

THE SECRETS OF THE SECRET COURT: AN ANALYSIS OF THE MISSING PARTY AND OVERSIGHT OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

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INTRODUCTION

In 1978, Congress passed the Foreign Intelligence Surveillance Act¹ (FISA) in response to groundbreaking revelations that the U.S. government conducted surveillance of U.S. persons.² FISA established that non-criminal surveillance within the United States was permissible *only* for foreign intelligence purposes.³ There are two notable aspects of FISA: (1) § 702⁴ and (2) the Foreign Intelligence Surveillance Court (FISC).⁵

The FISC serves a dual purpose to protect the privacy interests and rights of U.S. persons and to combat and thwart terrorism.⁶ The FISC has eleven federal district court judges who sit on the court on a rotating basis and serve a maximum term of seven years.⁷ The Chief Justice of the U.S. Supreme Court appoints judges to the FISC, where at least three judges must reside within twenty miles of the District of Columbia at any given time.⁸ The FISC has jurisdiction to grant applications over four main types of activities: (1) electronic surveillance, (2) physical searches, (3) pen or trap surveillance,⁹ and (4) compelled production of tangible things.¹⁰

1. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 (2012)).

2. See JAMES G. MCADAMS, III, FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA): AN OVERVIEW 2 (explaining how historically U.S. presidents claimed inherent authority to conduct warrantless surveillance under Article II of the Constitution).

3. See *id.*

4. See generally 50 U.S.C. § 1881a (2012) (authorizing the surveillance of non-U.S. persons abroad).

5. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1803).

6. See generally MCADAMS, *supra* note 2, at 1 (noting how monitoring electronic platforms of individuals can aid in the fight against terrorism while maintaining the Foreign Intelligence Surveillance Court's (FISC's) original purpose of protecting privacy interests).

7. See 50 U.S.C. § 1803(a)(1).

8. *Id.*

9. Pen surveillance records telephone numbers, e-mail addresses, and other various numbers that are *transmitted by* instruments that carry wire or electronic communications, such as telephones or computers. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE,

The proceedings before the FISC are conducted in an ex-parte manner, where only the government is present at the certification or application hearing.¹¹ Because adversaries to warrant applications and certifications are not made aware of the FISA proceedings against them, critics of the FISC often call the process a “rubber stamp” on any request the government makes.¹²

The so-called “rubber stamp” became more rampant after the September 11, 2001 terrorist attacks. Then-President George W. Bush began circumventing the FISC and authorized wide sweeping collections of data.¹³ After the media uncovered and disseminated this information to the public, Congress passed the FISA Amendments Act of 2008 (Amendments Act), which reauthorized FISA and broadened § 702.¹⁴

The FISC came under scrutiny again with the 2013–2014 release of classified documents detailing how the National Security Agency (NSA) gathers intelligence.¹⁵ In response to the unprecedented leaks, Congress passed the USA Freedom Act in 2015, which imposed new transparency and account-

OVERSIGHT AND REVIEW DIV. 15-06, A REVIEW OF THE FBI'S USE OF PEN REGISTER AND TRAP AND TRACE DEVICES UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT IN 2007 THROUGH 2009 1 (2015). Trap surveillance records telephone numbers, e-mail addresses, and other various numbers that are *received by* instruments. *Id.* This type of communication is limited because it does not record any substantive content of the communication. *Id.*

10. See *Foreign Intelligence Surveillance Court (FISC)*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/surveillance/fisa/fisc/> (last visited Oct. 31, 2018).

11. See *id.* (explaining the target of the order is not given an opportunity to be at the hearing, nor is informed of the application against him or her).

12. See Holly Yan, *What Is the FISA Court, and Why Is It so Secretive?*, CNN (Mar. 8, 2017, 12:55 PM), <http://www.cnn.com/2017/03/08/politics/fisa-court-explainer-trnd/index.html>.

13. See Nina Totenberg, *Why the FISA Court Is Not What It Used to Be*, NPR (June 18, 2013, 3:07 AM), <https://www.npr.org/2013/06/18/191715681/why-the-fisa-court-is-not-what-it-used-to-be>; see also Yan, *supra* note 12.

14. Section 702 now allows the U.S. Attorney General to authorize mass collections of communications if the communications are between an individual located in the U.S. and an individual located in a foreign jurisdiction. See Yan, *supra* note 12. Section 702 expired at the end of 2017 and its reauthorization passed on January 19, 2018. See FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (2018).

15. Edward Snowden downloaded 1.5 million files and went public with information that included but was not limited to: Verizon records from millions of customers, data collected from the PRISM program, and metadata collected from Americans' Internet history. See Paul Szoldra, *This Is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks*, BUS. INSIDER (Sep. 16, 2016, 8:00 AM), <http://www.businessinsider.com/snowden-leaks-timeline-2016-9>.

ability measures for the FISC.¹⁶ The most significant change was the appointment and designation of at least five amici curiae to serve the FISC regarding specific legal or technical issues.¹⁷ Effective October 2018, the FISC has eight appointed amici.¹⁸

The FISC serves a quasi-administrative and quasi-judicial purpose within the federal government.¹⁹ Nonetheless, the Administrative Procedure Act (APA) has not been extended to agencies solely entrenched in surveillance or foreign affairs matters.²⁰ This APA exception, however, does not apply to the FISC because the FISC is not concerned *solely* with foreign affairs matters.²¹ Although intelligence gathering agencies have generally been uncertain under the APA, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has hinted at the possibility of using administrative law to govern surveillance related issues.²² In *Electronic Privacy Information Center v. U.S. Department of Homeland Security*,²³ the D.C. Circuit considered an APA challenge to the Transportation Security Administration's (TSA's) decision to use body scanners in airports rather than standard

16. See ELECTRONIC PRIVACY INFO. CTR., *supra* note 10 (noting the Director of National Intelligence now must review each FISC order and determine if it “includes a significant construction or interpretation of any provision of law”).

17. *Id.*; see also 50 U.S.C. § 1803(i)(1) (Supp. III 2012).

18. See *Amici Curiae*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., <http://www.fisc.uscourts.gov/amici-curiae> (last visited Oct. 31, 2018). The current amici are: (1) Jonathan G. Cedarbaum, partner at WilmerHale; (2) Laura Donohue, professor at Georgetown Law; (3) Amy Jeffress, partner at Arnold & Porter; (4) Marc Zwillinger, managing member at ZwillGen PLLC; (5) David Kris, co-founder at Culper Partners LLC; (6) Ana I. Anton, Ph.D, professor at School of Interactive Computing, Georgia Institute of Technology; (7) Ben Johnson, co-founder and Chief Technology Officer at Obsidian Security; and (8) Robert T. Lee, digital forensics and incident response lead at SANS Institute. *Id.*

19. The FISC mirrors a common characteristic of administrative agencies; it primarily exhibits a specialized lawmaking body that hears specific issues requiring a high level of expertise. See *generally Administrative Agencies*, U.S. LEGAL, <https://system.uslegal.com/administrative-agencies/> (last visited Oct. 31, 2018) (explaining that lawmaking administrative agencies specialize in specific issues requiring specific expertise).

20. See 5 U.S.C. § 553(a)(1) (2012) (excluding foreign affair related issues from the Administrative Procedure Act's (APA's) rulemaking provisions).

21. The FISC authorizes not only foreign intelligence surveillance collection but also domestic surveillance collection. See *supra* note 14 and accompanying text. See *generally* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936) (categorizing foreign affairs as a situation “entirely external to the United States”).

22. See *generally* *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (affirming that the Transportation Security Administration (TSA) must use a notice-and-comment period when deciding to implement body scanners at airports).

23. 653 F.3d 1 (D.C. Cir. 2011).

metal detectors.²⁴ The petitioners argued TSA failed to comply with the APA's notice-and-comment procedures, and the court agreed.²⁵ While this case demonstrates the extent of federal administrative law, it nevertheless gestures at the possibility of using administrative law to substantially govern agencies engaged in surveillance related activities.²⁶

The FISC was created through statute by the power vested in Congress in Article III of the U.S. Constitution.²⁷ Even so, the FISC allows for public comment under the APA.²⁸ Organizations have asserted the right to publicly petition the FISC as a federal agency, thereby affirming not only the APA's authority over the FISC, but the FISC's quasi-administrative nature.

Part I of this Comment will discuss the history and evolution of the FISC, noting the emerging role of the amici. Part II will explain why current oversight mechanisms are ineffective. It will also compare the FISC to the traditional adversarial judicial system practiced in most U.S. courts. Part III will address the advantages and disadvantages of more oversight. Lastly, Part IV assesses what more oversight can look like within the FISC and provides a recommendation that the Administrative Conference of the United States (ACUS) research and adopt an independent ombudsman entity to ensure the FISC is adhering to its mandate and provides a unique process of judicial review.

