]

Two major events provided the impetus for the enactment of FISA: the Supreme Court's decision in *United States v. United States District Court for the Eastern District of Michigan* (*Keith*)[31] in 1972 and the findings of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activites (the Church Committee) in 1976. The Supreme Court addressed the use of electronic surveillance in national security for the first time in *Keith*.[32] In *Keith*, the defendants were involved in a plot to bomb a CIA office in Ann Arbor, Michigan, and during pretrial proceedings, the defendants sought to obtain electronic surveillance information that the government intended to use against them.[33] The government argued that § 2511(3) allowed the President to conduct warrantless domestic surveillance.[34] The Court, however, rejected this argument, stating that the national security provisions of § 2511(3) were "neutral" and "merely provide[d] that [Title III] shall not be interpreted to limit or disturb such power as the President may have under the

28. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510–2522 (2012)). Title III relating to Wiretapping and Electronic Surveillance gave the government the authority to conduct wiretapping for use in criminal investigations.

29. *Id.* § 802, 82 Stat. at 214 (codified at 18 U.S.C. § 2511(3)), *repealed by* FISA, Pub. L. No. 95-511, § 201(c), 92 Stat. 1797.

30. Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 330–31 (2005).

31. 407 U.S. 297 (1972).

32. *Id.*

33. *Id.* at 299–300.

34. *Id.* at 303.

Constitution."[35] Thus, no new powers were conferred on the President through § 2511(3). The Court held that prior judicial approval pursuant to the Fourth Amendment is required for domestic security surveillance.[36]

Though *Keith* only involved domestic security surveillance, the Court made some explicit distinctions between the standards that may be appropriate for different types of surveillance. The Court acknowledged that the Fourth Amendment warrant requirements for domestic security surveillance may be different than for more "ordinary crimes."[37] Additionally, the Court limited its holding to "the domestic aspects of national security," stating that "[w]e have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[38] The Court, therefore, appeared to recognize three levels of surveillance requirements: the strictest procedures for electronic surveillance of ordinary domestic crimes (under Title III), less strict standards for surveillance for domestic threats to national security, and the least strict standards for foreign threats to national security.[39] A warrant application for domestic security purposes could, in turn, "vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection," and authorization for such a warrant could "be made to any member of a specially designated court."[40]

Following the Court's decision in *Keith*, and around the same time as the enactment of FISA, a handful of federal circuit courts addressed the issue of electronic surveillance of foreign powers, with the majority of them finding that such foreign intelligence surveillance constituted an exception to the general warrant requirement.[41]

35. *Id.*

36. *Id.* at 323–24.

37. *Id.* at 322–23.

38. *Id.* at 321–22.

39. *See* Seamon & Gardner, *supra* note 30, at 332.

40. *Keith*, 407 U.S. at 323.

41. *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 912–16 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977), *cert. denied*, 434 U.S. 890 (1977); United States v. Butenko, 494 F.2d 593, 605–06 (3d Cir. 1974), *cert. denied*, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 425–26 (5th Cir. 1973) (relying on the Fifth Circuit's decision in United States v. Clay, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971)), *cert. denied*, 415 U.S. 960 (1974). The U.S. Court of Appeals for the District of Columbia Circuit questioned whether a foreign intelligence exception existed in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). For a more in-depth discussion of these circuit court cases, see Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 803–05 (1989) (stating, in discussing *Zweibon*, that "the depth and force of this bold insinuation that no national security exception should exist provided the executive branch and Congress with a

The second major incident that contributed to the enactment of FISA was the 1976 Report of the Church Committee. The Church Committee, named after its Chairman Frank Church, a Democratic senator from Idaho, was established in the wake of the Watergate scandal. After reviewing forty years of domestic surveillance, the committee concluded that: "Too many people have been spied upon by too many Government agencies and to [sic] much information has beeen [sic] collected. . . . Investigations have been based upon vague standards whose breadth made excessive collection inevitable."[42] Additionally, though the agencies were pressured by the Executive Branch to serve their political objectives, "they also occasionally initiated improper activities and then concealed them from officials whom they had a duty to inform."[43] The report detailed vast domestic surveillance over the prior four decades by the Federal Bureau of Investigation, the CIA, the NSA, the Army, and the Internal Revenue Service.[44] Based upon these findings, the Church Committee "recommended a strict and careful separation of domestic and foreign intelligence gathering."[45]

B. The Foreign Intelligence Surveillance Act of 1978

FISA was the result of a compromise between the branches of government.[46] Until 1978, "no president had ever conceded that the Congress could interpose any set of procedures to confine the constitutional discretion of the president to engage in electronic surveillance to protect the national security."[47] With the Supreme Court's recognition in *Katz* of a limit on warrantless electronic surveillance and the Church Committee's revelations, however, changes had to be made "to assure Americans that past abuses would not be repeated."[48]

FISA authorizes electronic surveillance[49] under two scenarios: without a

substantial basis for reconsidering the state of the law in this area").

42. CHURCH COMMITTEE REPORTS, *supra* note 1, at 5.

43. *Id.*

44. *See* William C. Banks, *Symposium*, *9/11 Five Years On: A Look at the Global Response to Terrorism: The Death of FISA*, 91 MINN. L. REV. 1209, 1226–27 (2007).

45. *Id.* at 1226.

46. *See id.* at 1211.

47. *Id.*

48. *Id.* at 1212.

49. Under the original 1978 Act, "electronic surveillance" encompassed four components: (1) "the acquisition . . . of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person"; (2) "the acquisition . . . of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition

court order and with a court order. FISA grants the President, through the Attorney General, the power to "authorize electronic surveillance without a court order . . . to acquire foreign intelligence information for periods of up to one year."[50] To do so, the Attorney General must certify under oath that the electronic surveillance is done for the purpose of obtaining the content of communications solely between foreign powers or acquiring the technical intelligence from the property of a foreign power.[51] Additionally, the Attorney General must certify that "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party"[52] and the Attorney General must employ minimization procedures[53] designed to prevent or minimize the collection, retention, and dissemination of information "concerning unconsenting United States persons."[54]

The Attorney General is also required to report the minimization procedures and a compliance assessment to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.[55] Moreover, the Attorney General is required to issue a report on a semiannual basis to the Select Committees on Intelligence and the Committee on the Judiciary of the Senate.[56]

Electronic surveillance can also be authorized by the issuance of a court order upon an application to the FISC by a federal officer with the

occurs in the United States"; (3) "the intentional acquisition . . . of the contents of any radio communication . . . if both the sender and all intended recipients are located within the United States"; and (4) "the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication." 50 U.S.C. § 1801(f)(1)–(4) (2006). Each component, besides the second, is defined "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.*

50. *Id.* § 1802(a)(1). "Foreign intelligence information" is defined as information that relates to the ability of the United States to protect itself against "actual or potential attack," "sabotage or international terrorism," or "clandestine intelligence activities" of a foreign power, as well as information that relates to "the national defense or the security" or "the conduct of the foreign affairs" of the United States. *Id.* § 1801(e)(1)–(2).

51. *Id.* § 1802(a)(1)(A)(i)–(ii).

52. *Id.* § 1802(a)(1)(B).

53. *Id.* § 1802(a)(1)(C).

54. *Id.* § 1801(h)(1). *See generally id.* § 1801(h).

55. *Id.* § 1802(a)(1)(C), (a)(2).

56. *Id.* § 1808(a)(1). The report must include (1) the number of applications for and extensions of orders that approved electronic surveillance if "the nature and location of each facility or place at which the electronic surveillance will be directed is unknown," (2) the criminal cases wherein information acquired through electronic surveillance will be used at trial, and (3) the number of approved and denied emergency orders for electronic surveillance. *Id.* § 1808(a)(2)(A)–(C). Emergency orders for electronic surveillance are authorized under § 1805(f).

approval of the Attorney General.[57] An application to the FISC for an order for electronic surveillance must contain, among other requirements, the identity of the target of the surveillance, a statement of the facts that justify the belief that the target is a foreign power or agent of a foreign power, a statement of the minimization procedures, a description of the information sought and the communications that are the subject of the surveillance, and a certification that the information sought is foreign intelligence information and that the acquisition of foreign intelligence information is a significant purpose[58] of the surveillance.[59]

In addition to the FISC, which "hear[s] applications for and grant[s] orders approving electronic surveillance,"[60] FISA also created the Foreign Intelligence Surveillance Court of Review (FISA Court of Review), which has "jurisdiction to review the denial of any application."[61] The FISA Court of Review is composed of three federal district court or court of appeals judges who are designated by the Chief Justice.[62]

C. Major FISA Amendments

1. USA PATRIOT Act of 2001

The first major amendment to FISA came in 2001, in the wake of the events of September 11, with the passing of the USA PATRIOT Act.[63] The most significant provision changed the language of § 1804(a)(7)(B), formerly requiring the government to show that "the purpose" of the surveillance was to obtain foreign intelligence information, to now requiring that the government only show that "a significant purpose" of the surveillance was to obtain foreign intelligence information.[64] Validated by the FISA Court of Review,[65] the change in language essentially dismantled

57. *See generally id.* §§ 1804–1805.

58. *See infra* note 64 (discussing the "significant purpose" requirement under the USA PATRIOT Act).

59. *See generally* § 1804(a)(1)–(11) (enumerating the required elements for an application for electronic surveillance).

60. *Id.* § 1803(a). For a discussion of the structure of the FISC, see *infra* Part III.B (comparing the current makeup of the FISC to Senator Blumenthal's proposal under the FISA Judge Selection Reform Act).

61. *Id.* § 1803(b).

62. *Id.*

63. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

64. *See* 50 U.S.C. § 1804(a)(7)(B). For an extensive analysis of the "significant purpose" requirement, see Scott J. Glick, *FISA's Significant Purpose Requirement and the Government's Ability to Protect National Security*, 1 HARV. NAT'L SEC. J. 87, 102–15 (2010).

65. In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002), *cert. denied*, ACLU v. United States, 538 U.S. 920 (2003) (denying a motion by the ACLU for leave to intervene to file a

the "wall" between law enforcement officials and intelligence officials, which was "designed to protect against using the secretive foreign intelligence collection process in order to build a criminal case."[66]

2. Protect America Act of 2007

The next substantial amendment to FISA came in 2007 when Congress passed the Protect America Act.[67] Section 105A of the Act established that "Nothing in the definition of electronic surveillance . . . shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States."[68] Section 105B authorized the Attorney General and the Director of National Intelligence (DNI) to obtain foreign intelligence information "concerning persons reasonably believed to be outside the United States" for up to one year.[69] The Protect America Act was considered quite controversial and was thus limited to a six-month timeframe, which expired in February 2008.[70]

3. FISA Amendments Act of 2008

After the expiration of the Protect America Act, Congress passed the FISA Amendments Act of 2008 in July 2008.[71] Section 702 grants the

petition for writ of certiorari and denying a motion of the Bar Association of San Francisco for leave to file a brief as amicus curiae). Professor Banks describes the FISA Court of Review decision as "gutt[ing] th[e] central premise of FISA when it upheld the [Department of Justice's] new procedures permitting the use of FISA even when the primary objective of the planned surveillance is to find evidence to support a prosecution." Banks, *supra* note 44, at 1213.

66. Banks, *supra* note 44, at 1265. For further discussion of the FISA "wall," see William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147 (2003); David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487 (2006).

67. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007). Congress amended FISA "based on the Bush Administration's arguments that FISA was inadequate to fight the war on terror." Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 295 (2009). The Protect America Act of 2007 and the FISA Amendments Act of 2008, *see* discussion *infra* Part I.C.3, grew out of the realization that the Bush Administration, following the events of September 11, 2001, had granted the NSA the authority to secretly wiretap Americans without FISA warrants. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com /2005/12/16/politics/16program.html. The wiretapping was known as the Terrorist Surveillance Program (TSP). *See* Blum, *supra*, at 269.

68. Protect America Act of 2007, § 105A (codified at 50 U.S.C. § 1805(a)).

69. *Id.* § 105B(a).

70. *See* Blum, *supra* note 67, at 297.

71. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as

Attorney General and the DNI the authority to approve "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[72] An authorization under § 702 is subject to a set of limitations.[73] Before implementing an authorization under § 702(a), the Attorney General and the DNI, must provide the FISC with a written certification and affidavits indicating that, among other requirements, the procedures for the targeting are designed to ensure that only persons reasonably believed to be outside the United States are targeted and to prevent the communications of persons in the United States from being obtained.[74] The FISC then reviews the certification within thirty days after its submission and can then make amendments to the certification[75] before granting an order approving the use of the procedures.[76]

II. Criticisms of the FISC

FISA is a complicated statute that grants the government substantial authority to conduct its surveillance programs. After the Snowden leaks revealed the extent of this authority, the FISC, once a rather secretive court, was propelled into the open and, due to its power to grant government surveillance orders, became one of the scapegoats for the perceived illegal and far-reaching authority that the government possesses under FISA.

Many criticisms of the FISC emerged in the aftermath of the leaks: that the court is non-adversarial, that there is a lack of transparency in its process and its decisions, and that the judge selection process is flawed. All of these critiques, however, stem from one overarching public perception of the court—that it is simply a pawn for constitutional abuses by the government through its surveillance programs and intelligence agencies.

amended in scattered sections of 50 U.S.C.).

72. 50 U.S.C. § 1881a(a) (Supp. V 2012).

73. The acquisition:

(1) may not intentionally target any person known at the time of acquisition to be located in the United States; (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States; (3) may not intentionally target a United States person reasonably believed to be located outside the United States; (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States." *Id.* § 1881a(b).

74. *Id.* § 1881a(g)(1)(A), (2)(A)(i).

75. *Id.* § 1881a(i)(1)(A)–(C).

76. *Id.* § 1881a(i)(3)(A).