I. THE "RUBBER STAMPING" HISTORY OF THE FISC

A. *Pre-USA Freedom Act*

Often described as the most powerful court individuals have never heard of, the FISC has substantial discretion in its authority to grant, modify, or deny warrants.²⁹ Between 1979 and 2012, federal agencies submitted some

24. *Id.* at 3–4.

25. *Id.* at 4–5.

26. See Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1098 (2016).

27. See U.S. CONST. art. III, § 1.

28. In 2010, the Electronic Privacy Information Center submitted comments to the FISC regarding proposed FISC rules. See Electronic Privacy Information Center, Comment Letter on Proposed Amended FISC Rules of Procedure (Oct. 4, 2010), <https://www.jdsupra.com/documents/ee34a6bd-0a83-45e7-be79-0a126e46c001.pdf>. See generally 5 U.S.C. § 533(b)–(e) (2012) (establishing that administrative agencies are to give general notice of proposed rules and allow individuals or institutions to petition the rules).

29. See Bruce Moyer, *Washington Watch*, FED. B. ASS'N (Mar. 2015), <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2015/March-2015-The-Most-Powerful->

33,900 ex-parte requests for various warrants under the FISC's jurisdiction.³⁰ In total, only eleven requests were denied, a 99.97% approval rate.³¹ This can hardly be surprising, as lopsided win rates are a common characteristic of ex-parte proceedings.³² However, a win rate *this* lopsided—where the balance of individuals' privacy interests and national security interests are critical—should raise concerns. This trend continued into 2012 when the Director of the Administrative Office of the U.S. Courts (AOC) reported that the FISC received 1,856 applications and denied zero, making the FISC's warrant approval 100%.³³

In early 2013, Congress's interests in the FISC processes piqued for, perhaps, the first time since the passage of the USA Patriot Act.³⁴ In a rare meeting with Senator Diane Feinstein and District Court Judge John Bates, discussions of the warrant application, certification processes, and the interworking of the court were conducted in significant detail.³⁵ Although the meeting was intended to quell Congress's concerns surrounding the FISC, Senator Ron Wyden, a member of the Senate Intelligence Committee, made clear that "the government can get virtually anything."³⁶ With concerns from lawmakers growing and outrage from the American people continuing to stir, lawmakers passed the USA Freedom Act in 2015.³⁷

B. *The Implications of the USA Freedom Act*

The USA Freedom Act reauthorized sections of the expired USA Patriot Act.³⁸ The Act terminated the highly controversial NSA program of bulk

Court-You-Have-Never-Heard-Of.aspx.

30. See Conor Clarke, Essay, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125, 125 (2014).

31. *Id.*

32. *Id.* at 126.

33. See U.S. COURTS, REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2012 (2013).

34. See Peter Wallsten et al., *For Secretive Surveillance Court, Rare Scrutiny in Wake of NSA Leaks*, WASH. POST (June 22, 2013), https://www.washingtonpost.com/politics/for-secretive-surveillance-court-rare-scrutiny-in-wake-of-nsa-leaks/2013/06/22/df9eaa6-d9fa-11e2-a016-92547bf094cc_story.html?utm_term=.020e770fc6ba (noting that various media reports about FISA's vast reach prompted lawmakers' attention).

35. See *id.* (describing meetings with former FISC judges as highly unusual).

36. See *id.* (stating that the FISC gives the federal government access to Americans' credit card usage and firearm purchases, among other tangibles).

37. See USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

38. See *USA Freedom Act: What's In, What's Out*, WASH. POST (June 2, 2015),

collection of telephone records and required more transparency measures to be taken by the FISC.³⁹

The FISC is given complete authority and discretion to determine who to appoint as an amicus curiae.⁴⁰ The statutory authority controlling the implementation of the amici is left to the broad discretion of the court.⁴¹ In fact, the only statutory requirements the FISC must abide by are: (1) an amicus curiae must be an expert in civil liberties, intelligence collection, communications technology, or another area that may be useful to the court and (2) an amicus curiae must have a security clearance.⁴² Once an amicus curiae is appointed, he or she serves pursuant to rules the presiding judge establishes.⁴³ However, an amicus curiae cannot be used by the presiding judge unless, *in the court's opinion*, a novel or significant interpretation of the law is presented.⁴⁴ Fortunately for the presiding judge, a provision within the statute permits dismissing the mandated amicus curiae when “the court issues a finding that such appointment is not appropriate.”⁴⁵ Nonetheless, the statute fails to define “not appropriate,” leaving it up to the court’s interpretation.⁴⁶ The court in *In re Applications of the Federal Bureau of Investigation for Orders Requiring the Production of Tangible Things*⁴⁷ found the appointment of an amicus curiae is generally not appropriate when obvious legal issues or legal conclusions are involved, even when the issue presented

<https://www.washingtonpost.com/graphics/politics/usa-freedom-act/>; *see also* 50 U.S.C. § 1803 (2012 & Supp. III 2016); USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

39. The new measures include (1) declassification of FISC opinions containing a significant legal interpretation, (2) reporting requirements to FISA authorities, (3) allowing private companies more latitude in publishing FISA applications received, and (4) the formation of amici. *See* 50 U.S.C. § 1803; USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

40. *See generally* 50 U.S.C. § 1803(a)(1)(i) (explaining further that there is no confirmation process involved).

41. *See* Ben Cook, Note, *The New FISA Court Amicus Should be Able to Ignore Its Congressionally Imposed Duty*, 66 AM. U. L. REV. 539, 544 (2017) (stating that the statute gives the FISC “broad discretion to control whether the amicus participates”).

42. *See* 50 U.S.C. § 1803(i)(3)(A)–(B).

43. *See id.* § 1803(i)(1).

44. *See id.* § 1803(i)(2)(A); *see also* Chad Squitieri, Essay, *The Limits of the Freedom Act's Amicus Curiae*, 11 WASH. J. L. TECH. & ARTS 197, 204 (2015) (using the word “shall” implies that the FISC must appoint an amicus curiae in that setting).

45. *See* 50 U.S.C. § 1803(i)(2)(A); *see also* Squitieri, *supra* note 44, at 204 (explicitly providing that the court can opt out of the amici, contradicting its seemingly compulsory language).

46. *See generally* 50 U.S.C. § 1803 (lacking any definition for “not appropriate”).

47. Nos. BR 15-77, BR 15-78 (FISA Ct. June 17, 2015).

is “novel or significant.”⁴⁸ This standard is, similar to the FISC’s statutory authority, subjective and discretionary; what an “obvious” legal issue is to one presiding FISC judge may not be obvious to a different presiding judge.

Additionally, the amici are limited to three types of arguments when their expertise is requested by the court: (1) legal arguments that advance the protection of individual civil liberties and privacy interests, (2) information related to intelligence collection or communication technology, and (3) other legal arguments the presiding judge wants to hear.⁴⁹ When an amicus curiae is determined to be appropriate, the court determines what information is relevant to the duties of the amicus curiae; thus allowing the court to further control the information given to the amicus curiae in preparation for the hearing.⁵⁰

The statute mandated the amici to be appointed by November 29, 2015, but the court used the amici well before the mandated deadline.⁵¹ After November 2015, the FISC could no longer use the lack of amici appointments as an excuse to avoid their use.⁵² However, the FISC’s use of the amici fared worse in 2016. In 2016, FISC received 1,752 applications and denied nine applications denied in full, equating to 99.486% approval.⁵³ Moreover, an amicus was appointed in only one instance.⁵⁴

48. *See id.* at 6 (explaining that if no reasonable jurist would reach a different decision, an amicus curiae is not required under the statute).

49. *See* 50 U.S.C. § 1803(i)(4)(A)–(C).

50. *See id.* § 1803(i)(6)(A)(i).

51. *See id.* § 1803(i)(1); *see also* U.S. COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2015 (2015), http://www.uscourts.gov/sites/default/files/fisc_annual_report_2015.pdf (noting between June 8, 2015 and December 31, 2015, the FISC granted the use of an amicus curiae four times and denied the use of an amicus curiae five times).

52. *See* U.S. COURTS, *supra* note 51 (observing that the use of an amicus was denied five times because it was impractical to appoint an amicus so soon after the provision became law).

53. *See generally* U.S. COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2016 (2016), http://www.uscourts.gov/sites/default/files/ao_foreign_int_surveillance_court_annual_report_2016_final.pdf (describing various FISC statistics).

54. *Id.* The appointment of the amicus curiae did not come from the FISC itself, but from the Foreign Intelligence Surveillance Court of Review (FISCR), to which the court disregarded all arguments made by the amicus curiae. *See In re Certified Question of Law*, 858 F.3d 591, 595 (FISA Ct. Rev. 2016).

II. A BAND-AID FIX TO A LARGER PROBLEM OF OVERSIGHT

A. Current Oversight Mechanisms

There are two oversight mechanisms written into FISA to balance security and individual privacy interests. The first mechanism is the Foreign Intelligence Surveillance Court of Review (FISCR).⁵⁵ The FISCR is comprised of a panel of three district court judges appointed by the Chief Justice of the Supreme Court.⁵⁶ The FISCR has authority to hear cases when (1) the Government appeals the denial of an order,⁵⁷ (2) there is a need for uniformity within decisions, or (3) the interest of justice so requires.⁵⁸

The second mechanism is the amici. However, this mechanism gives complete discretion to one presiding judge at any given time.⁵⁹ According to the USA Freedom Act, the presiding judge is allowed to pick any amicus curiae he or she chooses within broad statutory requirements and without an official confirmation process.⁶⁰ The amici are limited in their role based on whether the court wants the amici present, and the information given to the amici is determined entirely by the presiding judge.⁶¹

B. Warrant Processes

One stark difference between traditional criminal courts and the quasi-administrative FISC is the warrant standard. In the United States, there are two main mechanisms through which a warrant for surveillance can be authorized: (1) Title III of the U.S. Criminal Code, and (2) the FISC.⁶² A

55. *See generally* 50 U.S.C. § 1803(b) (2012) (establishing the FISCR and its governing authority).

56. *Id.*

57. *Id.*

58. *See* 50 U.S.C. § 1803(j) (2012 & Supp. III 2016).

59. *See supra* Part I.B. (explaining the various statutory discretionary functions that are left up to the presiding FISC judge to determine).

60. *See generally* 50 U.S.C. § 1803(i) (Supp. III 2016) (establishing requirements, or lack thereof, of choosing the amicus curiae).

61. *See id.* § 1803(i)(2)(A), (i)(6)(A)(i). The USA Freedom Act requires the amici to have access to a wide array of legal documents, but those materials can be limited when “the court determines [the documents] are relevant to the duties of the amicus curiae.” *See* USA Freedom Act of 2015, Pub. L. No. 114-23, § 103(i)(6)(A)(i), 129 Stat. 268, 280.

62. *See generally* OFFICE U.S. ATT’YS, CRIMINAL RESOURCE MANUAL 28 (2012), <https://www.justice.gov/usam/criminal-resource-manual-28-electronic-surveillance-title-iii-applications> (stating the requirements for a Title III warrant); 50 U.S.C. § 1803 (2012 & Supp. III 2016) (establishing the FISC and its duty to hear surveillance applications).

Title III warrant application must have a showing of probable cause that (1) a specific federal offense was violated or (2) a specific federal offense is in the process of being violated.⁶³ To prevent a spillover effect,⁶⁴ the warrant must also minimize all collection of non-relevant communications.⁶⁵ In the criminal context, a surveillance warrant is a warrant of last resort; whereas under FISA, authorities need not demonstrate prior measures taken to obtain the information sought with a surveillance application or certification.⁶⁶

Under the FISC, however, the standard for a surveillance warrant is lower than the strict probable cause required under Title III.⁶⁷ Arguably, the FISC's standard of probable cause is significantly lower than the probable cause standard under Title III because national security interests are higher under FISA.⁶⁸ To obtain a surveillance warrant for a pen register

63. See OFFICE U.S. ATT'YS, *supra* note 62, ¶ C.

64. Spillovers are when surveillance directed at one group sweeps up the communications or data of an entirely different group. See Renan, *supra* note 26, at 1064.

65. See OFFICE U.S. ATT'YS, *supra* note 62, ¶ L; see also Ellen Nakashima, *How Hard Is It to Get an Intelligence Wiretap? Pretty Hard.*, WASH. POST (Mar. 4, 2017), https://www.washingtonpost.com/world/national-security/just-how-would-the-government-obtain-a-wiretap-in-a-counterintelligence-probe-show-a-federal-judge-probable-cause-that-the-target-is-an-agent-of-a-foreign-power/2017/03/04/5905d7b4-0117-11e7-99b4-9e613afeb09f_story.html?utm_term=.e8454e98d83b (explaining that when authorities are listening to non-relevant communications under a Title III surveillance warrant, the authorities must cease listening to the communication entirely).

66. See OFFICE U.S. ATT'YS, *supra* note 62, ¶ L(f) (explaining that a declaration must be put into the warrant stating other methods of investigation have been used and failed). See generally 50 U.S.C. § 1803 (nothing in the mandate of the court explains the FISA warrant is a warrant of last resort).

67. FISA does not require probable cause of a crime, but probable cause that the target is an agent of a foreign power. See Rob Eno, *FISA Explained: The Left Is Misleading on the Trump "Wiretaps,"* CONSERVATIVE REV. (Mar. 5, 2017), <https://www.conservativereview.com/articles/fisa-explained-and-how-the-left-is-trying-to-mislead-on-the-trump-wiretaps/>; Asha Rangappa, *It Ain't Easy Getting a FISA Warrant: I Was an FBI Agent and Should Know*, JUST SECURITY (Mar. 6, 2017), <https://www.justsecurity.org/38422/aint-easy-fisa-warrant-fbi-agent/>.

68. See Memorandum from Charles Doyle, Senior Specialist, Cong. Research Serv., Probable Cause, Reasonable Suspicion, and Reasonableness Standards in the Context of the Fourth Amendment and the Foreign Intelligence Surveillance Act, to Senate Select Comm. on Intelligence 1 (Jan. 30, 2006), <https://www.hsdl.org/?view&did=460154> (summarizing that the U.S. Supreme Court has recognized probable cause to be less demanding in national security cases); see also Rangappa, *supra* note 67 (explaining that when it comes to the national security of the United States, as opposed to criminal surveillance, Fourth Amendment rights must be balanced against protecting the country).

and trap device under FISA, the application must include a certification that the information is *likely* foreign intelligence information not related to a U.S. person.⁶⁹ Similarly, to acquire business records, an application must contain *reasonable grounds* to believe the records sought are relevant to an investigation and that the records pertain to a foreign power or an agent of a foreign power.⁷⁰ A reasonable grounds standard is clearly below the probable cause standard employed in criminal warrants.⁷¹ For a quasi-administrative body that is dealing with two important interests of a democratic society—individual privacy and national security—a mechanism is needed to safeguard the privacy interests that are so highly valued; particularly when the legal standard is lowered.

C. Downfalls of the Current System

In general, most warrants are granted in any field in which they are requested.⁷² However, the FISC is the only court in the country that requires a lessened standard for surveillance warrants.⁷³ To create more transparency within the court, the amici were created.⁷⁴ But the amici do not solve any problems, let alone provide for more accountability within the court.⁷⁵

There are no mechanisms located within FISA or its subsequent

69. See 50 U.S.C. § 1842(c)(2) (2012).

70. See 50 U.S.C. § 1861(b)(2)(B), (b)(2)(B)(i) (Supp. III 2016); see also Jennifer Granick & Christopher Sprigman, *The Secret FISA Court Must Go*, DAILY BEAST (July 24, 2013, 4:45 AM), <https://www.thedailybeast.com/the-secret-fisa-court-must-go> (explaining that the term “relevance” under this provision differs from the norm, and individual pieces of data may not be relevant, but the sum of the data taken together *might* be relevant to *some* investigation).

71. See Memorandum from Charles Doyle, *supra* note 68, at 3–4 (noting in *United States v. Sokolow*, the Supreme Court described reasonable suspicion as less demanding than probable cause).

72. See 2016 U.S. CT. ANN. WIRETAP REP. TABLE 7 (2016) (stating out of the 3,170 wiretap warrants requested at the state and federal level, 3,168 of them were granted); see also Clarke, *supra* note 30 (emphasizing between 1968 and 2012, federal courts approved 99.97% of Title III wiretaps).

73. See *supra* note 67 and accompanying text. See generally *McNeill v. Butz*, 480 F.2d 314, 325 (4th Cir. 1973) (explaining fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights).

74. See 50 U.S.C. § 1803(i) (Supp. III 2016) (creating the statutory authority for the amici); see also Dia Kayali, *What You Need to Know About the FISA Court –And How It Needs to Change*, ELECTRONIC FRONTIER FOUND. (Aug. 15, 2014), <https://www EFF.ORG/deeplinks/2014/08/what-you-need-know-about-fisa-court-and-how-it-needs-change> (explaining that the FISC needed to change and a part of that change was the creation of the amici).