The rhetoric proceeds in this way: that the FISC is "a radical perversion of the judicial process,"[77] that the court "rubber-stamp[s] virtually anything and everything the government wants to do" in a "mindless" fashion,[78] that the court "plays no role whatsoever in reviewing whether the procedures it approved are actually complied with,"[79] that the "entire process is a fig leaf, 'oversight' in name only,"[80] that the court is "broken,"[81] and that what it does "is not adjudication, but approval."[82]

Are such characterizations of the FISC justified? At first glance, it may appear that they are—as widely available statistics about the FISC's approval rate suggest. The court has denied only eleven of 20,000 government applications in its thirty-four year history, all in the past decade.[83] Over the last couple of years especially, it would seem that the FISC almost blindly approves government applications for electronic surveillance. In 2012, of 1,789 electronic surveillance applications, only one was withdrawn by the government, and the FISC did not deny any applications.[84] Similarly, in 2011, of 1,676 applications to conduct electronic surveillance, the government only withdrew two, and the FISC again did not deny any applications.[85]

Even though the media commonly uses these numbers to portray the FISC as a rubber stamp, these statistics do not tell the whole story. In fact, the court did make modifications to forty electronic surveillance

77. Glenn Greenwald, *The Bad Joke Called 'the FISA Court' Shows How a 'Drone Court' Would Work*, THE GUARDIAN, May 3, 2013, http://www.theguardian.com/commentisfree/2013/may/03/fisa-court-rubber-stamp-drones.

78. *Id.*

79. Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, THE GUARDIAN, June 18, 2013, http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy.

80. *Id.*

81. Senator Richard Blumenthal, *FISA Court Secrecy Must End*, POLITICO.COM, July 14, 2013, http://www.politico.com/story/2013/07/fisa-court-process-must-be-unveiled-94127.html.

82. Dan Roberts, *US Must Fix Secret FISA Courts, Says Top Judge Who Granted Surveillance Orders*, THE GUARDIAN, July 9, 2013, http://www.theguardian.com/law/2013/jul/09/fisa-courts-judge-nsa-surveillance (quoting the Honorable James Robertson, a retired judge for the U.S. Court of Appeals for the District of Columbia Circuit who sat on the FISC from 2002 to 2005).

83. *See* Greenwald, *supra* note 77.

84. *See* 2012 FISA Annual Report to Congress, Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, to Harry Reid, Sen. Majority Leader (Apr. 30, 2013), *available at* http://www.fas.org/irp/agency/doj/fisa/2012rept.pdf.

85. *See* 2011 FISA Annual Report to Congress, Letter from Ronald Weich, Assistant Attorney General, to Joseph R. Biden, Jr., Sen. Pres. (Apr. 30, 2012), *available at* http://www.fas.org/irp/agency/doj/fisa/2011rept.pdf.

applications in 2012 and to thirty applications in 2011.[86] Additionally, even though the court did not deny any of the 212 government applications for business records in 2012, the court made modifications to 200 of them; similarly, of the 205 applications for business records in 2011, of which the court denied none, the court made modifications to 176.[87] The character and substance of these modifications are not included in the press reports, however.

Even more enlightening to the process of FISC approval of government applications for electronic surveillance is an unclassified letter from the Honorable Reggie B. Walton, presiding judge of the FISC from February 2013 to May 2014, to Senator Patrick J. Leahy, the Chairman of the Senate Judiciary Committee, dated July 29, 2013, sent in response to inquiries made by Senator Leahy concerning the court's operations.[88] The first question posed to the court concerned the court's process for considering applications for orders of electronic surveillance (Title I), orders for access to business records (Title V), and submissions under § 702 of FISA.[89] Judge Walton described in detail the process that applications go through before they are approved. After a proposed application is submitted to the FISC, a member of the court's legal staff reviews it to determine "whether it meets the legal requirements under the statute"; as part of this determination, a court attorney will routinely seek additional information or raise concerns with the government.[90] A court attorney then provides a written analysis to the judge, including "an identification of any weaknesses, flaws, or other concerns."[91] The judge then reviews the application and the analysis and makes a preliminary determination, including whether to approve the application, whether to impose conditions on approval, whether additional information is needed, and whether a hearing should be held to discuss the application.[92] The government will then submit a final application upon which the judge makes a final determination, sometimes including a reporting requirement in a Supplemental Order.[93] If the judge decides to decline a final application,

86. *See* 2012 and 2011 FISA Annual Reports to Congress, *supra* notes 84–85.

87. *See id.*

88. *See* Letter from the Honorable Reggie B. Walton, Presiding Judge of the FISC, to Patrick J. Leahy, Chairman of the Sen. Comm. on the Judiciary (July 29, 2013) [hereinafter Walton July 29, 2013 Letter], *available at* http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf.

89. *Id.* at 1.

90. *Id.* at 2.

91. *Id.*

92. *Id.* at 2–3.

93. *Id.* at 3.

the court prepares a statement explaining its reasoning.[94] Thereafter, the government may decide to withdraw a final application before the application is declined; the government may also decide not to submit a final application if it knows that the judge is likely to decline the application.[95]

Judge Walton then provided crucial insight concerning the 99% approval rate that is touted in the media. He stated that this number represents "only the number of *final* applications submitted to and acted on by the Court. *These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely*, often after an inclination that a judge would not approve them."[96] In a footnote, Judge Walton then made a comparison to applications under the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), pointing out that the approval rate of wiretap applications under Title III is actually higher than the approval rate for FISA applications: only five out of 13,593 were declined from 2008–2012.[97]

FISA Title V applications for bulk collection of phone call metadata records follow the same process as described, but it is "more exacting," with both the court attorney and the judge spending more time reviewing such applications than individual applications under Title I.[98] For § 702 applications (relating to the targeting of persons reasonably believed to be located outside the United States other than United States persons), the judge must determine whether the applications meet the targeting and

94. *Id.*

95. *Id.*

96. *Id.* (second emphasis added).

97. *Id.* at n.6 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT 2012, TABLE 7, http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2012/Table7.pdf). Commentators disagree over the relevance of this comparison of Title III warrant applications to FISA applications. *Compare* Joel Brenner, *The Data on FISA Warrants*, LAWFARE (Oct. 17, 2013, 6:08 PM), http://www.lawfareblog.com/2013/10/the-data-on-fisa-warrants/ ("[T]he FISA Court looks tough when compared to the way federal district courts handle wiretap applications under Title III. . . . Even if you stick with the misleading 99 percent figure [for FISA application approval], the approval rate for Title III wiretaps is higher. . . . But you won't find [this comparison] in the New York Times, the Wall Street Journal, the Washington Post, or any other news outlet. Bashing the FISA court is too much fun to let numbers get in the way."), *with* Stephen Vladeck, *Two FISA Data Questions for Joel Brenner*, LAWFARE (Oct. 18, 2013, 7:35 AM), http://www.lawfareblog.com/2013/10/two-fisa-data-questions-for-joel-brenner/ ("How many of the 'ordinary' warrants issued by federal district courts *ex parte* and *in camera* are subsequently subjected to vigorous judicial review (and invalidated) in the context of motions to suppress in criminal cases and/or civil suits for damages for unlawful surveillance? In the FISA context, we know the answer: 0.").

98. Walton July 29, 2013 Letter, *supra* note 88, at 3–4.

minimization requirements of 50 U.S.C. § 1881a(d) and (e) and the requirements of the Fourth Amendment; then the judge approves the application and also issues an opinion in support, as required by the statute.[99]

One critique of the FISC process relates to the orders that the court gives pertaining to the requests for collection from the Attorney General. The critique belabors a very insignificant, and quite misleading, aspect of the orders: that they are very short.[100] Such an argument is deceptive. In the official FISC order to which this critique refers, Judge John D. Bates, in the first sentence of the order, states: "For the reasons stated in the Memorandum Opinion issued contemporaneously herewith."[101] This first sentence expressly states that, alongside the "one-paragraph form order," a complete Memorandum Opinion has also been issued that sets forth the reasoning behind the FISC's decision to approve the government's request. Such a short court order, which accompanies a longer opinion establishing the reasoning of the court, is the standard in the court system and does not speak to any lack of thought or consideration on the part of the FISC judge that this type of critique implies.

The government does not simply come to the FISC with an application for electronic surveillance followed by a judge blindly preparing a form order approving the surveillance. A back-and-forth exchange exists during which the court and the government communicate and the applications are reformulated in order to satisfy the requirements of the judges and FISA. In fact, on October 11, 2013, Judge Walton reported new statistics concerning the applications that are submitted to the FISC, based on new statistics the FISC began collecting in July 2013 on the rate of modifications made to electronic surveillance applications.[102] Between July 1, 2013 and

99. *Id.* at 5; 50 U.S.C. § 1881a(i)(3)(C).

100. *See, e.g.*, Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, THE GUARDIAN, June 18, 2013, http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy ("[T]he [FISC] judge then issues a *simple order* approving those guidelines. The court endorses a *one-paragraph form order* stating that the NSA's process 'contains all the required elements and . . . [the] minimization procedures . . .'are consistent with the requirements of [50 U.S.C. § 1881a(e)] and with the fourth amendment to the Constitution.'") (final brackets in original) (emphases added) (internal quotation marks removed).

101. FISC Order 702(i)–08–01, Judge John D. Bates (Aug. 19, 2010), *available at* http://www.theguardian.com/law/interactive/2013/jun/21/fisa-court-warrant-full-document.

102. *See* Letter from the Honorable Reggie B. Walton, Presiding Judge of the FISC, to Patrick J. Leahy, Chairman of the Sen. Comm. on the Judiciary, at 1 (Oct. 11, 2013) [hereinafter Walton Oct. 11, 2013 Letter], *available at* http://www.uscourts.gov/uscourts/courts/fisc/chairman-leahy-letter-131011.pdf.

September 30, 2013, 24.4% of applications that were submitted to the FISC "ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of Court inquiry or action."[103] Judge Walton believed that the modification rate during this three-month period was typical, but he stated that the FISC would continue to monitor these statistics to determine if it was out of the ordinary.[104] Thus, the over 99% approval rate that the media portrays does not tell the whole story. The statistics that the public sees are misleading and the press uses these numbers to wrongfully portray the FISC as a rubber stamp for the government's desires.[105] Indeed, as would be expected, a number of FISC judges have publicly defended the work of the court.[106] This seems to raise the question: who would know whether

103. *Id.*

104. *Id.*

105. Others dispute that Judge Walton's statistics are significant in proving that the FISC is a legitimate check on the applications that the government submits. *See, e.g.*, Jaikumar Vijayan, *Jury Still out on FISA Court*, COMPUTERWORLD.COM, Oct. 18, 2013, 5:00 PM, http://www.computerworld.com/s/article/9243351/Jury_still_out_on_FISA_court_?source=rss_keyword_edpicks&google_editors_picks=true ("The data alone is practically useless without a deeper sense of the nature of the push back the FISA Court is undertaking. And I, for one, am skeptical that it's as forceful as we might like it to be.") (quoting Professor Stephen Vladeck). *But see* Brenner, *supra* note 97 (Joel Brenner, former Inspector General and Senior Counsel at the NSA, stating, "Those of us with inside knowledge have long known, and publicly said, that the FISA court scrutinizes the government's applications with special care, but the data to prove it have been missing. Now we have them."). *Compare id.*, *with* Vladeck, *supra* note 97 ("[I]n assessing the significance of the 24.4% figure, shouldn't the *nature* of the substantive changes to 'the information provided by the government or the authorities granted' be relevant to any conclusions about what this data tells us re: the meaningfulness of the FISA Court's review?" (quoting Walton Oct. 11, 2013 Letter, *see supra* note 102, at 1)).

106. *See, e.g.*, Spencer Ackerman, *FISA Chief Judge Defends Integrity of Court over Verizon Records Collection*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/fisa-court-judge-verizon-records-surveillance (quoting Judge Walton, stating: "The perception that the court is a rubber stamp is absolutely false. . . . There is a rigorous review process of applications submitted by the executive branch, spearheaded initially by five judicial branch lawyers who are national security experts and then by the judges, to ensure that the court's authorizations comport with what the applicable statutes authorize."); Carrie Johnson, *Ex-FISA Court Judge Reflects: After 9/11, 'Bloodcurdling' Briefings*, NPR.ORG, July 3, 2013, http://www.npr.org/2013/07/11/198329788/fisa-court-judge-reflects-after-sept-11-bloodcurdling-meetings-and-briefings (quoting Judge Lamberth, presiding judge of the FISC from 1995 to 2002, stating: "What I found that bothered me is the notion that the court was a rubber stamp because we're approving so much. . . . We're approving it because it should be approved, because it's valid, because what the government's doing here is the kinds of things we should be doing."); Carol D. Leonnig et al., *Secret-Court Judges Upset at Portrayal of 'Collaboration' With Government*, WASH. POST, June 29, 2013, http://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-

the FISC is a rubber stamp for the government better than the judges that have actually presided over its proceedings? The judges are the experts on FISA and have analyzed, modified, and approved countless applications; they thus would know better than anyone else the extent and degree of FISC approval.

More evidence showing that the FISC is not simply a rubber stamp for the government's surveillance programs can be found in the actual orders and accompanying opinions of the FISC that have been released by the Office of the Director of National Intelligence (ODNI).[107] For example, on September 10, 2013, the ODNI released a series of FISC opinions and orders that were issued between 2008 and 2009. In December 2008, the FISC authorized the government to acquire tangible things pursuant to one of its applications to the FISC.[108] In January 2009, the government notified the FISC that it had been acquiring business records contrary to the corresponding FISC order.[109] Judge Walton subsequently ordered the government to supply the FISC with a brief to aid the court in determining "whether the Orders issued in this docket should be modified or rescinded; whether other remedial steps should be directed; and whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violation of its Orders."[110] The court also required the government to answer a series of questions concerning the noncompliance.[111] In response to the government's subsequent brief to the FISC, the court on a number of occasions rebuked the government for misinterpreting the FISC's orders;[112] for "repeatedly submitting inaccurate

collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8_story.html (quoting Judge Kollar-Kotelly, presiding judge of the FISC from 2002 to 2009, stating, in response to a leaked Inspector's General Report describing her as "amenable" by the government: "I participated in a process of adjudication, not 'coordination' with the executive branch.").