75. See Cook, *supra* note 41, at 563 (recognizing the FISC has declined to use an amicus curiae even when the issue at hand was novel or significant).

amendments to monitor the privacy implications of ongoing surveillance.⁷⁶ Once the amicus curiae presents an argument regarding civil liberties and privacy interests, the warrant will likely be granted, appearing to be the end of the process.⁷⁷ The process, however, does not end when the warrant is granted because most FISC warrants, if not all, are *ongoing* surveillance, not subject to the amicus curiae mandate.⁷⁸ The current role of the amicus is a one-off interaction, whereas surveillance is a cumulative process expanding across time, space, and people.⁷⁹ For instance, the targeting of one individual in a FISA warrant not only implicates the privacy of that individual, but also implicates the privacy of other individuals who may be directly or indirectly associated with the original individual.⁸⁰

This lack of oversight compliance is not solved by the implementation of the amici because even if the court chooses to use an amicus curiae, his or her duties end when the presiding judge grants the request.⁸¹ For instance, in regard to multi-communication transactions (MCTs),⁸² collection of the

76. But this very issue has caught the Supreme Court's attention. *See* *United States v. Jones*, 565 U.S. 400 (2012). The Court held a twenty-eight-day GPS tracking of a vehicle constituted a "search" in violation of the Fourth Amendment. *Id.* at 404. While the majority virtually ignored the constitutional question of cumulative tracking, in her concurrence, Justice Sotomayor discussed that long-term monitoring may impinge on the expectation of privacy. *Id.* at 415 (Sotomayor, J., concurring). *See generally* 50 U.S.C. § 1803 (noting there are no provisions that call for the monitoring of ongoing surveillance).

77. *See* Glenn Greenwald, *Fisa Court Oversight: A Look Inside a Secret and Empty Process*, *GUARDIAN* (June 18, 2013, 7:36 PM), <https://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy> (explaining that once the FISC puts its "approval stamp" on an application, the FISC is no longer involved).

78. *See* Renan, *supra* note 26, at 1054 (explaining the type of programmatic surveillance warrants the FISC grants are continuous and cumulative).

79. *Id.*

80. *See id.* at 1042–43 (describing how familial connections can be made based on the target individual's communications or biological data).

81. *See* Greenwald, *supra* note 77 (confirming there is no judicial check after the FISC approves the surveillance).

82. Multi-communication transactions (MCTs) can be described as communication transactions that contain multiple discrete communications. *See* Redacted, 2011 WL 10945618, at *9 (FISA Ct. Oct. 3, 2011). When an e-mail user logs onto his or her account, the user will see a list of unread e-mails; this list of unread e-mails generally contains the date of the e-mail, the sender, the subject, and the size of the message, which are sent to the National Security Agency (NSA) as one communication, although each unread e-mail is technically a separate communication. *See* Parker Higgins, *Intelligence Agency Attorney on How "Multi-Communication Transactions" Allowed for Domestic Surveillance*, *ELECTRONIC FRONTIER FOUND.* (Aug. 21, 2013), <https://www EFF.org/deeplinks/2013/08/intelligence-agency-attorney-explains-how-multi-communication-transactions-allowed>.

surveillance data happened *after* the warrant was granted.⁸³ This is significant because once an application or certification is granted, there is no mandated follow-up to ensure compliance.⁸⁴ In fact, the 2011 upstream collection⁸⁵ of MCTs only became visible to the FISC more than two years after the application was granted and was not within the scope of FISA.⁸⁶

Upstream collection of MCTs is specifically problematic for two reasons. First, at the time of the warrant application, the residual collection of domestic surveillance is not the target of the warrant, but a potential consequence of the warrant.⁸⁷ Second, the amicus curiae's arguments are limited to individual civil liberties and privacy interests.⁸⁸ The future privacy and individual civil liberty interests are largely left unprovided for, even with the emerging role of the amici. Even if the amici provision was functioning as intended, future implications of the warrant or certification would be absent from the hearing.⁸⁹ Although the methods NSA uses to collect its data continue to be problematic, a broader statutory authority or an independent ombudsman office could remedy how future implications of warrant or certification applications are analyzed in a FISC hearing.

FISC proceedings are still largely *ex-parte*.⁹⁰ The continued "secretive nature" of the FISC results in an "echo chamber," where isolated government actors have a reduced risk to have their presumptions and conclusions "tested by outside opinions."⁹¹ Likewise, the U.S. judicial system has for decades recognized that *ex-parte* proceedings are not fair.⁹² In the early 1950s, the U.S. Attorney General (AG) listed organizations as communist

83. See Redacted, 2011 WL 10945618, at *11 (noting once the application is approved, NSA can start its collection of MCTs).

84. See *supra* note 81 and accompanying text.

85. Upstream collection is described as the Internet traffic NSA collects as it flows through major telecommunications hubs. See Higgins, *supra* note 82.

86. See Redacted, 2011 WL 10945618, at *13, 14 (explaining that upstream collection was outside the scope of § 702); Renan, *supra* note 26, at 1072.

87. This is also known as the spillover effect, where surveillance directed at one group sweeps up communications of unrelated groups. See Renan, *supra* note 26, at 1064.

88. See 50 U.S.C. § 1803(i)(4)(A)-(C) (Supp. III 2016).

89. See *id.* (noting the three types of arguments the amici are allowed to make).

90. Since the implementation of the amici in late 2015, the FISC has used an amicus curiae five times out of over 2,700 warrant applications. The court decides to use an amicus curiae at an average ratio of 1:540 per warrant application. See U.S. COURTS, *supra* note 51; U.S. COURTS, *supra* note 53.

91. See Squitieri, *supra* note 44, at 201.

92. See generally *McNeill v. Butz*, 480 F.2d 314, 325 (4th Cir. 1973) (explaining fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights).

entities, including the Joint Anti-Fascist Refugee Committee.⁹³ The plaintiff brought suit and argued that listing its entity as communist without a hearing or prior notice violated its constitutional due process rights.⁹⁴ Concluding that the AG did not have the authority to designate organizations as communist, Justice Douglas, in a concurring opinion, affirmed that notice and opportunity are fundamental parts of due process.⁹⁵ In dicta, Justice Douglas continued: “to let the Government adopt such lesser [standards of fair dealing] as suits the convenience of its officers is to start down a totalitarian path.”⁹⁶ Although *Joint Anti-Fascist Refugee Committee v. McGrath*⁹⁷ was well before the creation of the FISC, it illustrates the same issue prevalent in the FISC debate—the fairness of ex-parte hearings in the context of national security.⁹⁸ While threats of communism were paramount at the time *McGrath* was decided, national security has largely dominated since September 11, 2001.⁹⁹

D. Judicial Review of Agency Action

The APA permits judicial review of final agency actions.¹⁰⁰ A party inclined to obtain judicial review of a federal administrative action must establish (1) the reviewing court has jurisdiction,¹⁰¹ (2) a cause of action exists,¹⁰² (3) sovereign immunity does not bar the action,¹⁰³ (4) the venue is proper,¹⁰⁴ and (5) the requirements of standing are met.¹⁰⁵ A party seeking

93. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 129 (1951).

94. *Id.* at 132.

95. *Id.* at 177–78 (Douglas, J., concurring).

96. *Id.* at 177 (Douglas, J., concurring).

97. 341 U.S. 123 (1951).

98. *Id.* at 174 (Douglas, J., concurring) (“The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two.”).

99. Post-September 11, 2001 has fostered an environment of manmade threats, ideological terrorism, and the rapid spread of technology, distinguishing itself from previous years of homeland security events. See Kathleen Hicks, *What Will Americans Do About Their Fear of Terrorism?*, ATLANTIC (Aug. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/08/the-state-of-national-security-after-911/496046/>.

100. See generally 5 U.S.C. § 551(1) (2012) (defining “agency”).

101. See JARED COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 3 (2016) (recognizing the agency’s statute itself must authorize subject matter jurisdiction).

102. See 5 U.S.C. §§ 702–04 (providing a cause of action for parties adversely affected by an agency action where no adequate remedy is available).