107. *See generally* IC ON THE RECORD, http://icontherecord.tumblr.com/ (last visited May 9, 2014) (providing FISC orders and opinions).

108. FISC Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, No. BR 08–13, Judge Reggie B. Walton, at 1 (Jan. 28, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf.

109. *See id.* at 2.

110. *Id.*

111. *Id.* at 2–4.

112. FISC Order, No. BR 08–13, Judge Reggie B. Walton, at 5 (Mar. 2, 2009), *available at* http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf ("That interpretation of the Court's Orders strains credulity."). *But see* Stewart Baker, *FISA—The Uncanny Valley of Article III*, VOLOKH CONSPIRACY (Sept. 11, 2013, 12:19 AM), http://www.volokh.com/2013/09/11/fisa-uncanny-valley-article-iii/ ("[Judge Walton's] opinion dismisses the possibility that this could possibly be a good-faith

descriptions" of its procedures to the FISC;[113] for preventing, "for more than two years, both the government and the FISC from taking steps to remedy daily violations of the minimization procedures set forth in FISC orders";[114] and for "frequently and systematically violat[ing]" the government's minimization procedures.[115] This noncompliance led the court to "no longer ha[ve] . . . confidence" that the government was fully complying with the FISC's orders.[116] The court, therefore, prohibited the government from accessing the metadata it was collecting until remedial measures had been put in place "to protect the privacy of U.S. person information acquired and retained."[117] Subsequent FISC orders and opinions from later in 2009 show the ongoing concern of the noncompliance within the government, and particularly within the NSA, with the FISC's prior requirements.[118]

These opinions and orders are further evidence that the FISC is not a simple pawn for the government. Not only do they show that the FISC is concerned about, and is not going to tolerate, noncompliance with the government, but they also show how the FISC requires that the government make the requisite changes to meet certain criteria, as mandated by the minimization procedures, to continue conducting its surveillance and using the data the NSA acquires. On the other hand, the declassified opinions demonstrate how the FISC is not able to completely control the government. The opinions make clear how the government has routinely made misrepresentations to the FISC on a number of occasions.

misunderstanding. It's an outrage, he fumes, and efforts to explain it 'strain credulity.' Frankly, if anything strains credulity in this case, it's that line in the opinion.").

113. FISC Order, No. BR 08–13, Judge Reggie B. Walton, supra note 112, at 6.

114. *Id.* at 8–9.

115. *Id.* at 11.

116. *Id.* at 12.

117. *Id.* at 17.

118. *See e.g.*, FISC Supplemental Opinion and Order, No. BR 09–15, Judge Reggie B. Walton (Nov. 5, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Nov%205%202009%20Supplemental%20Opinion%20and%20Order.pdf; FISC Order Regarding Further Compliance Incidents, BR 09–13, Judge Reggie B. Walton (Sept. 25, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Sept%2025%202009%20Order%20Regarding%20Further%20Compliance%20Incidents.pdf; FISC Order, BR 09–06, Judge Reggie B. Walton (June 22, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Jun%2022%202009%20Order.pdf. *See also* FISC Memorandum Opinion, Judge John D. Bates, at 16 n.14 (Oct. 3, 2011), *available at* http://www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf ("The Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.").

This fact, however, does not establish that the FISC is a rubber stamp; it merely exhibits that the FISC cannot be an exhaustive check on the government and the NSA.[119] Such a distinction speaks to the relative oversight capabilities of the FISC, not to the neutrality of the court and its judges.

III. A LEGISLATIVE PROPOSAL

Arguing that the FISC is not a rubber stamp for the government does not mean, however, that the court and the entire process are perfect. Presiding Judge Walton, a strong supporter of the notion that the FISC does not simply do the government's bidding,[120] recognized this fact: "'The FISC is forced to rely upon the accuracy of the information that is provided to the Court.' . . . 'The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders.'"[121] But just because the process is not completely perfect, does that mean that it must be reformed? Do reasonable means exist to make this necessarily secretive process better?

Numerous legislative proposals to reform the structure and process of the FISC were submitted in the months following the Snowden disclosures. On August 1, 2013, Senator Blumenthal introduced two bills that would change both the way the FISC operates and how the judges of the FISC are selected.[122] The two proposed bills were the FISA Court Reform Act of 2013[123] and the FISA Judge Selection Reform Act of 2013.[124]

119. *Compare* Carrie Cordero, *Initial Observations on Newly Declassified FISA Documents*, LAWFARE (Aug. 22, 2013, 12:01 PM), http://www.lawfareblog.com/2013/08/initial-observations-on-newly-declassified-fisa-documents/ (stating that the newly released FISC opinions show "[a] court that had the authority, ability and willingness to the [sic] direct the government to correct its actions. A Court that told the government that it could do better, and insisted that it do so."), *with* Stephen Vladeck, *Carrie Cordero Misses the Point (Again) on FISA Reform*, LAWFARE (Aug. 22, 2013, 9:01 PM), http://www.lawfareblog.com/2013/08/carrie-cordero-misses-the-point-again-on-fisa-reform/ ("[W]hy should we have *any* faith that the FISA Court is in a position to meaningfully review what the government is up to in cases *other than* those in which the government comes clean and admits that it materially misrepresented the NSA's activities to the FISA Court?").

120. *See* Ackerman, *supra* note 106.

121. Carol D. Leonnig, *Court: Ability to Police U.S. Spying Program Limited*, WASH. POST, Aug. 15, 2013, http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html (alteration in original) (quoting Judge Reggie B. Walton).

122. *See* Press Release, Sen. Richard Blumenthal, *supra* note 18. For a discussion of the reasoning behind the selection of Senator Blumenthal's proposals for more in-depth analysis, see *supra* note 20.

123. S. 1467, 113th Cong. (2013).

A. FISA Court Reform Act of 2013

The purpose of the FISA Court Reform Act is "To establish the Office of the Special Advocate to provide advocacy in cases before courts established by [FISA]."[125] The proposed amendment would allow the presiding judge of the FISA Court of Review to appoint a Special Advocate from a list of candidates, which would be submitted by the Privacy and Civil Liberties Oversight Board (PCLOB or the Board).[126] The Special Advocate would be appointed for a five-year term,[127] would not be limited in the number of consecutive terms he or she could serve,[128] and could be removed only for good cause.[129]

The Special Advocate would be tasked with "protect[ing] individual rights by vigorously advocating before the [FISC] . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention."[130] The Special Advocate would review every application to the FISC submitted by the government;[131] would review each FISC decision in "a complete, unredacted form";[132] would participate in any proceedings before the FISC, either by request or if appointed by the FISC;[133] and would be permitted to request reconsideration of a FISC decision and participate in any appeal or review.[134] The Special Advocate would be given the authority to designate an outside counsel who would be allowed to participate in matters before the FISC, the FISA Court of Review, or the Supreme Court,[135] and who would be given access, along with the Special Advocate, to any documents before the court.[136]

124. S. 1460, 113th Cong. (2013).

125. S. 1467 Preamble.

126. *Id.* § 3(b)(2)(A)–(B). The Privacy and Civil Liberties Oversight Board (PCLOB or the Board) is an independent agency within the Executive Branch with the authority "To review and analyze actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties." PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014).

127. S. 1467 § 3(b)(2)(D).

128. *Id.* § 3(b)(2)(E).

129. *Id.* § 3(b)(2)(D). Good cause would include the inability of the appointed Special Advocate to qualify for the requisite security clearance. *Id.*

130. *Id.* § 3(d)(2).

131. *Id.* § 3(d)(1)(A).

132. *Id.* § 3(d)(1)(B).

133. *Id.* § 3(d)(1)(C)–(E).

134. *Id.* § 3(d)(1)(F)–(H).

135. *Id.* § 3(d)(3)(A).

136. *Id.* § 3(d)(4).

The amendment grants standing to the Special Advocate to participate in a proceeding before the FISC, an appeal before the FISA Court of Review, or the Supreme Court.[137] Additionally, amici curiae would be permitted to participate in any proceedings, including participation in oral argument, either through a motion filed by the Special Advocate with the FISC or sua sponte by the FISC itself.[138]

The Act would require the Attorney General to disclose all significant FISC and FISA Court of Review decisions made after July 10, 2003, any decision of the FISC that the Special Advocate appealed, and any FISA Court of Review decision.[139] The Attorney General could satisfy the disclosure requirements by releasing a decision either in its entirety or redacted, by releasing a summary of a decision, or by releasing a FISC application and any briefs filed in their entirety or redacted.[140]

Many commentators have recommended and applauded proposals to create a Special Advocate, like the FISA Court Reform Act, with an eye toward making proceedings before the FISC more adversarial.[141] The proposed amendment, nonetheless, raises a number of substantial concerns from administrative or constitutional law and national security perspectives. Concerns include: the provisions for appointment and removal of the Special Advocate, the status of the Special Advocate's standing before the FISC and during the appeals process, and the effectiveness of the disclosure requirements.

137. *Id.* §§ 4(a)(1)–(2), 5(a)(2), 5(b)(2).

138. *Id.* § 4(c)(1)–(2).

139. *Id.* § 6(a)(1)–(3) (providing an exception for national security). Decisions made after July 10, 2003 must be released within 180 days of the enactment of the Act; FISC decisions appealed by the Special Advocate must be disclosed within 30 days of the appeal; FISA Court of Review decisions appealed by the Special Advocate must be released within 90 days of the appeal. *Id.* § 6(e).

140. *Id.* § 6(c)(1)–(3).

141. *E.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?_r=0; Orin Kerr, *A Proposal to Reform FISA Court Decisionmaking*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-courtdecisionmaking/. *But see, e.g.*, Stewart Baker, *Critiquing FISA Reforms*, VOLOKH CONSPIRACY (Aug. 1, 2013, 5:54 AM), http://www.volokh.com/2013/08/01/critiquing-fisa-reforms/ ("There may be a dozen offices that think their job is to act as a check on the intelligence community's use of FISA. . . . To that army of second-guessers, are we really going to add yet another lawyer, this time appointed from outside the government?"); Carrie Cordero, *Thoughts on the Proposals to Make FISA More Friendly*, LAWFARE (Aug. 12, 2013, 1:17 PM), http://www.lawfareblog.com/2013/08/thoughts-on-the-proposals-to-make-fisa-more-friendly/ ("Adding a special advocate to evaluate surveillance activities for civil liberties issues actually duplicates the work that dozens of lawyers currently perform in the FISA process.").

Appointment and Removal. The Appointments Clause grants the President the power to nominate "Officers of the United States" with the advice and consent of the Senate, and Congress the power to "vest the Appointment of such inferior Officers, . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[142] An officer is "any appointee exercising significant authority pursuant to the laws of the United States."[143]

The FISA Court Reform Act grants the presiding judge of the FISA Court of Review the power to appoint the Special Advocate from a list of candidates submitted by the PCLOB.[144] Whether the appointment of the Special Advocate under this scheme is constitutional turns first on whether the Special Advocate is an officer of the United States. Because the Special Advocate would have "wide, significant, and permanent authority to litigate on behalf of the privacy and civil liberties interests of the general public" and would be able to "seek judicial relief that would bar certain foreign intelligence gathering by the executive branch," the Special Advocate would be exercising "significant" and "sovereign" authority on behalf of the United States and would thus constitute an officer.[145] Others, however, contend that the Special Advocate would not be a senior officer because he or she "would not exercise significant government authority."[146]

If the Special Advocate were an officer of the United States, then whether his or her status is a principal or inferior officer must be determined. The Supreme Court has applied two different tests for determining whether an officer is principal or inferior. First, in *Morrison v. Olson*,[147] the Court laid out four factors to consider in making this determination: (1) whether the officer is "subject to removal by a higher

142. U.S. CONST. art. II, § 2, cl. 2.

143. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). Not all employees of the United States are considered officers: "Employees are lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

144. S. 1467, 113th Cong. § 3(b)(2)(A)–(B) (2013).

145. ANDREW NOLAN ET AL., CONG. RESEARCH SERV., 7-5700, INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES 10 (2013) [hereinafter CRS REPORT], *available at* http://www.fas.org/sgp/crs/intel/advocate.pdf. For a more recent analysis of the issues that arise in introducing a public advocate into the FISC proceedings, see generally ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R43260, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE (2014), *available at* http://www.fas.org/sgp/crs/intel/R43260.pdf.

146. Marty Lederman & Stephen Vladeck, *The Constitutionality of a FISA "Special Advocate"*, JUST SECURITY (Nov. 4, 2013, 1:34 PM), http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/ (noting that the advocate would simply present non-binding legal arguments, would not be able to sue to enforce compliance, and would only be permitted to participate before the FISC after the government had filed a surveillance application).

147. 487 U.S. 654 (1988).