103. Sovereign immunity is waived when available relief is non-monetary. See 5 U.S.C. § 702.

104. See generally 28 U.S.C. § 1391(e) (2012) (describing venue).

judicial review must also demonstrate (1) administrative remedies have been exhausted¹⁰⁶ and (2) the action is ripe.¹⁰⁷

Two types of agency rulemaking can be granted judicial review—formal rulemaking¹⁰⁸ and informal rulemaking.¹⁰⁹ For the purposes of this Comment, the most prevalent standard of judicial review is the *Chevron* deference standard.¹¹⁰ However, before instituting a *Chevron* analysis, a court must consider “step zero”—was the rule in question promulgated pursuant to Congressional authority delegated to the agency?¹¹¹ If the answer is yes, a court can then begin its *Chevron* analysis by asking two questions: (1) whether Congress has directly spoken to the precise question at issue and (2) if not, whether the agency’s answer is based on a permissible construction of the statute.¹¹²

At first glance, there appears to be some, albeit limited, judicial review of FISA orders by the FISC.¹¹³ By virtue of the limited judicial review enjoyed by the FISC, the requirement of a final agency action is most likely met.¹¹⁴ As for the FISC’s statutory authority specifically, only the govern-

105. Standing consists of (1) an injury in fact; (2) a causal connection between the injury and conduct complained of; and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

106. *See Darby v. Cisneros*, 509 U.S. 137, 142 (1993) (explaining a person can seek judicial review of an agency action without exhausting administrative remedies unless agency regulations require the exhausting of available remedies).

107. A claim is ripe when an administrative action results in the imposition of an obligation. *See Ripeness of Question for Judicial Review*, U.S. LEGAL, <https://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/ripeness-of-question-for-judicial-review/> (last visited Oct. 31, 2018).

108. Formal rulemaking is convened when a statute explicitly states proceedings must be made on the record, largely following judicial processes and procedures. *See* 5 U.S.C. § 553(c). *See generally* 5 U.S.C. §§ 556, 557 (explaining formal rulemaking procedures).

109. Informal rulemaking includes a notice-and-comment period. *See generally* 5 U.S.C. § 553 (describing the notice-and-comment procedures, among others).

110. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

111. *See* Thomas Merrill & Kristin Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 912 (2001) (explaining what step zero is and the history surrounding it).

112. *See Chevron*, 467 U.S. at 842–43.

113. *See generally* 50 U.S.C. § 1861(f) (Supp. III 2016) (explaining when judicial review can exist within the FISC). Statutory authority allows individuals or entities receiving compelled production of tangible things to challenge such orders by petitioning the FISC. *Id.*

114. *See generally* *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (establishing that agency action cannot be interlocutory, and it must establish legal rights or consequences).

ment can seek review to the FISCR.¹¹⁵

1. *Pre-Enforcement Review*

Where a statute provides an exclusive opportunity for judicial review, pre-enforcement review is permitted.¹¹⁶ Under pre-enforcement review, the question is not whether an affected party will obtain judicial review, but rather when such review will be granted.¹¹⁷ The Supreme Court in *Abbott Laboratories. v. Gardner*¹¹⁸ developed the widely known bifurcated test to determine which agency actions can be challenged prior to enforcement.¹¹⁹ The reviewing court must evaluate (1) the fitness of the issue(s)¹²⁰ and (2) the hardship of the parties.¹²¹

Although judicial review is largely statutorily precluded with regard to warrant applications or certifications, this is not the case for production orders.¹²² In *In re Directives to Yahoo! Inc. Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*,¹²³ the petitioner, Yahoo!, filed a petition to review an order compelling Yahoo! to allow DOJ to collect data on its customers.¹²⁴ While the FISCR affirmed the FISC's production order, the court recognized Yahoo! had standing, despite the fact no injury had occurred.¹²⁵ This case demonstrates that the FISCR has jurisdiction to review petitions of compelled disclosure, the statutory authorization exists for such petition,

115. See 50 U.S.C. § 1803(j) (describing how the FISCR reviews FISC decisions).

116. See generally *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1966) (the controlling case on pre-enforcement review requirements).

117. See Daniel McNeil, *Pre-Enforcement Review of Administrative Agency Action: Developments in the Ripeness Doctrine*, 53 NOTRE DAME L. REV. 346, 346–47 (1977) (describing pre-enforcement review as a subsidiary of ripeness).

118. 387 U.S. 136.

119. *Id.* at 141–43.

120. This element of the test includes evaluating whether the issue in question is purely legal and whether the issue is a final agency action as defined under the APA. See McNeil, *supra* note 117, at 348.

121. To qualify for hardship, the agency must place a grievance on the party, such as sanctions. *Id.*

122. Judicial review is precluded for all parties except for the government, unless the issue in question is an order compelling the production of tangible records, in which the individual may challenge the order. See 50 U.S.C. §§ 1803(j), 1861(f) (Supp. III 2016).

123. No. 08-01, 2008 WL 10632524 (FISA Ct. Rev. Aug. 22, 2008).

124. *Id.* at *1.

125. The court relies on the Fourth Amendment Rights of Third Party Customers doctrine. *Id.* at *3. If Congress—explicitly or implicitly—cedes to a party's right to sue based on the interests of others, the party has standing. *Id.*

and the venue is arguably proper.¹²⁶

2. *Surveillance as an Injury in Fact?*

What makes the FISC unique in this situation is standing.¹²⁷ On the surface, it will prove difficult, if not impossible, to meet the actual injury requirement of standing.¹²⁸ One main issue contributes to this conclusion: the warrant application and certification proceedings are conducted *ex parte*, therefore, individuals who have suffered an actual injury are not made aware of it.¹²⁹ As it currently stands, this undercuts any possibility of judicial review of FISC actions as it pertains to surveillance applications or certifications.¹³⁰

For a court so deeply rooted in not only administrative law, but also Article III of the Constitution, a traditional administrative forum of review is needed to protect not only the FISA system, but also to protect individuals' constitutional rights. Individuals are adversely affected by the FISC's adjudication proceedings and to completely shut the door to judicial review for national security interests contradicts the APA and presents a dangerous slippery slope argument of citing national security to deprive individuals of their rights. Caution is needed, however, because opening the door to judicial review too far may expose U.S. national security secrets.¹³¹ Allowing for an independent authority to provide adversarial hearings in conformity with formal adjudication proceedings will provide the balance needed between national security and individuals' constitutional rights.

126. *Id.* at *3–4.

127. *See* U.S. CONST. art. III, § 2. *But see In re Directives to Yahoo!*, 2008 WL 10632524, at *3 (stating Congress has the authority to relax prudential standing in judicial review of administrative agencies).

128. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (noting the injury in fact requirement of standing).

129. *See supra* note 11.

130. An *amicus curiae* has no litigation powers and is before the court to provide the presiding judge with additional arguments, at his or her request. *See generally* 50 U.S.C. § 1803 (Supp. III 2016) (noting what arguments the amici can make before the FISC). Therefore, only the government can bring judicial review actions. *See supra* note 122.

131. *See generally* Benjamin Wittes, *Friends of the Court: A Suggestion for the FISA Court on the Nunes Memo*, LAWFARE (Feb. 7, 2018, 7:48 PM), <https://www.lawfareblog.com/friends-court-suggestion-fisa-court-nunes-memo> (explaining that the government has a difficult conundrum, whether to allow public disclosure and expose methods, or to remain secret).

III. MORE OVERSIGHT? WHY IT IS GOOD

A. Congressional Intent Recognizes Oversight

In conjunction with all government agencies, the FISC exists for the American judicial process.¹³² FISA is an act of Congress, and Congress authorized the FISC to enjoy an unsettling amount of discretion.¹³³ But what Congress did not do is give the FISC carte blanche; otherwise, the protections of the Constitution would be wholly irrelevant in a national security context.¹³⁴ Ultimately, Congress was, and currently is, concerned with privacy interests because Congress chose to put the FISC into limited public view, allowing for limited transparency.¹³⁵ Congress could have easily made the FISC into a Special Access Program (SAP),¹³⁶ which it has done and continues to do with other government programs and agencies.¹³⁷

What is more, Congress recently passed the FISA Amendments Reauthorization Act of 2017, reauthorizing § 702.¹³⁸ In conjunction with § 702, § 103(6) requires the FISC to deem the first issuance of a § 702 certification as a novel or significant interpretation of the law; thus, igniting the re-

132. Cf. Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html> (noting the FISC is forgoing a system that is a staple of the American justice system).

133. See *supra* Part I.B.

134. As a quasi-administrative and quasi-judicial agency, the FISC's statutory authority is rooted in the Constitution, in particular, the Fourth Amendment and its protections against unreasonable searches and seizures. See Renan, *supra* note 26, at 1044 (arguing FISA and respectively the FISC supply a complementary mechanism to regulate Fourth Amendment activity); *In re Certified Question of Law*, 858 F.3d 591, 595 (FISA Ct. Rev. 2016) (conducting a Fourth Amendment analysis in concluding that § 1842 is valid).