Executive Branch official"; (2) whether the officer "is empowered by the Act to perform only certain, limited duties"; (3) whether the officer's office "is limited in jurisdiction"; and (4) whether the officer's office "is limited in tenure."[148] In *Edmond v. United States*,[149] on the other hand, Justice Scalia applied a test that he first iterated in his dissenting opinion in *Morrison*:[150] "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior."[151] Additionally, "'inferior officers' 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."[152] An inferior officer is therefore one who is controlled by an officer appointed by the President and confirmed by the Senate.[153]

Applying the *Morrison* criteria to the FISA Court Reform Act, it is unclear whether the Special Advocate is a principal or inferior officer. The Special Advocate can only be fired for cause, but it is not apparent whether this is enough to constitute being "subject to removal by a higher Executive Branch official."[154] In *Morrison*, the Court concluded that because the independent counsel could be removed for cause by the Attorney General, the first prong was met.[155] In contrast, the FISA Court Reform Act does not establish who would have the authority to remove the Special Advocate. The Court in *Morrison* determined that the independent counsel, even though she was granted "'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,'" had only "certain, limited duties."[156] In this case, the Special Advocate is not given such sweeping responsibility. He or she is granted authority to review each FISC application, to review each FISC or FISA Court of Review decision and all relevant materials, to participate in proceedings before the FISC, and to appeal a decision and participate in

148. *Id.* at 671–72 (applying the factors and concluding that the independent counsel is an inferior officer and thus need not be appointed by the President with the advice and consent of the Senate).

149. 520 U.S. 651 (1997).

150. *Morrison*, 487 U.S. at 720 (Scalia, J., dissenting) ("Of course one is not a 'superior officer' without some supervisory responsibility, just as, I suggest, one is not an 'inferior officer' . . . unless one is subject to supervision by a 'superior officer.'").

151. *Edmond*, 520 U.S. at 662.

152. *Id.* at 663.

153. *See* CRS REPORT, *supra* note 145, at 12.

154. *Morrison*, 487 U.S. at 671.

155. *Id.*

156. *Id.*

such appeal.[157] The Special Advocate can also delegate duties to outside counsel and obtain access to any documents to carry out his or her duties.[158] The Special Advocate's duties are, in effect, limited, so the Supreme Court would likely find that the Special Advocate would be an inferior officer based on *Morrison*'s second prong.

The third *Morrison* factor—limited jurisdiction—demonstrates that the Special Advocate would be an inferior officer. In *Morrison*, the independent counsel's jurisdiction was limited.[159] Under the FISA Court Reform Act, the Special Advocate is appointed solely to advocate for privacy rights.[160] He or she is not given the authority to do any other sort of investigation, which demonstrates limited jurisdiction. The last factor—limited tenure—points to the Special Advocate being a principal officer. In *Morrison*, the independent counsel was "appointed essentially to accomplish a single task, and when that task [was] over the office [was] terminated."[161] On the other hand, the office of the Special Advocate is "established in the executive branch as an independent establishment," is appointed for a term of five years, and is permitted to serve for an unlimited number of terms.[162] Such language implies that the office itself is permanent and is not being established solely to advocate for privacy rights in only a single proceeding before the FISC; the Special Advocate is performing more than "a single task."[163]

Applying the *Edmond* criteria to the FISA Court Reform Act, however, leads to the clearer conclusion that the Special Advocate is a principal officer. The Special Advocate is not an officer "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."[164] Though the Special Advocate is chosen from a list compiled by the PCLOB,[165] the Act gives no indication whether the PCLOB or any other government official would supervise the Special Advocate. On the contrary, the Act establishes the Office of the Special Advocate as "an independent establishment" within the Executive Branch.[166]

157. S. 1467 § 3(d)(1)(A)–(H).
158. *Id.* § 3(d)(3)–(4).
159. *Morrison*, 487 U.S. at 672 (noting that jurisdiction was limited to investigating serious crimes of certain federal officials).
160. S. 1467 § 3(d)(2).
161. *Morrison*, 487 U.S. at 672.
162. S. 1467 § 3(a), (b)(2)(D)–(E).
163. *Morrison*, 487 U.S. at 672.
164. Edmond v. United States, 520 U.S. 651, 663 (1997).
165. S. 1467 § 3(b)(2)(B).
166. *Id.* § 3(a).

Analyzing the Office of the Special Advocate this way demonstrates that Article II Appointments Clause issues may arise in the FISA Court Reform Act. It is unclear whether the Special Advocate would even be considered an "Officer of the United States" and thus subject to the Appointments Clause. Then, if the Special Advocate is considered an officer, whether he or she is a principal or inferior officer varies based on the *Edmond* and *Morrison* standards. Under *Edmond* the Special Advocate is clearly a principal officer, but the distinction is more ambiguous under *Morrison*.

This principal or inferior distinction determines whether the Special Advocate, due to his or her status as a principal or inferior officer, must be appointed by the President. If the Special Advocate is a principal officer, then, under the Appointments Clause, the President must appoint him or her with the advice and consent of the Senate. On the other hand, if the Special Advocate is an inferior officer, then Congress could confer the appointment power to a court through legislation. If this were the case, then the fact that the presiding judge of the FISA Court of Review would be choosing the Special Advocate from a list provided by the PCLOB would likely not raise any constitutional issues.

Standing. Article III of the U.S. Constitution grants the courts the power to hear only "cases" and "controversies."[167] One of the "essential and unchanging part[s] of the case-or-controversy requirement of Article III" is the doctrine of standing.[168] The standing doctrine contains three elements: "injury in fact," "a causal connection between the injury and the conduct complained of," and likelihood "that the injury will be 'redressed by a favorable decision.'"[169]

The FISA Court Reform Act grants the Special Advocate standing when the FISC has appointed him or her to be a participant in a FISC proceeding.[170] One can debate whether the FISC proceedings "are an adjudicatory function of an Article III court and require adherence to Article III's case-or-controversy requirement" or are "merely incidental to the traditional Article III powers of a federal court."[171] Nonetheless, since the government is the party bringing the case and the Special Advocate would not be a party to the case,[172] it does not seem "that a public

167. U.S. CONST. art. III, § 2, cl. 1.

168. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

169. *Id.* at 560–61 (citations and internal quotation marks omitted). The "injury in fact" must be "(a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and internal quotation marks omitted).

170. S. 1467 § 4(a)(1)–(2).

171. CRS REPORT, *supra* note 145, at 19–20. For a more extensive discussion of whether FISC proceedings are subject to Article III requirements, see *id.* at 14–19.

172. *See* Lederman & Vladeck, *supra* note 146.

advocate who has a more limited role in the FISA proceedings . . . would . . . be constitutionally infirm under Article III."[173]

Issues arise, however, when the Special Advocate is granted standing when he or she makes an appeal of a FISC ruling to the FISA Court of Review or then to the Supreme Court,[174] given that the special advocate has not suffered any personal harm.[175] Because standing requires that the injury is "concrete and particularized,"[176] not generalized,[177] and because a party must have standing "not just at the beginning of a suit . . . but also standing to *appeal*,"[178] the Special Advocate would have difficulty meeting the Article III appellate standing requirements. Additionally, the standing requirement is not overcome solely because Congress permits it: "Congress cannot obviate the standing requirements by statutorily authorizing the advocate to appeal a FISC ruling."[179]

The FISA Court Reform Act, therefore, appears to raise issues of appellate standing under Article III, even though it may not lead to any concerns for initial proceedings before the FISC. It is unlikely that the Special Advocate would be able to demonstrate any concrete and specific injury to meet the Article III standing requirements. Such a concern is not present in the proceedings before the FISC because the government is the party initially bringing the case, not the Special Advocate. This means that, under the FISA Court Reform Act, the Special Advocate would have

173. CRS REPORT, *supra* note 145, at 21; *see also* Stephen I. Vladeck, *Standing and Secret Surveillance*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 24 (forthcoming 2014), *available at* http://ssrn.com/abstract=2351588 ("At least with regard to proceedings before the FISA Court, the creation of a 'special advocate,' however conceived, should not raise any new Article III concerns (if anything, it should mitigate any existing constitutional objections).") (footnote omitted).

174. S. 1467 § 5(a)(2), (b)(2).

175. CRS REPORT, *supra* note 145, at 21–22.

176. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also supra* note 169 (laying out the requirements for an injury).

177. *See* Flast v. Cohen, 392 U.S. 83, 106 (1968) (concluding that a taxpayer cannot "seek to employ a federal court as a forum in which to air his generalized grievances about the conduct of government").

178. Vladeck, *Standing and Secret Surveillance*, *supra* note 173, at 24 (emphasis in original) (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.' He must possess a 'direct stake' in the outcome of the case.") (finding that appellants lacked standing to appeal). For further discussion of how *Perry* affects the appellate standing of the Special Advocate before the FISA Court of Review and the Supreme Court, see generally Vladeck, *supra* note 173, at 24–26, and CRS REPORT, *supra* note 145, at 22–24.

179. CRS REPORT, *supra* note 145, at 22 (citing Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009); Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997); Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100 (1979)).

standing initially when the applications are brought before the FISC, but the Special Advocate's standing on appeal becomes dubious. Because the Special Advocate is granted the authority to appeal, the fact that the Advocate's standing may no longer exist on appeal raises constitutional standing issues with the Act.

Disclosure. Under the proposed amendment, the Attorney General would be required to disclose many FISC and FISA Court of Review decisions made after July 10, 2003 in various potential formats—releasing opinions in their entirety or in redacted form, releasing summaries of decisions, or releasing the applications and briefs.[180] The disclosures would be part of efforts to promote transparency in the intelligence community's surveillance methods and also in the FISA and FISC processes. The issues of disclosure focus predominantly on disclosure to the American public, because procedures exist for Congress to be well-informed on the surveillance that the Executive Branch performs.[181] Disclosure to the public obviously raises

180. *See* S. 1467 § 6(a)(1)–(3), (c)(1)–(3).

181. Transparency regarding the government's bulk collection methods and the authorizations given by the FISC appears to have been extensive throughout Congress generally and particularly within the Senate and House Select Intelligence Committees and the Judiciary Committees. For a far-reaching analysis of the extent of congressional knowledge and oversight of the scope of the surveillance programs, see generally David S. Kris, *On the Bulk Collection of Tangible Things*, LAWFARE RESEARCH PAPER SERIES, Sept. 2013, 1, 41–59 (2013), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf (discussing the extent to which members of Congress had been given the opportunities to review the government's bulk collection methods and the opinions of the FISC) (quoting Senator Saxby Chambliss, the Vice Chair of the Senate Intelligence Committee, as stating in 2012: "In matters concerning the FISA Court, the congressional Intelligence and Judiciary Committees serve as the eyes and ears of the American people. Through this oversight, which includes being given all significant decisions, orders, and opinions of the court, we can ensure that the laws are being applied and implemented as Congress intended."). *Compare* Marcy Wheeler, *How Mike Rogers' Excessive Secrecy in 2011 Might Kill the Dragnet*, EMPTYWHEEL.NET (Sept. 17, 2013), http://www.emptywheel.net/2013/09/17/how-mike-rogers-excessive-secrecy-in-2011-may-kill-the-dragnet/?utm_source=rss&utm_medium=rss&utm_campaign=how-mike-rogers-excessive-secrecy-in-2011-may-kill-the-dragnet ("[A] very large block of Congresspersons . . . appear to have had no such opportunity to learn about the program."), *and* Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215*, VOLOKH CONSPIRACY (Sept. 17, 2013, 7:39 PM), http://www.volokh.com/2013/09/17/thoughts-august-2013-fisc-opinion-section-215/ ("[F]ew members of Congress knew of the opinions . . . ."), *and* Alan Grayson, *Congressional Oversight of the NSA Is a Joke. I Should Know, I'm in Congress*, THE GUARDIAN, Oct. 25, 2013, http://www.theguardian.com/commentisfree/2013/oct/25/nsa-no-congress-oversight ("Despite being a member of Congress possessing security clearance, I've learned far more about government spying on me and my fellow citizens from reading media reports than I have from 'intelligence' briefings . . . . I've requested information, and further meetings with NSA officials. The House Intelligence Committee has refused to provide either."), *with* Benjamin Wittes & Jane

national security concerns, as David Kris points out: "At one level, of course, keeping classified information from the American People is exactly what the Intelligence Community is supposed to do, because there is no way to inform the American People without also informing the People's adversaries."[182] Kris goes on to explain, however, that reasonable, though time-consuming and difficult, methods do exist to promote better public disclosure.[183]

Judge Walton has also addressed the national security and practical obstacles to disclosure. One obstacle to releasing summaries of FISC opinions is that, unlike summaries of federal court opinions, which are accompanied by the full opinion, "nuanced or technical points of a court's analysis" may be lost in a summary of a FISC decision, creating a risk of confusion without the full opinion to fall back on.[184] Additionally, in most FISC opinions, "the facts and the legal analysis are so inextricably intertwined that excising the classified information from the FISC's analysis would result in a remnant void of much or any useful meaning."[185] Thus, the summaries would not "meaningfully inform[] the public."[186] Problems also exist with revisiting prior opinions and writing post hoc summaries, potentially written by judges who did not write the original opinions.[187] Resource concerns are also present: writing summaries would take time away from the FISC judges fulfilling their current obligations.[188] Judge

Chong, *Congress Is Still Naked*, LAWFARE (Sept. 19, 2013, 12:03 AM), http://www.lawfareblog.com/2013/09/congress-is-still-naked/#more-25155 ("Both committees were kept fully apprised, as they have both made clear. . . . So the question is really limited to whether non-committee members were kept informed in advance of their votes . . . . [T]he answer to this question is also unambiguous."), *and* Cordero, *supra* note 141 ("Today's FISA collection is probably the most oversight-laden foreign intelligence activity in the history of the planet.").

182. Kris, *supra* note 181, at 59.

183. Methods could include reestablishing the annual reports that existed during the first five years of FISA and releasing them to the public. *See id.* at 62–63 ("Such public reporting . . . would require considerable and sustained effort from the two political branches . . . but it could be done. Of course . . . significant limits would remain, meaning that much would need to remain secret, but it would be reasonable to expect at least incremental gains in transparency and public understanding.").

184. *See* Letter from the Hon. Reggie B. Walton, Presiding Judge of the FISC, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intel. (Mar. 27, 2013) [hereinafter Walton Mar. 27, 2013 Letter], *available at* http://www.fas.org/irp/agency/doj/fisa/fisc-032713.pdf (responding to Letter from Sen. Feinstein, Chairwoman, S. Select Comm. on Intel., to the Hon. John D. Bates, Presiding Judge of the FISC (Feb. 13, 2013), *available at* http://www.fas.org/irp/agency/doj/fisa/fisc-021313.pdf.).