135. Policymakers have attempted, and failed, to add more transparency to the FISC. See Cook, *supra* note 41, at 555. For instance, before the passage of the USA Freedom Act, Senator Richard Blumenthal supported a provision calling for a special advocate with not only litigation powers before the FISC, but with standing as a party. *Id.* at 555–56.

136. A Special Access Program (SAP) is a program so sensitive that it is exempt from standard reporting requirements to Congress. See COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, S. DOC. NO. 105-2, pt. 2 at 26 (1997).

137. The NSA is an example of an agency that was once a SAP. The NSA was founded in 1952 but was not declassified until 1975. See Daniel Schorr, *A Brief History of the NSA*, NPR (Jan. 29, 2006, 8:00 AM), <https://www.npr.org/templates/story/story.php?storyId=5176847>.

138. See FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3.

quirement of the amici.¹³⁹ This new provision demonstrates congressional intent to provide a more adversarial process by *almost* requiring the court to use its mandated oversight mechanism.

B. More Information Equals More Informed Decisions

The amici's role within the FISC's current regime is to safeguard classified surveillance programs, rather than the specific targets located within the warrant.¹⁴⁰ However, the amici have little to no authority in a FISC proceeding.¹⁴¹ This is problematic because more information via the presence of an adverse party not only ensures more informed decisions, but also more unified decisions.¹⁴² This very problem is highlighted by the Second Circuit in *ACLU v. Clapper*.¹⁴³ There, the court considered whether the Patriot Act authorized bulk surveillance and ultimately came to a conclusion that contradicted the FISC's conclusion on that exact issue.¹⁴⁴ Although the Second Circuit's opinion represents one differing decision on surveillance collection, it is revealing that two different courts, embodying two different judicial systems, interpreting the same law, came to contradictory decisions.¹⁴⁵

Critics of a more adversarial system highlight that FISC proceedings should not be subject to more scrutiny.¹⁴⁶ However, this logic is flawed. In

139. *See id.* Section 103(b)(6) requires the Court to consider a § 702 certification as a novel or significant legal issue “unless the court determines otherwise.” *Id.*

140. *See generally* Granick & Sprigman, *supra* note 70 (explaining that the court does not approve specific targets).

141. *See supra* notes 40–44 and accompanying text.

142. *See* Squitieri, *supra* note 44, at 204 (suggesting if the FISC was not ex-parte, the Second Circuit's decision would be uniform to that of the FISC's decision regarding bulk surveillance).

143. 785 F.3d 787 (2d Cir. 2015).

144. *See id.* at 826. The FISC held that bulk surveillance was authorized under § 215 of the Patriot Act, whereas the Second Circuit Court of Appeals found otherwise. *See* Orin Kerr, *How Much Has Congress Changed on Surveillance*, WASH. POST (June 2, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/02/how-much-has-congress-changed-on-surveillance/?utm_term=.50d5bf3f8ee1.

145. *See* Squitieri, *supra* note 44, at 202 (reaffirming that the difference in holdings of the Patriot Act was not a difference in quality of the judging).

146. *See* Wallsten et al., *supra* note 34 (noting the Deputy Attorney General stated that more oversight is not necessary because of the rigorous review process taken at the federal agency level); Elizabeth Goitein, *The FISC's Newest Opinion: Proof of the Need for an Amicus*, JUST SECURITY (June 23, 2015), <https://www.justsecurity.org/24134/fiscs-newest-opinion-proof-amicus/> (exploring that judges themselves are more than capable of probing for weaknesses in the government's case).

a U.S. federal court case with only one viable answer, practitioners could not realistically suggest that proceeding without the “losing” side’s attorney present would be appropriate; further, this suggestion violates the constitutional right to counsel.¹⁴⁷

C. Critics and Counterarguments

Critics of more oversight rely on the foundation that surveillance will be ineffective if not conducted surreptitiously.¹⁴⁸ But this logic is outdated because the FISC’s role in surveillance has vastly changed since its creation.¹⁴⁹

Critics also focus on the stringent process the application or certification must go through before it is presented to the presiding judge at the FISC.¹⁵⁰ This assertion has truth; before the application reaches the FISC, it is altered and changed multiple times.¹⁵¹ However, this argument fails to consider the point at issue: the lack of oversight via *ex-parte* judicial proceedings. The fact that an application or certification goes through multiple revisions before it reaches the FISC has no bearing on how the presiding judge will interpret a significant or novel legal issue.¹⁵²

IV. PUBLIC RECOMMENDATIONS TO A SECRET COURT

A. Authoritative Agency Bodies

The most obvious place to direct a recommendation for change in a decisionmaking body created by an act of Congress, is Congress. As a quasi-judicial entity, Congress can exercise its lawmaking powers over the

147. See Goitein, *supra* note 146. See generally U.S. CONST. amend. XI (establishing the right to counsel in criminal prosecutions).

148. See Granick & Sprigman, *supra* note 70.

149. See Kayyali, *supra* note 74 (explaining that the FISC was originally created as a warrant framework whereas it now regularly functions as a review and approval mechanism).

150. Former Deputy Attorney General James Cole insists FISC judges “push back a lot” and ask for more information when needed. See Wallsten et al., *supra* note 34.

151. See *id.* (explaining that before reaching the FISC, the application must go through five Judicial Branch lawyers who are experts in national security).

152. Former FISC judges themselves have advocated for an independent authority present before the court: James Robertson stated publicly that an advocate with litigation powers was needed within the FISC, whereas James Carr highlighted there were times on the court where the judges faced novel issues and even the staff attorneys could not contribute much clarity to the issue. See James 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.

FISC.¹⁵³ Throughout the various FISA amendments and reauthorizations, however, Congress has demonstrated great difficulty in instituting reform within the FISC.¹⁵⁴ In fact, the current Administration has been forced to confront different positions within its own party with regard to FISA and the FISC's capabilities.¹⁵⁵ With how polarized and disorganized Congress has become in recent years, it is highly unlikely that any recommendation directed specifically at Congress will be effective.¹⁵⁶

A more feasible option is ACUS. ACUS is an independent federal agency that brings together field experts from both “the public and private sectors to recommend improvements to administrative process and procedure.”¹⁵⁷ The agency's main duties are to make independent formal recommendations concerning federal agencies and their operations.¹⁵⁸ ACUS undertakes four main types of projects: (1) assembly projects,¹⁵⁹ (2)

153. Under Article III of the Constitution, Congress has indisputable power to regulate not only the practice, but also the procedure of federal courts. See ANDREW NOLAN & RICHARD THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 8 (2014).

154. See Cook, *supra* note 41, at 555–56 (stating the original proposal for the USA Freedom Act would have created an Office of Special Advocate, but the Congressional Research Service Office rejected this proposal); Elizabeth Goitein, *USA Freedom and the Surveillance Reform that Almost Was*, JUST SECURITY (May 1, 2015), <https://www.justsecurity.org/22624/usa-freedom-surveillance-reform/> (detailing an amendment that would prevent “back-door” surveillance and how, although most members agreed with the amendment, it ultimately did not move forward because of “fragile compromise”).

155. President Donald Trump challenged his own party's position hours before a scheduled vote on FISA's reauthorization. See Donald Trump (@realDonaldTrump), TWITTER (Jan. 11, 2018, 7:33 AM), <https://twitter.com/realDonaldTrump/status/951431836030459905>; Kevin Liptak et al., *Trump's FISA Tweets Throwing Washington into Chaos*, CNN (Jan. 11, 2018, 7:07 PM), <http://www.cnn.com/2018/01/11/politics/president-donald-trump-fisa/index.html> (noting the President not only directly contradicted his party, but also contradicted a prior public statement on the reauthorization).

156. See Renan, *supra* note 26, at 1071 (“Congress is not well suited to micromanage program design and implementation through statutes alone.”).