185. *Id.* at 2.

186. *Id.*

187. *See id.*

188. *Id.*

Walton further points out that procedures already do exist for FISC orders and opinions to be made public.[189]

Though further transparency and public disclosure would help to bring more legitimacy to the FISA process and help alleviate the "rubber-stamping" concerns of the FISC, national security and practical problems exist in simply allowing for full publication of FISC orders and opinions. The Executive Branch has already started to release a substantial number of previously classified documents,[190] but it is yet to be seen whether such disclosures will lead to greater transparency and to what extent the publications may have an effect on national security.[191]

B. FISA Judge Selection Reform Act of 2013

The purpose of the FISA Judge Selection Reform Act is "To create two additional judge positions on the court established by [FISA] and modify the procedures for the appointment of judges to that court."[192] The proposed amendment would increase the number of judges on the court from eleven to thirteen.[193] Under the current version of FISA, eleven district court judges are chosen from at least seven of the Federal Circuit Courts of Appeals, three of whom must reside within twenty miles of the District of Columbia, where the court sits.[194] Under the proposed bill, the thirteen judges would be designated from each of the thirteen Federal Circuit Courts of Appeals.[195] There is no requirement that a minimum number of judges reside within any established distance of the District of Columbia.

Currently, each of the eleven district court judges that sits on the FISC is chosen by the Chief Justice of the Supreme Court.[196] Under the reforms, the chief judge of the circuit where there is a vacancy will propose a district

189. *Id*; *see* FISC R. Procedure 62(a) (Nov. 1, 2010), *available at* http://www.fas.org/irp/agency/doj/fisa/fiscrules-2010.pdf (providing a mechanism for releasing opinions with necessary redactions).

190. *See generally* IC ON THE RECORD, *supra* note 107.

191. *See* Kris, *supra* note 181, at 67 ("As a democracy that runs on informed public debate but also engages in classified intelligence activity, America has struggled with the proper balance between secrecy and transparency. Recent disclosures have brought that struggle into much sharper relief, and have called into question the balance struck and maintained since the 1970s. It remains to be seen whether those disclosures will yield substantial, enduring change.").

192. S. 1460, 113th Cong. Preamble (2013).

193. *Id.* § 3(a).

194. 50 U.S.C. § 1803(a) (2006).

195. S. 1460 § 3(a).

196. 50 U.S.C. § 1803(a).

judge from that circuit.[197] The Chief Justice of the Supreme Court has the discretion to appoint the nominee, and if he chooses not to, the chief judge will propose two other district judges from that circuit and the Chief Justice must then designate one of them to fill the vacant position.[198] Eleven of the FISC judges, therefore, will be appointed as the vacancy from the circuit that he or she represents becomes available. The other two judges, representing the District of Columbia and Federal Circuits, are to be designated by the Chief Justice within 180 days of the enactment of the Act after being proposed by the chief judges of those circuits.[199] The current members of the FISC will finish up their scheduled terms before a new judge is designated.[200] The judges of the FISA Court of Review under the proposed bill would be designated by the Chief Justice, just as in the current version of FISA,[201] but the proposal would require that at least five associate Supreme Court justices approve each designation.[202] All of the judges would serve for a maximum of seven years, except for the district judge representing the Federal Circuit, who would only serve an initial term of four years.[203]

Senator Blumenthal proposed the FISA Judge Selection Reform Act "to ensure that the court is geographically and ideologically diverse and better reflects the full diversity of perspectives on questions of national security, privacy, and liberty."[204] He argued the current system "has failed to produce a panel of FISA judges representing diverse perspectives," particularly "the diversity of viewpoints held by the American people—not just the preferences of the Chief Justice of the Supreme Court."[205]

197. S. 1460 § 3(a)(1)(C).
198. *Id.*
199. *Id.* § 3(a)(1)(C)(i).
200. *Id.*
201. 50 U.S.C. § 1803(b).
202. S. 1460 § 3(b)(2).
203. *Id.* § 3(a)(3)(B).
204. Press Release, Sen. Richard Blumenthal, *supra* note 18.
205. *Id.* (pointing out the fact that ten of the eleven current FISC judges were appointed to the federal bench by Republican presidents, that 86% of Chief Justice Roberts's designees have been Republican appointees, and that half of them have been former Executive Branch officials). But he also noted that the current makeup of the FISC "may not lead to bias." Press Release, Sen. Richard Blumenthal, Blumenthal Delivers Major Policy Address at Harvard Law School on Legislation to Reform FISA Courts (Aug. 8, 2013), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-major-policy-address-at-harvard-law-school-on-legislation-to-reform-fisa-courts. Senator Blumenthal then backtracked, stating that "the issue we are grappling with is one of perception and the very essence of impartial justice. A court that appears not to reflect a diversity of viewpoints inevitably gives rise to the appearance of bias." *Id.* Should solely the appearance of bias necessitate a complete overhaul of the composition of the FISC? *See also*

At first glance, the FISA Judge Selection Reform Act would appear to alter the designation of judges to the FISC in order to promote more diversity—simply the fact that more than one person (the thirteen chief judges of the circuit courts vs. the one Chief Justice) would have a voice in who gets chosen to sit on the court suggests this is the case. It is hard to argue with the recommendations of thirteen individuals, instead of just the decision of one individual, as representing a greater diversity of viewpoints. The question remains as to whether this system will produce the desired diversity in practice. If one of the dominant critiques of the composition of the FISC is that it is dominated by Republican appointees, to answer that criticism the new proposed system should establish a greater balance between Republican and Democratic appointees. The only way to determine if such a balance would be achieved is to analyze how the new selection process would occur in practice. The proposal appears to promote greater diversity, at least in terms of political affiliations, but if the same patterns remain, then the proposal fails to accomplish its goal.

To start with, the current membership of the FISC must be examined. The eleven current judges represent nine different circuits.[206] This means that four circuits are not currently represented and judges from these circuits would have to be added to the court at some point to follow the proposed reform.[207] The current judges will end their terms on the court between 2014 and 2020.[208] Pursuant to the proposed amendment, when a current member of the court completes his or her term, the chief judge from whichever circuit that judge represented will make a recommendation from the pool of district judges within that circuit.[209] The district judges who will be recommended from each circuit, therefore, will depend upon who the chief judge of each circuit is at the time that circuit's seat on the

Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=1&http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?&_r=0 (raising the same concerns over the composition of the FISC as Senator Blumenthal).

206. Current judges represent the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits. The Fourth, Sixth, Eleventh, and Federal Circuits are not currently represented. For a listing of and statistics on the current and past composition of the FISC, see FEDERATION OF AMERICAN SCIENTISTS, *Current and Past Members of the Foreign Intelligence Surveillance Court (May 2013)*, FAS.ORG https://www.fas.org/irp/agency/doj/fisa/fisc-members.pdf (last visited May 9, 2013).

207. S. 1460 § 3(a).

208. *See Current and Past Members of the Foreign Intelligence Surveillance Court (May 2013)*, *supra* note 206.

209. S. 1460 § 3(a)(1)(C).

FISC is made available. It is thus necessary to analyze who the chief judges will be and by whom they were appointed (Republican vs. Democratic president) in order to determine whether the FISC will actually be more diverse than it is currently.[210]

To determine whether the chief judge of a particular circuit is likely to choose a district judge for the FISC who will be either a Republican or a Democratic appointee, it must be established who will be the chief judge of each circuit, based upon the selection process, at the time that each circuit's seat on the FISC is made available.[211] A couple of examples will illustrate how the new process will play out in practice.[212]

(1) The current Chief Judge of the First Circuit is the Honorable Sandra L. Lynch.[213] Judge Lynch was an appointee of President Bill Clinton and she became Chief Judge of the First Circuit in 2008. Unless she retires earlier, in 2015 a new chief judge will be appointed to the First Circuit.[214] Based upon the required criteria,[215] the next First Circuit judge in line to become chief is the Honorable Jeffrey R. Howard. Judge Howard was appointed by President George W. Bush. The current district judge on the FISC who represents the First Circuit is the Honorable F. Dennis Saylor, IV. Judge Saylor's term on the FISC is scheduled to end in 2018.[216] Judge

210. The following analysis assumes that the current chief judges would appoint nominees to the FISC from the same party that they were appointed by. Because the current critique of the FISC, and one of the motivating factors behind the FISA Judge Selection Reform Act as proposed by Senator Blumenthal, rests on Chief Justice Roberts having appointed ten of the current eleven judges, the assumption behind the bill is that greater diversity in appointment power will create greater diversity in judges. Thus, even if chief judges do not follow exact party-line appointments, the analysis should achieve greater diversity.

211. *See* 28 U.S.C. § 45 (2012) (detailing requirements, such as age and length of service, for appointments of chief judge to the federal circuit courts).

212. In the examples that follow, for the sake of simplicity, it is being assumed that the FISA Judge Selection Reform Act of 2013 will be passed sometime in 2014.

213. For information on the composition of the First Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, http://www.ca1.uscourts.gov/judges (last visited May 9, 2014).

214. For the sake of simplicity, these examples are based upon the presumption that the current chief judges of the circuit courts will end their chief judgeships according to the normal process, i.e. their seven-year terms end or they reach seventy years of age before their seven-year terms end. The examples are also based upon the presumption that the circuit judges next in line to become the chief judges will remain on the circuit court until that time and through their seven-year terms.

215. 28 U.S.C. § 45.

216. As is the case with the chief judges of the circuit courts, *see* discussion *supra* note 214, the examples are also based upon the presumption, for the sake of simplicity, that the terms of the current FISC judges will end according to the normal process, i.e., when their seven-year terms end.

Howard, therefore, would be the chief judge from the First Circuit who would be selecting the next district judge from the First Circuit to be represented on the FISC. Because Judge Howard was a Republican appointee, it is assumed that he would also appoint a Republican appointee to the FISC.[217]

(2) The current chief judge of the Second Circuit is the Honorable Robert A. Katzmann.[218] Judge Katzmann was an appointee of President Bill Clinton and he became Chief Judge of the Second Circuit in 2013, where he is scheduled to remain until 2020. The current district judge on the FISC who represents the Second Circuit is the Honorable Raymond J. Dearie. Judge Dearie's term on the FISC is scheduled to end in 2019. Judge Katzmann, therefore, would be the Chief Judge from the Second Circuit who would be selecting the next district judge from the Second Circuit to be represented on the FISC. Because Judge Katzmann was a Democratic appointee, it is assumed that his selection to the FISC will also be a Democratic appointee.

These two examples illustrate how the process of selecting the next FISC judges will take place under the FISA Judge Selection Reform Act. At times it will be a Republican-appointed chief judge who will be selecting the next FISC judge from any one circuit and at other times it will be a Democrat-appointed chief judge who would be making the selection, based upon when each circuit's FISC seat becomes available. If the full analysis is followed for each circuit, the final number of presumably Democrat-appointed FISC judges for the next round of selection to the court would be five and the final number of presumably Republican-appointed FISC judges would be three. There are several reasons why there are only eight FISC judges in total, and not the required thirteen.

The current composition of the FISC does not have representative district judges from the Fourth, Sixth, or Eleventh Circuit Courts. It is unknown, therefore, exactly when the position for a new FISC judge from these circuits will be available. Currently on the FISC are three representative judges from the District of Columbia Circuit.[219] A new procedure has been established through the Act for the selection of a FISC judge from the District of Columbia Circuit;[220] thus, when the first District of Columbia Circuit FISC seat becomes available in 2014, a new district judge from the District of Columbia Circuit will not be chosen. At that

217. *See* discussion *supra* note 210.

218. For information on the composition of the Second Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/judges/judges.html (last visited May 9, 2014).

219. As required under 50 U.S.C. § 1803.

220. S. 1460 § 3(a).

time, presumably, one of the three numbered circuits without a current representative on the FISC (the Fourth, Sixth, or Eleventh Circuits) will take this position and then, as the other two seats currently occupied by District of Columbia Circuit district judges become available in 2016 and 2020, the other two numbered circuits that were not chosen in 2014 will take those positions. The Act, however, does not include any provision to address this scenario. Indeed, the Act does not state when and how any of these three circuit representatives will be added. Consequently, it cannot be determined whether the representatives from the Fourth, Sixth, and Eleventh Circuits will be selected by Republican- or Democrat-appointed chief judges.

Additionally, who the representatives to the FISC from the District of Columbia and Federal Circuits (who are selected through a slightly different procedure)[221] will be is largely dependent on when the FISA Judge Selection Reform Act would come into effect. If the Act takes effect some time in 2014, then, within 180 days after the date of enactment, the Chief Justice would have to designate the representatives from the District of Columbia and Federal Circuits from selections of the Circuits' chief judge. The current Chief Judge of the District of Columbia Circuit is the Honorable Merrick B. Garland, a President Clinton appointee, who was appointed Chief Judge in 2013 and whose seven-year term will expire in 2020.[222] The current Chief Judge of the Federal Circuit is the Honorable Randall R. Rader, a President George H. W. Bush appointee, who was appointed Chief Judge in 2010 and whose seven-year term will expire in 2017.[223] The representatives from these circuits, therefore, would include one Republican-appointed judge and one Democrat-appointed judge. This would bring the current total up to six Democrat-appointed FISC judges and four Republican-appointed judges, with the final three seats unknown.

This analysis demonstrates that, if the process goes perfectly, the next round of FISC judges will consist of an almost even split of Republican- and Democrat-appointed district judges, or, at the least, the selections to the FISC will be made by an almost even split of Republican- and Democrat-appointed circuit chief judges. Does this mean that the new system of selecting FISC judges is a resounding success that achieves the

221. *Id.*

222. For information on the composition of the U.S. Court of Appeals for the District of Columbia Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges (last visited May 9, 2014).

223. For information on the composition of the Federal Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html (last visited May 9, 2014).

"geographical[] and ideological[] divers[ity]"[224] that Senator Blumenthal was seeking? Not necessarily; other considerations may be involved.

In 2007, Professor Theodore Ruger analyzed the appointments that Chief Justice Rehnquist made to the FISC during his tenure as Chief Justice from 1986 until his death in 2005.[225] In an effort to discover whether Chief Justice Rehnquist typically appointed judges to the FISC who were politically conservative and more likely to side with the government, Professor Ruger reviewed hundreds of Fourth Amendment rulings made by the twenty-five judges that Chief Justice Rehnquist appointed to the court.[226] He also looked at the political parties of the presidents who appointed those district judges.[227] This analysis led to "a picture of twenty-five Rehnquist-selected judges who are primarily Republican appointees, who skew in a conservative direction . . . [and] who ruled in the government's favor in a large majority of the Fourth Amendment questions presented to them."[228]

Professor Ruger took the analysis further, and selected a random group of twenty-five district judges from the same pool from which the Chief Justice selected his FISC judges and analyzed them in the same manner. Professor Ruger found that "the Rehnquist [FISC] judges may be conservative both in general, and on Fourth Amendment issues in particular, but this conservatism appears to reflect the baseline of the federal judiciary rather than an unrepresentative cohort chosen by the Chief Justice."[229] Though the FISC judges appeared not to be an anomaly in terms of their political parties and Fourth Amendment decisions, Chief Justice Rehnquist may have taken a couple of factors into account in his selections, including FISC judges' divergence in Fourth Amendment cases and the number of Fourth Amendment cases they heard.[230] Chief Justice Rehnquist's FISC judges had a much lower standard deviation in terms of the government win rate in Fourth Amendment cases than the random group, meaning that the judges showed less variance in their Fourth

224. Press Release, Sen. Richard Blumenthal, *supra* note 18.

225. *See* Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239 (2007).

226. *Id.* at 242, 257.

227. *Id.* at 243.

228. *Id.*

229. *Id.* For example, of Chief Justice Rehnquist's twenty-five FISC appointees, sixteen were Republican appointees (64%); of the twenty-five randomly selected district judges, fifteen were Republican appointees (60%). *Id.* at 253. Similarly, in Fourth Amendment rulings of Chief Justice Rehnquist's FISC appointees, the government won about 87% of the time; in Fourth Amendment rulings of the randomly selected district judges, the government won about 83% of the time. *Id.* at 255.

230. *See generally id.* at 255–57.

Amendment decisions and more consistently held in the government's favor.[231] Chief Justice Rehnquist's appointments also heard more Fourth Amendment cases altogether compared to Professor Ruger's randomly selected group.[232]

A complete analysis of all the district judges currently seated across the country and their decisions in Fourth Amendment cases, such as the one that Professor Ruger performed, is beyond the scope of this writing; however, Professor Ruger's conclusions speak to the general demographic of the federal district courts and there is no reason to believe that today, only seven years after Professor Ruger's analysis, the demographics have substantially changed. The current federal district judges may, therefore, on the whole be Republican appointees and may decide in favor of the government in the majority of Fourth Amendment cases. If that is the case, then the fact that Chief Justice Roberts's FISC judges are predominantly Republican appointees and that the FISC largely grants the government's surveillance requests is not altogether surprising.[233] Additionally, it must not be forgotten that this criticism of FISC judges is based on the assumption that, because the majority of judges were appointed as district judges by Republican presidents, the FISC judges themselves are Republicans, and that party affiliation will impact rulings. Presidents do not always appoint federal judges that necessarily follow their own political views, whether intentionally or not.[234]

231. *Id.* at 255–56. Professor Ruger suggests that the "less dramatic variation" in Rehnquist's appointments' Fourth Amendment decisions in favor of the government demonstrates "a strategic choice [by the Chief Justice] to avoid preference outliers, particularly in a pro-defendant direction." *Id.* at 256.

232. *Id.* at 256. Rehnquist may have taken this "notoriety" in Fourth Amendment decisions into account in making his appointments to the FISC. *Id.*

233. Chief Justice Roberts' most recent selection to the FISA Court of Review was Judge José A. Cabranes. Though Judge Cabranes was appointed to the Court of Appeals for the Second Circuit by President Bill Clinton, "he is considered among the more conservative-leaning Democratic appointees on crime and security issues." Charlie Savage, *Newest Spy Court Pick Is a Democrat but Not a Liberal*, N.Y. TIMES, Aug. 20, 2013, http://www.nytimes.com/2013/08/21/us/roberts-varies-pattern-in-choice-for-spy-court.html?pagewanted=all&_r=1&.

234. One interesting example of this is President Eisenhower's appointment of Earl Warren as Chief Justice of the Supreme Court in 1953. Although they were both Republicans, the Warren Court became "synonymous with liberal activism." DOUGLAS CLOUATRE, PRESIDENTS AND THEIR JUSTICES 102–03 (2010). When asked by his biographer Stephen E. Ambrose what his biggest mistake was, Eisenhower answered: "The appointment of that S.O.B. Earl Warren." Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 TULSA L.J. 477, 477 (1997) (footnote omitted) (internal quotation marks omitted).

IV. AN EXECUTIVE REVIEW

Senator Blumenthal's proposals in the form of the FISA Court Reform Act and FISA Judge Selection Reform Act were just a couple of the many similarly themed bills introduced in Congress. As part of its efforts to assess the steps required to address the calls for reform in light of competing national security and privacy interests, the Executive Branch instituted a review mechanism through which an Executive body evaluated the need for and viability of changes to the government surveillance programs and the proceedings before the FISC. The review was performed by the newly-created President's Review Group on Intelligence and Communications Technologies (Review Group).[235] Additionally, after the release of the Review Group's findings, President Obama made a speech to the nation addressing the intelligence review and his plan for reforming the surveillance programs and FISC operations.

President's Review Group. Shortly after Senator Blumenthal announced the introduction of his reform proposals, on August 12, 2013, President Obama announced the establishment of the Review Group. The Review Group was tasked with assessing "how . . . the United States can employ its technical collection capabilities in a way that optimally protects our national security . . . while respecting our commitment to privacy and civil liberties, recognizing our need to maintain the public trust, and reducing the risk of unauthorized disclosure."[236] The Review Group released its findings on December 12, 2013.[237]

The Review Group's Report consisted of a series of forty-six recommendations relating to, among other topics, reforming governmental domestic surveillance, determining what type of intelligence to collect, how to collect it, and reforming the FISC.[238] The Review Group even briefly addressed the rubber-stamping critique of the court. The Review Group

235. Press Release, The White House, Presidential Memorandum—Reviewing Our Global Signals Intelligence Collection and Communications Technologies (Aug. 12, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/12/presidential-memorandum-reviewing-our-global-signals-intelligence-collec.

236. Press Release, The White House, Statement by the Press Sec'y on the Review Group on Intelligence and Communications Technology (Aug. 27, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/27/statement-press-secretary-review-group-intelligence-and-communications-t.

237. PRESIDENT'S REVIEW GROUP, LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (Dec. 12, 2013) [hereinafter REVIEW GROUP REPORT], *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

238. *See generally id.* at 14–42.

cited to Judge Walton's letter to Senator Leahy from July 29, 2013[239] and stated that Judge Walton's insight that many government surveillance applications to the FISC are changed before being approved "seem[] quite credible."[240] Additionally, the Review Group recognized "the FISC's strong record in dealing with non-compliance issues" and the FISC taking "seriously its responsibilities to hold the government accountable for its errors."[241] Nonetheless, the Review Group recommended changes to the FISC including: (1) the creation of a Public Interest Advocate, (2) making greater technological expertise available to FISC judges, (3) increasing transparency through declassification of FISC opinions, and (4) reforming the appointment process of FISC judges.[242]

The Review Group first recommended that Congress create a Public Interest Advocate who would "represent the interests of those whose rights of privacy or civil liberties might be at stake" and who could either be invited to participate in FISC proceedings by a FISC judge or could intervene on her own accord.[243] However, the Public Interest Advocate would not have the authority to participate in all matters before the FISC. It could only intervene in cases involving "novel and complex issues of law" that "would benefit from an adversary proceeding" and would be "likely to result in a better decision."[244] The idea behind allowing the Advocate to participate in such proceedings would be to give the FISC judge a more

239. *See supra* text accompanying notes 88–106 (discussing Judge Walton's July 29, 2013 and Oct. 11, 2013 letters to Senator Leahy).

240. REVIEW GROUP REPORT, *supra* note 237, at 260.

241. *Id*; *see also supra* text accompanying notes 107–118 (positing that many of the recently declassified FISC opinions contain instances of the FISC rebuking the government for not complying with the court's orders).

242. REVIEW GROUP REPORT, *supra* note 237, at 200–201 (encompassing the suggested FISC reforms in Recommendation no. 28).

243. *Id.* at 204.

244. *Id.* at 203–04. An example of a case that would raise a "novel and complex issue[] of law" would be the § 215 authorizations for bulk telephony metadata, which "posed serious and difficult questions of statutory and constitutional interpretation about which reasonable lawyers and judges could certainly differ." *Id.* at 203. The Review Group's recommended role for the Advocate appears to be much narrower than the role that the Special Advocate would play in Senator Blumenthal's FISA Court Reform Act, under which the Special Advocate could review every FISC application and could participate in FISC proceedings without being limited by any specific issues of law. *See generally* S. 1467, 113th Cong. § 3(d)(1) (2013). This aspect of the Review Group's proposal appears quite similar to Representative Schiff's Ensuring Adversarial Process in the FISA Court Act, however. *See* H.R. 3159, 113th Cong. § 2(b) (2013), *supra* note 16 (proposing that the Public Interest Advocate should be appointed in any matter involving "any novel legal, factual, or technological issue").

"researched and informed presentation of an opposing view."[245] The Review Group, while recognizing the difficulties of doing so, recommended that the Advocate could either be housed in the Civil Liberties and Privacy Protection Board (CLPP Board) or could be outsourced to a law firm or public interest group.[246]

Concerned about the ever-evolving complexity of many of the legal issues that the FISC must examine, the Review Group, as its second FISC reform recommendation, suggested that the FISC "should be able to call on independent technologists . . . who do not report to NSA or Department of Justice," who would be able to assist the judges in overseeing these complex legal issues.[247] Going along with many of the legislative reform proposals, the Review Group then recommended that, "unless secrecy of the opinion is essential to the effectiveness of a properly classified program," whole FISC opinions or redacted versions should be publicized.[248] The Review Group pointed out that the ODNI determined "that the gains from transparency outweighed the risk to national security" when it decided to begin releasing various FISC opinions in their entirety.[249]

Finally, the Review Group, reflecting concerns over the Republican-appointed FISC judges, recommended a plan to change the way that FISC judges are appointed, allowing each Supreme Court justice the ability to nominate judges from their own circuits.[250]

The Review Group's Report was met with mixed reviews. Some commentators appeared to agree with the overall thrust of the Report,[251]

245. REVIEW GROUP REPORT, *supra* note 237, at 204.

246. *Id.* at 204–05. The Civil Liberties and Privacy Protection Board (CLPP Board) is a new creation of the Review Group that would replace the existing PCLOB and which would "have broad authority to review government activity relating to foreign intelligence and counterterrorism whenever that activity has implications for civil liberties and privacy." *Id.* at 21.

247. *Id.* at 205. No such provision is included in Senator Blumenthal's proposal. *See generally* S. 1467.

248. REVIEW GROUP REPORT, *supra* note 237, at 207; *accord* S. 1467 § 6.

249. REVIEW GROUP REPORT, *supra* note 237, at 207.

250. *Id.* at 208. This suggestion for the appointment of FISC judges is substantially different from Senator Blumenthal's proposal in the FISA Judge Selection Reform Act, in which the chief judge of each federal circuit would appoint one FISC judge. *See* S. 1460, 113th Cong. § 3(a)(1)(C) (2013).

251. *E.g.*, Jack Goldsmith, *40,000 Foot Reactions to President's Review Group Report and Recommendations*, LAWFARE (Dec. 20, 2013, 10:25 AM), http://www.lawfareblog.com/2013/12/40000-foot-reactions-to-presidents-review-group-report-and-recommendations/#.UwlnKfldU6Y ("I find myself in wild agreement with the basic approach at the heart of the Report."); Benjamin Wittes, *Assessing the Review Group Recommendations: Final Thoughts*, LAWFARE (Jan. 13, 2014, 8:16 AM), http://www.lawfareblog.com/2014/01/assessing-the-review-group-recommendations-final-

but the same and other commentators also found the Report critically flawed.[252] Indeed, the Report is over 300 pages long with comparatively very few citations explaining on what bases the Review Group made its assertions.[253]

V. AN INDEPENDENT REVIEW

The Review Group Report, authorized by the President, was not the sole review taking place with increased calls for legislative reform. The PCLOB, on its own initiative and with congressional encouragement, conducted an investigation into the reform proposals and produced its own set of recommendations.

The PCLOB is an "independent, bipartisan agency within the executive branch" with the authority to "ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism."[254] The PCLOB oversees Executive Branch policies, procedures, regulations, and actions and advises the Executive Branch on policy creation and application.[255]

In the immediate aftermath of the original NSA disclosures, on June 7, 2013, the PCLOB sent a letter to DNI James Clapper requesting a classified background briefing on the government surveillance programs.[256] Shortly thereafter, on June 12, 2013, a group of senators requested that the PCLOB investigate the surveillance programs mentioned in the NSA leaks

thoughts/#.UwgIk_ldU6Y ("On the good side, the Review Group report offers a lot of sound ideas. It thinks boldly. And it offers the President cover for dramatic change to the extent he wants to pursue it.").