157. See ADMIN. CONF. OF THE U.S. (2017), <https://www.acus.gov/acus> (last visited Aug. 28, 2018).

158. See 5 U.S.C. § 594(a) (2012); ADMIN. CONF. OF THE U.S., *supra* note 157.

159. There are six steps to an assembly project: (1) idea gathering; (2) Council approval for a project; (3) selection of a researcher; (4) Administrative Conference of the United States (ACUS) committee consideration of the researcher's report and the drafting of a recommendation; (5) ACUS Council approval of the recommendation; and (6) ACUS working with stakeholders to implement the recommendation, if approved. See *Assembly Projects*, ADMIN. CONF. OF THE U.S. (2017), <https://www.acus.gov/research-projects> (last visited Oct. 31,

Office of the Chairman projects,¹⁶⁰ (3) recommendations, and (4) requests for proposals (RFPs).¹⁶¹ While ACUS cannot make binding law, its recommendation can become binding law when the recommendation is (1) adopted by a federal agency or (2) adopted through legislative rulemaking.¹⁶²

B. Recommendation: The Independent Advocate Ombudsman Office

The question that looms over the FISC is how to create an oversight institution that is capable of governing an administrative and judicial regime.¹⁶³ To avoid repeating past shortcomings of the FISC, this Comment recommends that ACUS, through its independent research, endorse an independent advocate ombudsman office to oversee the FISC.¹⁶⁴ The ombudsman office would be an independent office, whose personnel serve as an independent party in a FISA application or certification hearing and are required to advocate on behalf of individuals or groups targeted by the surveillance.¹⁶⁵ The most difficult component of establishing this office will be for Congress to approve and sign the ACUS recommendation into law.¹⁶⁶ If and when this is achieved, it will provide an easier pathway for implementation.¹⁶⁷

2018).

160. Narrow and specific working groups are established by the Office of the Chairman to research various administrative rules, regulations, and policies of administrative agencies. *See Office of the Chairman Projects*, ADMIN. CONF. OF THE U.S. (2017), <https://www.acus.gov/office-chairman-projects> (last visited Oct. 31, 2018).

161. Requests for Proposals (RFPs) are requests for consultants to undertake research projects. *See ADMIN. CONF. OF THE U.S., REQUEST FOR PROPOSALS—AUGUST 14, 2017: PUBLIC ENGAGEMENT IN RULE MAKING* (2017).

162. *See generally* DAVID LEWIS & JENNIFER SELIN, ABOUT THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF THE U.S. EXEC. AGENCIES (Administrative Conference of the United States, 1st ed. 2012) (noting the ways in which a recommendation can become binding law).

163. *See Renan, supra* note 26, at 1048.

164. Some commenters have suggested that an independent overseer can better respond to the aggregation and spillover problems that are a chronic complication of the federal government's programmatic surveillance. *See id.* at 1075.

165. *See generally* *Frequently Asked Questions*, INT'L OMBUDSMAN ASS'N, <https://www.ombudsassociation.org/Resources/Frequently-Asked-Questions.aspx> (last visited Oct. 31, 2018) (describing what an organizational ombudsman is and how it can operate).

166. *See* Adoption of Recommendations, 82 Fed. Reg. 31,039 (July 5, 2017) (affirming ACUS recommendations are not binding but must be adopted by the agency at which it is directed).

167. The ACUS recommendation will provide the necessary information as to why an

The establishment of an ombudsman office would help the FISC improve procedures while advocating on behalf of individuals, a party completely absent in the FISC's current ex-parte proceedings.¹⁶⁸ Specifically, the ombudsman office would be tasked with (1) identifying significant or new issues of concern, (2) being present at all application and certification hearings, (3) supplying the court with additional arguments, and (4) developing procedures that allow for follow-up on warrant applications and certifications.¹⁶⁹ In addition, the ombudsman office shall embody "three core standards of practice: (1) independence, (2) confidentiality, and (3) impartiality."¹⁷⁰

This is not a new idea; comparable courts are known to employ an ombudsman office.¹⁷¹ For instance, when the Swedish Defense Intelligence Court (the Swedish counterpart to the FISC) approves a new target application, the ombudsperson must be present at all hearings and is authorized to raise objections concerning citizens' rights.¹⁷² Closer to home, U.S. courts and federal agencies also have some form of an ombudsman or inspector general.¹⁷³ As an independent agency, the ombudsman office will serve as a transparent intermediary between the FISC and the public.

ombudsman office will give the court more oversight. See LEWIS & SELIN, *supra* note 162 (explaining that the sole purpose of ACUS is to objectively study how to improve administrative processes; thus, by the time the recommendation has passed the ACUS full body, the investigatory work, research, and analysis are completed, allowing Congress to consider the recommendation instead of employing time consuming resources into research and analysis).

168. See Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316, 94,317 (Dec. 23, 2016).

169. See *id.*

170. See *id.* at § 1, 94,318.

171. Sweden has an ombudsperson that must authorize all surveillance operations. See Elizabeth Pond, *What the NSA Can Learn From Sweden*, WORLD POL'Y BLOG (Aug. 9, 2013, 11:31 AM), <http://www.worldpolicy.org/blog/2013/08/09/what-nsa-can-learn-sweden>.

172. *Id.*

173. The Office of the Citizenship and Immigration Services Ombudsman is the most analogous to what the FISC needs; it provides individual case assistance and makes recommendations to improve the agency. See *CIS Ombudsman*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/topic/cis-ombudsman> (last visited Oct. 31, 2018). But see *Office of the Ombudsman*, U.S. DEP'T OF STATE, <https://www.state.gov/s/ombudsman/> (last visited Oct. 31, 2018) (informally handles work place conflicts and does not participate in adjudicative or administrative procedures).

C. *Practical Applications of an Independent Ombudsman Office*

1. *Creation of the Ombudsman Office*

To achieve a functional and effective ombudsman office, several steps must first be taken. First, the issue of lack of oversight and the protection of civil liberties and privacy interests concerning the FISC would have to be taken up by ACUS.¹⁷⁴ After the report has been drafted, an ACUS committee must make a recommendation for an ombudsman office.¹⁷⁵ Subsequently, the ACUS full body will consider the recommendation.¹⁷⁶ Once approved by the full body, Congress must take up the recommendation through legislation for it to become law.¹⁷⁷

There are no defined organizational structures to provide for the creation of an ombudsman office.¹⁷⁸ However, there are two main avenues in which an ombudsman office can be chosen: (1) ombudsman personnel can be hired internally, including former FISC judges or staff attorneys, or (2) ombudsman personnel can be hired externally.¹⁷⁹ With the highly confidential and secretive nature of the FISC, the ombudsman office will have to employ licensed attorneys with the highest security clearance, who are experts in national security, technology, and constitutional law. The ombudsman office need not be limited to one attorney, as there can be multiple attorneys who are experts in the respective fields previously mentioned. To ensure the office acts within its scope, the ombudsman office must participate in professional trainings, such as those authored by the International Ombudsman Association.¹⁸⁰ These securities and processes will help the newly chosen ombudsman office transition into the role of overseer of the most secret court in the United States.

174. This could be as simple as ACUS publicizing an RFP or as complex as the Office of the Chairman creating a working group to research the issue. *See generally Assembly Projects, supra* note 159 (laying out the steps of ACUS's research and recommendation process).

175. ACUS has previously authored reports and recommendations for an ombudsman in federal agencies and has explored ex-parte communications in informal rulemaking. *See generally Completed Projects*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/past-projects> (last visited Oct. 31, 2018).

176. *See Assembly Projects, supra* note 159.

177. *See* Adoption of Recommendations, 82 Fed. Reg. 31,039 (July 5, 2017).

178. *See Frequently Asked Questions, supra* note 165.

179. *Id.* (noting that internally hired ombudsmen can be more attractive because they have the preexisting knowledge of how the agency works).

180. *Id.* (explaining the different training materials and courses provided).

2. *Standing*

Creating an ombudsman office with authority to argue against the government may raise substantial constitutional standing issues.¹⁸¹ For the ombudsman office to have standing before the FISC, the office must be completely independent from the federal government.¹⁸² Otherwise, there will be potential roadblocks to establishing standing before the court.¹⁸³

Individually speaking, the ombudsman will have authority to litigate in FISC proceedings. To the extent that the ombudsman's role fits within the traditional scope of the rights of the defense—such as the guaranteed right to appeal—the argument could plausibly be made that the ombudsman office violates the Constitution.¹⁸⁴ To the contrary, FISA proceedings are merely incidental to the FISC's Article III powers and therefore need not independently satisfy the case or controversy requirement.¹⁸⁵ Because warrant applications and certifications presented to the FISC—as well as warrants presented to district courts—are not the main function of the judiciary, the requests become incidental.¹⁸⁶ Thus, allowing an ombudsman to appear before and obtain relief from the FISC would be constitutionally valid.¹⁸⁷

In the alternative, if standing requirements cannot be avoided, the ombudsman may still have standing via the Fourth Amendment Rights of Third Party Customers Doctrine (Third Party standing).¹⁸⁸ Under Third Party standing, the FISC may adjudicate a case when the request for relief is premised on the assertion of third party federal rights—such as a Fourth Amendment violation.¹⁸⁹ However, to have Third Party standing, the liti-

181. See Squitieri, *supra* note 44, at 199; see also *supra* note 105 and accompanying text.

182. See ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R43260, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 39 (2014) (embodying not only a separation of powers argument but also one of standard practices).