252. *E.g.*, Goldsmith, *supra* note 251 (describing at least one of the Review Group Report recommendations as "pie-in-the-sky"); Michael Leiter, *Too Much and Too Little*, LAWFARE (Dec. 26, 2013, 10:39 AM), http://www.lawfareblog.com/2013/12/too-much-and-too-little/#.UwgB9vldU6Z (arguing that the breadth of reform topics and proposals in the Review Group Report "may sound good in isolation—but they can combine to form a deadly and inefficient bureaucratic mix" that "will almost certainly have an intelligence 'cost' even if they simultaneously produce a transparency and privacy 'benefit'"); Wittes, *supra* note 251 ("I think on balance the Review Group did the President, and the country, a disservice. . . . [It is a] document that is at once aggravatingly long-winded yet simultaneously badly underdeveloped.").

253. *See generally* REVIEW GROUP REPORT, *supra* note 237.

254. PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014); *see also supra* note 126 (discussing the other authority of the PCLOB).

255. PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014).

256. Letter from David Medine, Chairman, PCLOB, to the Honorable James R. Clapper, Dir. of Nat'l. Intel. (June 7, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/ PCLOB_ODNI%20FISA%20PRISM%20Briefing%20Request.pdf.

and provide an unclassified report on its findings.[257] The Board responded, stating that, "to the greatest extent possible," it would provide the senators with the requested unclassified report.[258] Additionally, on July 11, 2013, House Minority Leader Nancy Pelosi requested that the Board examine the operations of the FISC.[259] One week after the President gave his speech on reforming the surveillance programs, the PCLOB released its final report on January 23, 2014.[260] Prior to his speech on surveillance reform programs, the President met with the Board to hear its conclusions and had access to near final drafts of the PCLOB report.[261]

PCLOB Report. The PCLOB Report focused on transparency issues at the FISC, and addressed some of the same concerns that the President's Review Group did in its report.[262] The PCLOB report briefly discussed how the FISC pushes back against the government when compliance issues come to its attention. The report also discussed how the media figures about the FISC application approval rate are misleading.[263]

Turning to the Board's recommendations, the PCLOB report gave great weight to two considerations: "that the FISC, its judges, their staff, and the government lawyers who appear before the court operate with integrity and give fastidious attention and review to surveillance applications; but also that it is critical to the integrity of the process that the public have confidence in its impartiality and rigor."[264] The PCLOB report furnished three recommendations for reforming the FISC process: (1) allowing the FISC to hear an independent voice on "novel and significant applications,"

257. Letter from Sen. Tom Udall et al., to Members of PCLOB (June 12, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/6.12.13%20Senate%20letter%20to%20PCLOB.pdf.

258. Letter from David Medine, Chairman, PCLOB, to Sen. Tom Udall (June 20, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/PCLOB_TUdall.pdf.

259. Letter from Rep. Nancy Pelosi, Minority Leader, U.S. House of Representatives, to David Medine, Chairman, PCLOB (July 11, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/Pelosi%20Letter%20to%20PCLOB.pdf.

260. PCLOB, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (Jan. 23, 2014) [hereinafter PCLOB REPORT], *available at* http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

261. *Id.* at 6.

262. *See* REVIEW GROUP REPORT, *supra* note 237, at 202. *See generally* PCLOB REPORT, *supra* note 260, at 8–17 (summarizing the Board's analysis of the surveillance programs and recommending that the government end its § 215 bulk telephone records program and implement additional privacy safeguards in operating the program).

263. PCLOB REPORT, *supra* note 260, at 177–80 (citing to Judge Walton's letters of July 29, 2013 and Oct. 11, 2013).

264. *Id.* at 182.

(2) expanding appellate review of FISC decisions, and (3) giving the FISC the opportunity to obtain technical assistance and legal input from outside parties.[265]

To add an independent voice to the FISC proceedings, PCLOB recommended that Congress authorize the FISC to create a panel of Special Advocates who would serve before the FISC in "important" cases.[266] "Important" cases would include cases in which "FISC judges are considering requests for programmatic surveillance affecting numerous individuals or applications presenting novel issues."[267] This provision is largely in line with the recommendations of the Review Group.[268] The panel of Special Advocates would be national security, privacy, and civil liberties experts from the private sector who would be selected by the presiding judge of the FISC.[269] Participation of the Special Advocate would be determined at the discretion of the FISC. The PCLOB report does "not mandate the participation of the Special Advocate in any particular case"; rather, the FISC "should have the option of seeking input when such applications present novel legal or technical questions."[270] The role of the Special Advocate under this system would be much narrower compared to the Review Group's recommendation of the role of the Public Interest Advocate, who would be permitted to participate when invited by a FISC judge but who would also have the authority "to intervene on her own initiative."[271] The role of the PCLOB report's Special Advocate would be substantially similar to the role of Senator Blumenthal's Special Advocate under the FISA Court Reform Act, who could review every FISC application but participate in proceedings only if the FISC appoints the Special Advocate to do so or grants the Special Advocate's request.[272] The Special Advocate under Senator Blumenthal's proposal, however, is not limited by any specific issues of law.[273]

265. *Id.* at 183–89.

266. *Id.* at 184.

267. *Id.*

268. *See* REVIEW GROUP REPORT, *supra* note 237, at 203–204 (permitting the Public Interest Advocate to participate in cases involving "novel and complex issues of law").

269. PCLOB REPORT, *supra* note 260, at 184.

270. *Id.* at 185; *see also id.* at 186 ("The Board does not intend this proposal to confer on the Special Advocate any absolute right to participate in any matter. Instead, the Board intends that Special Advocate participation would be at the discretion of the court.").

271. REVIEW GROUP REPORT, *supra* note 237, at 204.

272. *See generally* S. 1467, 113th Cong. §§ 3(d)(1) & 4(a) (2013).

273. *See generally id.* The proposed bill does not limit Special Advocate participation only to "novel and complex issues of law" or "important" cases. Of course, if the Special Advocate can only participate if the FISC grants permission, then the FISC is unlikely to grant permission to participate when the court is handling only routine individual search

The PCLOB report's second recommendation was to expand the occasions for appellate review of FISC decisions by both the FISA Court of Review and the Supreme Court to "strengthen the integrity of judicial review under FISA" and "further increase public confidence in the integrity of the process."[274] The Board suggested two potential ways that judicial review could be sought. The Special Advocate could either (1) directly file a petition for review with the FISA Court of Review or (2) request that the FISC certify an appeal.[275] This proposal appears to raise the same standing concerns that Senator Blumenthal's FISA Court Reform Act did.[276]

The Board, however, did not seem concerned about standing issues. Though the PCLOB report states that the Special Advocate "would not be considered an adversary in the traditional sense," which would imply that he has not suffered any injury in fact, the Board was confident that both of its mechanisms for appellate review "avoid concerns by some commentators that a Special Advocate lacks Article III standing to directly appeal a FISC decision."[277] The Board, although convinced that no standing issues would arise, nonetheless covered its bases, stating in a footnote that "The Board does not take a position on whether these concerns about lack of standing would ultimately prevail in litigation."[278] It is hard to understand how, since the PCLOB report is not "requiring the Special Advocate to serve as the government's adversary, as opposing lawyers would do in traditional litigation,"[279] the Special Advocate meets the injury in fact standing requirement and thus has a basis to appeal any FISC decision.

As its last recommendation for reforming the FISC process, the PCLOB report suggests, similar to the Review Group Report,[280] that FISC judges should be able to appoint technical experts to help with the applications.[281] Participation of amici curiae should also be made available and

warrant requests that do not implicate complex legal issues.

274. PCLOB REPORT, *supra* note 260, at 187. The Review Group Report does not advance any recommendation for appellate review of FISC decisions. *See generally* REVIEW GROUP REPORT, *supra* note 237, at 200–208.

275. PCLOB REPORT, *supra* note 260, at 187.

276. *See supra* text accompanying notes 167–79 (laying out the Article III appellate standing concerns for the Special Advocate).

277. PCLOB REPORT, *supra* note 260, at 188 n.64 (citing the CRS REPORT, *see supra* note 145, and Lederman & Vladeck, *The Constitutionality of a FISA "Special Advocate"*, *see supra* note 146).

278. *Id.* at 189 n.641.

279. *Id.* at 185.

280. *See* REVIEW GROUP REPORT, *supra* note 237, at 205.

281. PCLOB REPORT, *supra* note 260, at 189.

encouraged.[282]

Concerning transparency, the PCLOB report gave three recommendations for FISC decisions and process: (1) the government should release future FISC documents with minimal redactions, (2) the government should review previously written FISC documents with an eye toward declassification, and (3) the government should publicly report on the operation of the Special Advocate program.[283] Looking forward, the PCLOB report suggests that FISC judges should draft their opinions expecting they will be released publically so that FISC opinions and orders can be released with minimal redactions.[284] Statistics should be released chronicling the involvement of the Special Advocate in FISC proceedings, including when the Special Advocate was and was not invited to participate.[285] The PCLOB report's transparency proposals are generally consistent with the other reform proposals.[286]

The PCLOB report did not mention or give any recommendations relating to whether or how the FISC judges should be appointed, thus differing from the Review Group Report and Senator Blumenthal's FISA Judge Selection Reform Act. The recommendations encompassed in the PCLOB report as a whole constituted only a majority viewpoint of the Board; two of the five members of the Board filed dissenting statements to the PCLOB report.[287] The two Board members who filed the separate statements, however, did not disagree with the majority's recommendations in relation to reforming the operations of the FISC or increasing transparency; rather, they largely disagreed with the majority's opinion that the § 215 bulk collection program should be shut down.[288]

282. *Id.* For a thorough treatment of the issues surrounding the participation of amici curiae before the FISC, see generally ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES (2014), *available at* http://www.fas.org/sgp/crs/intel/R43362.pdf.

283. *See* PCLOB REPORT, *supra* note 260, at 203–04.

284. *Id.* at 203.

285. *Id.* at 203–204.

286. *See, e.g.*, REVIEW GROUP REPORT, *supra* note 237, at 205–07; S. 1467, 113th Cong. § 6 (2013).

287. *See generally* PCLOB REPORT, *supra* note 260, at 208–18.

288. *See id.* Board member Rachel Brand stated: "Although I believe the FISC already operates with the same integrity and independence as other federal courts, I agree with the Board that some involvement by an independent third party will bolster public confidence in the FISC's integrity and strengthen its important role." *Id.* at 208. Similarly, Board member Elisebeth Cook stated: "I also agree with the Board that modifications to the operations of the [FISC] and an increased emphasis on transparency are warranted—to the extent such changes are implemented in a way that would not harm our national security efforts." *Id.* at 214.

VI. A JUDICIAL RESPONSE

After the President's Review Group released its findings, and shortly before President Obama addressed the nation on reforming the surveillance programs and the FISC, Judge John Bates, the Director of the Administrative Office of the United States Courts and former presiding judge of the FISC, sent a letter and accompanying documentation to Senator Dianne Feinstein setting forth some of the judiciary's comments on the FISC reform proposals.[289] In preparing this commentary, Judge Bates consulted with current and former judges of both the FISC and FISA Court of Review.[290] The purpose of the commentary was "to explain how certain proposals for substantive or procedural changes to FISA would significantly affect the operations of the FISC and the [FISA] Court of Review . . . in an effort to enhance the political branches' ability to assess whether, on balance, it would be wise to adopt those proposals."[291] Stressing the need for a "commensurate augmentation of resources" if the proposed reforms were to take effect, Judge Bates[292] reviewed the effects of four general FISC operations reform plans: (1) an independent advocate, (2) substantive proposals, (3) selection of FISC judges, and (4) declassification of FISC decisions and orders.[293]

Judge Bates began by pointing out that the vast majority of proceedings before the FISC are simple ex parte government search warrant requests, electronic surveillance orders, and requests for production of records, not requests for bulk collection of data by the NSA.[294] Thus, the majority of government applications "do not implicate the privacy interests of many U.S. persons because the collections at issue are narrowly targeted at particular individuals . . . that have been found to satisfy the applicable legal standards."[295] Judge Bates concluded, therefore, that having the participation of an independent advocate "in the large majority of cases"

289. Letter from the Hon. John D. Bates, Dir., Admin. Office of the United States Courts, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intel. (Jan. 13, 2014), *available at* http://www.fas.org/irp/news/2014/01/bates.pdf; Judge John D. Bates, *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act* (Jan. 10, 2014) [hereinafter *Comments of the Judiciary*], *available at* http://www.fas.org/irp/news/2014/01/bates.pdf.

290. *Comments of the Judiciary*, *supra* note 289, at 1.

291. *Id.*

292. Although the comments in the document are the comments of the Judiciary and not solely the comments of Judge Bates, because Judge Bates compiled the comments and penned the letter to Senator Feinstein, Judge Bates will be referred to throughout this discussion.

293. *See generally Comments of the Judiciary*, *supra* note 289.

294. *Id.* at 3.