183. *Id.* at 39–40 (reaffirming the notion that the government cannot sue itself under the Constitution).

184. “It is generally recognized that ‘only a named party is entitled to litigate on the merits.’” See ANDREW NOLAN & RICHARD THOMPSON II, *supra* note 153, at 15.

185. See *id.* at 16–17 (explaining that when the judiciary is engaging in an atypical function, the typical constraints of Article III—standing, mootness, or ripeness— would not govern).

186. See *id.* at 17–18

187. See *id.* at 20 (assuming the FISA proceedings are incidental to the FISC's Article III powers).

188. See *supra* note 125 and accompanying text.

189. See Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS.

gant must have a “close relation” to the absent party and “some hindrance” must prevent the third party from bringing the claim.¹⁹⁰ Because the ombudsman office’s enabling statute will grant the ombudsman authority to represent absent parties, the “close relation” prong can arguably be met.¹⁹¹ Furthermore, “hindrance” is easily met because the named parties in the application and certification are prohibited from knowing about the proceedings against them.¹⁹² Thus, the ombudsman office could have effective standing to be present before the FISC and FISCR.

3. *Judicial Review of FISC Actions*

It is imperative to note judicial review of the ombudsman office itself is absent from the subsequent analysis because it cannot exist.¹⁹³ Thus, this section focuses on what the process of judicial review within the FISC will look like with the addition of the ombudsman office. Another preliminary matter that must be mentioned is that judicial review of applications and certifications in this context is unique because it will take place under the APA and not under the traditional review that takes place among other Article III courts.¹⁹⁴

Beginning with the presumption that the requirements of judicial review under the APA are met,¹⁹⁵ the ombudsman office can petition for review of FISC decisions under the favorable presumption of judicial review.¹⁹⁶ This

J. 278, 290 (2015) (referencing *Osborn v. Bank of the U.S.*). *But see* NOLAN ET AL., *supra* note 182, at 28 (noting there is a general presumption against Third Party standing and to overcome the presumption, Third Party standing must be explicitly authorized in the statute).

190. *See* NOLAN ET AL., *supra* note 182, at 28 (referencing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

191. Because the authority is embedded in a legal obligation to represent privacy interests of surveillance targets, the “close relation” criteria is satisfied. *See id.* at 34.

192. *See supra* note 11.

193. The ombudsman office can only be established through congressional authority, and challenges to congressional acts are constitutional claims. *See Marbury v. Madison*, 5 U.S. 137, 137 (1803).

194. Instead of reviewing the application or certification *de novo*, the review will look to see whether the application or certification was granted properly, pursuant to FISA minimization procedures and the Constitution. *See generally* 5 U.S.C. § 706 (2012) (describing that judicial review includes the interpretation of statutory and constitutional provisions).

195. *See supra* notes 100–104 and accompanying text (asserting all pre-requisites to judicial review, except standing, are arguably met under FISA); *see also supra* Section IV.C.2. (asserting standing can indeed exist for the ombudsman office).

196. *See* Robert Holland, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 DUKE L.J. 431, 433 (explaining the Supreme Court has recognized this favorable presumption).

Comment concedes that pre-enforcement review is unavailable under the FISC in the application and certification context,¹⁹⁷ so the focus is on what the process of judicial review will look like with the addition of the ombudsman office.

When Congress implements ACUS's recommendation, judicial review will look largely the same as what it currently looks like in regard to production orders.¹⁹⁸ Under judicial review of production orders, the reviewing judge must determine whether the order meets the requirements set forth in FISA.¹⁹⁹ Because this standard of review is not *de novo*, it is plausible that judicial review in this context can employ the *Chevron* deference standard, and subsequently, judicial review can look similar for certification and application proceedings.²⁰⁰

First, the ombudsman needs to file a judicial review action with the FISC if it determines the FISC has exceeded statutory or constitutional authority. Once on the FISC's docket, the court will have to first determine step zero: whether Congress gave the FISC the power to delegate interpretational authority.²⁰¹ The answer will likely be in the affirmative because the FISC is the only court in the country authorized to grant, deny, or modify joint domestic and foreign surveillance warrants.²⁰² As long as it can be demonstrated that Congress gave the FISC the power to implement FISA via binding adjudications, step zero is satisfied.²⁰³

Once the FISC has found in the affirmative on step zero, it will move

197. Pre-enforcement review must be premised on two requirements: (1) fitness of the issues and (2) hardship of the parties. *See supra* notes 120–121. Pre-enforcement review fails the second prong of the test because, contrary to *Yahoo!*, there are no legal obligations surrounding the surveillance targets (such as fines), but rather, government authorization to perform a task. *See In re Directives to Yahoo! Inc.* Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, No. 08-01, 2008 WL 10632524, at *3 (FISA Ct. Rev. Aug. 22, 2008) (distinguishing production orders from applications or certifications for surveillance).

198. *See* 50 U.S.C. § 1861(f) (Supp. III 2016) (allowing judicial review of production orders).

199. *See* 50 U.S.C. § 1805(b) (2012) (noting the standard of review is not *de novo*).

200. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837–38 (1984) (explaining that judicial review via *Chevron* is appropriate in cases of statutory construction). *See generally* 5 U.S.C. § 706 (2012) (noting under the APA, judicial review is of statutory and constitutional provisions, as well as some decisions of fact).

201. *See Merrill & Hickman, supra* note 111, at 912.

202. *See MCADAMS, supra* note 2, at 2.

203. *See Merrill & Hickman, supra* note 111, at 837 (explaining how to prove congressional delegation of authority to an agency to satisfy step zero).

on to the *Chevron* deference analysis.²⁰⁴ The first question will be whether Congress has directly spoken to the specific issue involved in the judicial review action.²⁰⁵ The FISC is given an enormous amount of discretion to interpret statutes and promulgate binding precedent.²⁰⁶ Because of this, Congress is silent with respect to *how* the FISC interprets FISA regulations, and does not specifically state how far the Fourth Amendment reaches in regard to surveillance applications and certifications, leaving it up to the court to determine.²⁰⁷ The next question will be whether the FISC's ruling on the certification or application is based on a permissible interpretation of FISA.²⁰⁸ Unfortunately for the ombudsman, it is highly unlikely the FISC would overrule its lower court and hold that the FISC's interpretation of FISA was wrong.²⁰⁹

Although the process of judicial review under the APA will most likely lead to the disappointing result of reaffirming the FISC and reaffirming potential violations of individual freedoms, this is a significant step for a court known to have little to no checks. The process and ability of an independent ombudsman office to institute an extra check on applications or certifications greatly reduces the risk of potential violations slipping through the cracks. Instead, under this recommendation, there are two checks to ensure Fourth Amendment compliance: (1) the ombudsman presenting constitutional arguments at the initial FISC hearing and (2) if the ombudsman deeply believes constitutional violations are at stake, it may petition the FISC for review. While not perfect, mandating an ombudsman office is better and more productive than the amici who are subject to the court's complete discretion.

204. *See id.* at 834–35.

205. *See Chevron*, 467 U.S. at 842–43 (describing *Chevron* deference).

206. *See* 50 U.S.C. § 1803(h) (2012) (granting the FISC the inherent authority to hear, grant, and determine compliance with applications for electronic surveillance); *see also In re Sealed Case*, No. 02–001 (FISA Ct. Rev. Nov. 18, 2002) (explaining that the duties of the FISC are to review whether the FISC interprets and uses existing law correctly).

207. *See In re Certified Question of Law*, 858 F.3d 591, 595 (FISA Ct. Rev. 2016) (determining whether sections of FISA as applied to the application complied with the Fourth Amendment).

208. *See Chevron*, 467 U.S. at 842–43 (noting the second prong in the *Chevron* deference test).

209. In the only available FISC opinion on the FISC website, the FISC found the FISC's interpretation of a statute valid and not outside its statutory interpretation. *See In re Certified Question of Law*, 858 F.3d at 595.

CONCLUSION

The FISC must learn from its past mistakes. Congress has failed to protect individual privacy interests by masking proceedings in an entirely secret and ex-parte manner. As technology rapidly becomes more advanced and surveillance tactics become more covert, ACUS must be responsive so that Americans' trust in surveillance methods is not jeopardized again. ACUS needs to provide guidance to a disgruntled Congress and the FISC, in the form of an independent advocate ombudsman office, to enable the FISC to efficiently carry out its mandate while minimizing all potential violations of the Fourth Amendment. The ombudsman should be vetted, independent, and impartial to ensure transparency, while still remaining largely out of public view.