295. *Id.*

would be unnecessary and would give suspected terrorists greater due process protections than U.S. citizens would receive in criminal investigations.[296]

Judge Bates also raised practical concerns to the functioning of the FISC, including, complicating the gathering of information in fact- and time-intensive cases by necessitating all information to be supplied to the advocate, requiring the duty judge to extend his or her normal duty week (thus disrupting the judge's regular district court duties), and preventing the FISC from receiving all relevant facts from the government due to intelligence agency concerns over providing sensitive information "to a permanent bureaucratic adversary."[297] In terms of appellate review, Judge Bates was concerned with "standing and other constitutional issues," as well as practical "scheduling and logistical challenges" to the FISC and the potential need to increase the number of judges on staff on the FISA Court of Review to handle the extra caseload.[298]

Turning to the selection of FISC judges, Judge Bates emphasized the need for a "smoothly functioning selection process" that would "become even more imperative if other legislative changes result in a heavier workload for the [FISC and FISA Court of Review]."[299] One potential implication of any changes to the selection process concerns the requirement that at least three FISC judges reside within twenty miles of Washington, D.C., as is necessitated under FISA.[300] In particular, under Senator Blumenthal's approach in the FISA Judge Selection Reform Act, this would be a concern because only two of the FISC judges would be selected from the Washington, D.C. area—the District of Columbia and Federal Circuits, both located in D.C.[301] Judge Bates also pointed out the "unique role" that the Chief Justice maintains within the Judicial Branch.[302] As President of the Judicial Conference of the United States, the Chief Justice is tasked with "the responsibility to assign federal judges across the country to the various Conference committees . . . including service on

296. *Id.* at 4. *But see* Stephen Vladeck, *Judge Bates and a FISA "Special Advocate"*, LAWFARE (Feb. 4, 2014, 9:24 AM), http://www.lawfareblog.com/2014/02/judge-bates-and-a-fisa-special-advocate/#.UweBePldU6Y (contending that most of the reform proposals do not anticipate participation by the independent advocate in routine individualized warrant applications).

297. *Comments of the Judiciary*, *supra* note 289, at 5–7. *But see* Vladeck, *supra* note 295 (offering three responses to Judge Bates' concern that the government will not be as willing to share classified information with the FISC).

298. *Comments of the Judiciary*, *supra* note 289, at 8–9.

299. *Id.* at 12.

300. 50 U.S.C. § 1803(a)(1) (2006).

301. *See* S. 1460, 113th Cong. § 3(a)(1)(B) (2013).

302. *Comments of the Judiciary*, *supra* note 289, at 13.

special courts," thus making the Chief Justice "uniquely positioned . . . [to] select qualified judges for additional work on the FISC or [FISA] Court of Review."[303]

Judge Bates, much like Judge Walton before him,[304] also dealt with some of the practical limitations in requiring extensive declassification of FISC opinions and orders, including that declassification is predominantly reserved to the Executive Branch and that redacted opinions will largely give legal analysis devoid of any factual information.[305]

As can be seen from its comments, the Judiciary, at least those judges for whom Judge Bates spoke, sees many functional, practical, and constitutional difficulties in many proposals calling for change to operations of the FISC.

VII. AN EXECUTIVE PROPOSAL

On December 18, 2013, President Obama met with the Review Group to discuss its Report. The White House reported that "the President will work with his national security team to study the Review Group's report, and to determine which recommendations we should implement. The President will also continue consulting with Congress as reform proposals are considered in each chamber."[306] The Review Group Report was intended to become the basis for the Obama Administration's recommendations concerning the government surveillance programs. At least one commentator, however, points out that the Review Group Report put President Obama in a difficult position because it sought to rein in some of the aspects of the program that the President did not believe needed curtailing, including the § 215 program and the structure of the FISC.[307] Additionally, the media was not thrilled with the President's

303. *Id.* For a detailed analysis of the many positions for which the Chief Justice appoints judges, see generally Russell Wheeler, *John Roberts Appoints Judges to More Than the FISA Court*, BROOKINGS (Aug. 8, 2013), http://www.brookings.edu/research/articles/2013/08/08-john-roberts-judges-appointees-wheeler.

304. *See generally* Walton Mar. 27, 2013 Letter, *supra* note 184.

305. *Comments of the Judiciary*, *supra* note 289, at 14. Releasing redacted opinions would create "the risk of distorting, rather than illuminating, the reasoning and result of [FISC] opinions." *Id.*

306. Press Release, The White House, President Obama's Meeting with the Review Group on Intelligence and Communications Technologies (Dec. 18, 2013), http://www.whitehouse.gov/the-press-office/2013/12/18/president-obama-s-meeting-review-group-intelligence-and-communications-t.

307. *See* Benjamin Wittes, *The Very Awkward President Review Group Report*, LAWFARE (Dec. 18, 2013, 4:36 PM), http://www.lawfareblog.com/2013/12/the-very-awkward-president-review-group-report/#.UwgRgvldU6Y ("This presumably was not the report Obama was imagining when he asked this group to take this on. . . . To put the matter bluntly, there is

immediate response to the Review Group Report, contending that he should have instituted the Review Group's recommendations before the end of the year.[308]

In addition to meeting with his Review Group, on January 8, 2014, the President also met with the PCLOB to discuss its findings and recommendations before it released its final report on January 23, 2014.[309]

President's Speech. Against this backdrop, President Obama addressed the nation on January 17, 2014 to discuss the results of the Signals Intelligence Review.[310] In the midst of calling for reforms to the substance of the surveillance programs under §§ 215 and 702, the President also addressed some of the concerns over the FISC. In this regard, the President called for (1) reforms to increase transparency through an annual review "for the purposes of declassification [of] any future opinions of the [FISC] with broad privacy implications" and (2) the creation of "a panel of advocates from outside government" to add "a broader range of privacy perspectives" to the FISC proceedings.[311] The President also envisioned an increased role of the FISC by requiring a judicial finding before any information can be queried from the § 215 bulk metadata program database.[312] The President did not offer any reforms to the structure of the FISC for an alternative judge selection process, but he did state that he would be open to working with Congress to address these issues.[313]

Reactions to the President's speech were largely peppered with uncertainty and more questions.[314] Particularly with regard to his proposal

no way the administration will embrace a bunch of these recommendations.").

308. *E.g.*, Editorial Board, *Mr. Obama's Disappointing Response*, N.Y. TIMES, Dec. 20, 2013, http://www.nytimes.com/2013/12/21/opinion/mr-obamas-disappointing-response.html?_r=0 ("There was really only one course to take on surveillance policy from an ethical, moral, constitutional and even political point of view. And that was to embrace the recommendations of his handpicked panel on government spying—and bills pending in Congress—to end the obvious excesses. . . . He did not do any of that.").

309. *See* PCLOB REPORT, *supra* note 260, at 6.

310. Press Release, The White House, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.

311. *Id.*

312. *Id.*

313. *Id.*

314. *E.g.*, Wells Bennett, *The President's Speech: A Quick Reaction*, LAWFARE (Jan. 17, 2014, 3:53 PM), http://www.lawfareblog.com/2014/01/the-presidents-speech-a-quick-reaction/#.UwmFR_ldU6Y ("The devil is in the details . . . but details did not figure prominently in today's remarks, and some important ones will not come into focus for a while."); Editorial Board, *The President on Mass Surveillance*, N.Y. TIMES, Jan. 17, 2014, http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?hp&rref=opinion ("Most of [the President's] reforms were frustratingly

to include an adversarial process to the FISC proceedings, the President's remarks left the public with little guidance on what this measure would entail. With all of the different possible reform proposals, including his own Reform Group's submission, the President left the specifics for Congress to hash out and the experts to speculate and debate.[315]

CONCLUSION

The NSA leaks in the summer of 2013 implanted fear and anxiety into the American public over the extent and power of the government's surveillance programs. Commentators, scholars, and reporters were outspoken over the seemingly unrestrained Foreign Intelligence Surveillance Court. Senators and Representatives, "like greyhounds in the slips, straining upon the start," hurriedly drafted legislative reforms to overhaul FISA and the FISC "[a]t the first sound of a new argument over the United States Constitution and its interpretation."[316] The proposals, however, come up short of creating a perfect system that is able to protect both the national security of the United States and every privacy interest of the American people effectively. Establishing an independent advocate to participate in FISC proceedings brings with it appointment and standing difficulties, as well as practical implications for the FISC itself. Overhauling the FISC is based upon misplaced assumptions and concerns about the ideologies of Republican- and Democrat-appointed federal judges and the

short on specifics and vague on implementation."); David Cole, *Just the Data, Ma'am*, FOREIGN POL'Y (Jan. 17, 2014), http://www.foreignpolicy.com/articles/2014/01/17/just_the_data_ma_am_nsa_surveillance_speech (asserting that the President's proposals do not go far enough); Stephen Vladeck, *Which Congressional NSA Reform Proposals Will the Obama Administration Now Support?* JUST SECURITY (Jan. 18, 2014, 3:51 PM), http://justsecurity.org/2014/01/18/congressional-nsa-reform-proposals-obama-administration-support/ (stating, while contending that the President's speech could be just one step in the Administration's larger plan, that the speech contained "frustratingly equivocal language").

315. *See, e.g.*, Bennett, *supra* note 314 ("Its [sic] anyone's guess what the legislature might come up with here: a stable of trusted attorneys who can file amicus briefs, when called upon to do so in especially important FISC cases? A slate of lawyers who will play a wider role in FISC proceedings? Something else?"); Vladeck, *supra* note 314 ("Does the Administration have no view on how those questions should be answered? Or will we hear more specifics in the days and weeks to come, either affirmatively or in response to questions at congressional hearings?"). *But see* Joel Brenner, *President Obama's Speech and PPD-28*, LAWFARE (Jan. 17, 2014, 7:30 PM), http://www.lawfareblog.com/2014/01/president-obamas-speech-and-ppd-28/#.UwmFefldU6Y ("There [was no] point in being more detailed than he was on the nature of the privacy advocates panel for the FISC. Anything he did in that regard would be hashed over on the Hill anyway.").

316. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (quoting THE ECONOMIST, at 370, May 10, 1952).

amount of pushback the government receives from the court. The court is not merely a rubber stamp for the government surveillance programs; it takes a hard look at the information that it receives and makes complicated decisions based upon the law.

The court or its process, however, may need to be reformed to provide greater trust to the American people. After the quick reactions to the NSA disclosures in the form of the Legislative Branch proposals died down, the Executive and Judicial Branches, as well as an independent agency, were given the opportunity to produce more thoughtful responses after thorough analyses of all the issues and options. Now, almost one year after the first NSA leaks propelled the surveillance programs into the public debate, many choices are available, but few decisions have been made. Greater transparency has occurred through the increase in declassified FISC opinions and orders, but many are still left wondering what the future of the surveillance programs and the role of the FISC will be and in what direction the Executive,[317] Legislative,[318] and Judicial[319] Branches will

317. A request was made by President Obama following his January 17 speech for a report from the intelligence agencies and the Attorney General on alternative options to remove the phone surveillance program from the hands of the NSA. The DOJ and Office of the Director of National Intelligence provided the President with four options: (1) having the phone companies retain the metadata themselves; (2) having another agency besides the NSA, such as the Federal Bureau of Investigation, retain the metadata; (3) having a third party besides a government agency or the phone companies hold the data; or (4) abolish the program altogether. *See* Siobhan Gorman & Devlin Barrett, *White House Weighs Options for Revamping NSA Surveillance*, WALL ST. J., Feb. 25, 2014, http://online.wsj.com/news/articles/SB10001424052702303880604579405640624409 74. In March 2014 the Executive Branch announced that the bulk collection of telephony metadata under § 215 would be overhauled. *See* Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES, Mar. 24, 2014, http://www.nytimes.com/2014/03/25/us/obama-to-seek-nsa-curb-on-call-data.html?hp&_r=2. Under the President's proposal, the NSA would no longer collect the telephone records; instead, the telephone companies would retain the metadata themselves and the government could only obtain the records after receiving individual FISC orders approving the querying of specific telephone numbers. Press Release, The White House, FACT SHEET: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m. The proposal did not mention any changes to the structure or proceedings of the FISC. Jameel Jaffer, Deputy Legal Director at the ACLU, while still having questions, heralded the Administration's proposal as a "milestone." Jameel Jaffer, *Some Questions About the President's Phone-Records Proposal*, JUST SECURITY (Mar. 25, 2014, 1:42 PM), http://justsecurity.org/2014/03/25/questions-presidents-phone-records-proposal.

318. One day after the *New York Times* reported the Executive Branch's proposal to end the NSA's collection of metadata, *see supra* note 317, the House Intelligence Committee unveiled its own bill similar to the Administration's plan. *See* Frank Thorp V, *House Intel Panel Unveils NSA Metadata Overhaul Bill*, NBC NEWS, Mar. 25, 2014, 1:33 PM, http://www.nbcnews.com/storyline/nsa-snooping/house-intel-panel-unveils-nsa-metadata-

proceed. It is yet to be seen if any of the proposed legislative reforms will be passed or whether the Executive Branch will give more concrete answers as to how, or if, the changes to the structure of the programs and the FISC will be implemented.

overhaul-bill-n61751. In addition to the ending of the metadata collection by the government, the bill would allow the FISC to appoint an amicus curiae who would "assist the court in the consideration of a covered application." FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. § 5(i) (2014). In early May 2014, just before this Comment went to print, the House Judiciary Committee (through a unanimous 32–0 vote) and the House Intelligence Committee (through a voice vote) approved the USA FREEDOM Act, H.R. 3361, *see supra* note 19, which was proposed by Representative James Sensenbrenner, Jr., R-Wis., and Senator Patrick Leahy, D-Vt., in October 2013. *See* Julian Hattem, *House Clears Path for NSA Reform*, THE HILL, May 11, 2014, 7:30 AM, http://thehill.com/policy/technology/205762-house-poised-to-pass-nsa-reforms. The USA FREEDOM Act would require the phone companies to store the metadata instead of the NSA, would require NSA officials to obtain a FISC order before searching the metadata, and would create a panel of legal and technical experts that would analyze matters before the FISC. *Id.* The Act was the result of a compromise geared toward speeding its move through the House. Supporters of the bill expect a vote on the Act on the House floor by the end of May 2014 before it moves to the Senate. *Id.* Senator Leahy, Chairman of the Senate Judiciary Committee, promised that the Judiciary Committee would consider the bill in the summer of 2014. *Id.*

319. *See supra* notes 21–22 (discussing the recent district court decisions in *Klayman v. Obama* and *ACLU v. Clapper* on the legality of the government's bulk telephony metadata collection programs).