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SIMON CHIN

Introducing Independence to the Foreign Intelligence Surveillance Court

ABSTRACT. The Foreign Intelligence Surveillance Court (FISC), which reviews government applications to conduct surveillance for foreign intelligence purposes, is an anomaly among Article III courts. Created by the Foreign Intelligence Surveillance Act (FISA) in 1978, the FISC ordinarily sits ex parte, with the government as the sole party to the proceedings. The court's operations and decisions are shrouded in secrecy, even as they potentially implicate the privacy and civil liberties interests of all Americans. After Edward Snowden disclosed the astonishing details of two National Security Agency mass surveillance programs that had been approved by the FISC, Congress responded with the USA FREEDOM Act of 2015. The bill's reforms included the creation of a FISA amicus panel: a group of five, security-cleared, part-time, outside attorneys available to participate in FISC proceedings at the court's discretion. Policy makers hoped to introduce an independent voice to the FISC that could challenge the government's positions and represent the civil liberties interests of the American people. With the FBI's investigation of Trump campaign advisor Carter Page in 2016 and 2017 raising new concerns about the FISC's one-sided proceedings, it is now imperative to assess the FISA amicus provision: how it has functioned in practice since 2015, what effects it has had on foreign intelligence collection, and whether it has achieved the objectives that motivated its creation.

To conduct this assessment and overcome the challenges of studying a secret court, this Note draws upon the first systematic set of interviews conducted with six of the current and former FISA amici. This Note also includes interviews with two former FISA judges and three former senior government attorneys intimately involved in the FISA process. Using these interviews, as well as declassified FISA material, this Note presents an insiders' view of FISC proceedings and amicus participation at the court. The Note arrives at three main insights about the amicus panel. First, amicus participation at the FISC has not substantially interfered with the collection of timely foreign intelligence information. Second, the available record suggests that amici have had a limited impact on privacy and civil liberties. Third, there are significant structural limitations to what incremental reforms to the existing amicus panel can accomplish. Instead, this Note supports the creation of an office of the FISA special advocate—a permanent presence at the FISC to serve as a genuine adversary to the government. While Congress considered and rejected a FISA special advocate in 2015, this Note reenvisions the original proposal with substantive and procedural modifications to reflect the lessons of the past six years, as well as with a novel duty: oversight of approved FISA applications. This Note's proposal would address both the limitations of the FISA amicus panel that have become manifest in practice and the new Carter Page-related concerns about individual surveillance.

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INTRODUCTION

When the Foreign Intelligence Surveillance Court of Review (FISCR) met for the first time in its twenty-four-year history in 2002, the atmosphere was nothing short of surreal. The secret appellate court issued no advance notice of the hearing, though news had trickled out in Washington by that same morning.[1] Twelve senior government attorneys crowded into a secure room at the Department of Justice (DOJ) for the hearing, which was presided over by three federal judges who had never expected to hear a case when they had been appointed to the court.[2] Staffers from the Senate Intelligence and Judiciary Committees, who had caught wind of the hearing, were turned away at the door.[3]

It was an historic occasion: for the first time,[4] the federal government was appealing a ruling from the Foreign Intelligence Surveillance Court (FISC), the secret court that oversees government requests to conduct surveillance under the Foreign Intelligence Surveillance Act (FISA).[5] Leading the government's appeal was none other than the Solicitor General of the United States, Ted Olson. But perhaps the most surreal detail was this: as Olson was presenting the government's appeal of certain restrictions imposed by the FISC on electronic surveillance, there was no opposing party in the courtroom to challenge the government's assertions. As one of the three FISCR panelists, Judge Guy, observed: "This is a strange proceeding because it is not adversarial. It is ex parte. And if one were to just read the transcript of this hearing today one might think that the adversary, if there was one, is . . . the FISC."[6]

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1. Ann Beeson, *On the Home Front: A Lawyer's Struggle to Defend Rights After 9/11*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 295, 307-11 (Richard C. Leone & Greg Anrig eds., 2003); Philip Shenon, *Threats and Responses: Surveillance; Secret Court Weighs Wiretaps*, N.Y. TIMES (Sept. 10, 2002), https://www.nytimes.com/2002/09/10/world/threats-and-responses-surveillance-secret-court-weighs-wiretaps.html [https://perma.cc/925G-ATQR].

2. Transcript of Hearing at 1-3, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) (No. 02-001); Interview with Hon. Laurence H. Silberman, Senior J., U.S. Ct. of Appeals for the D.C. Cir., in Washington, D.C. (Mar. 9, 2020).

3. Shenon, *supra* note 1.

4. *In re Sealed Case*, 310 F.3d at 719.

5. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

6. Transcript of Hearing, *supra* note 2, at 102. The Foreign Intelligence Surveillance Court of Review (FISCR) did accept two amicus briefs at the briefing stage of the case after word of the appeal had spread, but the court did not permit amicus participation at oral argument. John Cline, a coauthor of the brief on behalf of the National Association of Criminal Defense Attorneys and a future Foreign Intelligence Surveillance Act of 1978 (FISA) amicus, recalled

There was no such fanfare, and no such self-awareness about the strangeness of ex parte proceedings, when the Federal Bureau of Investigation (FBI) sought approval from the FISC for the electronic surveillance of Carter Page, a foreign-policy advisor to President Trump between 2016 and 2017. While the USA FREEDOM Act, passed in 2015, formalized the process of appointing an outside attorney, or amicus, in a limited subset of FISA matters,[7] the Carter Page matter did not fall into one of the categories of FISA cases envisioned by the statute for outside scrutiny.[8] In routine fashion, four different FISC judges, in strictly ex parte proceedings, approved the initial application and three successive renewals for the FBI's surveillance of Page.[9] DOJ's Inspector General (IG) later tore apart the four FISA applications in the Page investigation, finding "so many basic and fundamental errors," including factual inaccuracies and omissions of exculpatory information.[10] Yet as the target of these FISA orders, Page never received the opportunity to examine and challenge the facts presented in the underlying FISA applications. The ex parte nature of FISA proceedings means that these errors would likely have never seen the light of day had it not been for the public furor surrounding the FBI's investigation into the alleged ties between the Trump 2016 campaign and the Russian government.[11]

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another surreal detail: Cline received a filed copy of the brief back from the court with a handwritten "filed" notation on the cover because the FISCR did not have a "filed" stamp typical of most working courts. *See In re Sealed Case*, 310 F.3d at 719; Email from John D. Cline, Former FISA Amicus, to author (Sept. 2, 2021) (on file with author).

7. *See* discussion *infra* Section I.C.

8. *See infra* text accompanying notes 59-64.

9. *See* Off. of the Inspector Gen., *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, U.S. Dep't Just. 121, 412 (Dec. 2019) [hereinafter *December 2019 DOJ Inspector General Report*], https://www.justice.gov/storage/120919-examination.pdf [https://perma.cc/Q2HV-NSEK].

10. *See id.* at 378; *see also infra* text accompanying notes 59-73 (discussing deficiencies in the Federal Bureau of Investigation's (FBI) FISA applications).

11. On the political firestorm in Washington over the Carter Page investigation, see, for example, Charlie Savage & Sharon LaFraniere, *Republicans Claim Surveillance Power Abuses in Russia Inquiry*, N.Y. Times (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/us/politics/republicans-surveillance-trump-russia-inquiry.html [https://perma.cc/FU38-GSU8]; Nicholas Fandos, *House Republicans Vote to Release Secret Memo on Russia Inquiry*, N.Y. Times (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/us/politics/release-the-memo-vote-house-intelligence-republicans.html [https://perma.cc/442X-S6PD]; and Byron Tau & Rebecca Ballhaus, *Memo's Release Escalates Clash Over Russia Probe; Trump Says It 'Totally Vindicates' Him*, Wall St. J. (Feb. 3, 2018), https://www.wsj.com/articles/house-releases-gop-surveillance-memo-1517592392 [https://perma.cc/FUN9-YS3V]. Elizabeth Goitein has observed that "ordinary people whose surveillance will never be leaked or generate inspector general reports or prompt declarations of outrage from members of Congress . . . are likely being sur-

Throughout the history of the FISC and FISCR, the imprimatur of the judiciary has empowered and legitimated the executive branch's use of secret electronic surveillance for foreign intelligence objectives. A political controversy about the abuses of the U.S. intelligence community led to the creation of the FISC and FISCR in 1978 as oversight institutions.[12] Subsequent reforms in 2015 were likewise driven by public revelations of excesses and flaws in intelligence collection.[13] In each of those historical moments, the three branches of government reached political settlements under which the executive branch agreed to subject its foreign intelligence surveillance activities to an evolving and mutually acceptable statutory regime overseen by secret courts.[14]

As DOJ itself has acknowledged, the government's surveillance power under FISA is "one of DOJ's most intrusive investigative authorities, and the use of it unavoidably raises civil liberties concerns."[15] Unlike ordinary criminal wiretaps and traditional search warrants, which "are granted in *ex parte* hearings but can potentially be subject to later court challenge, FISA orders generally have not been subject to scrutiny through subsequent adversarial proceedings."[16] Thus, while the FISC and FISCR are Article III courts, their ex parte, in camera operations run counter to two fundamental Article III values: transparency and adversarialism.[17] In each moment of public controversy, policy makers have used these judicial values as tools to craft political compromises about foreign intelligence surveillance. The level of transparency and degree of adversarial participation in the FISC have become ratchets to calibrate an oversight regime to quell the political firestorm of the day.

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veilled based on similarly flawed applications." Elizabeth Goitein, *The Privacy Problems Revealed by the FBI's Internal Review of the Trump-Russia Investigation*, BRENNAN CTR. FOR JUST. (Dec. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/privacy-problems-revealed-fbis-internal-review-trump-russia-investigation [https://perma.cc/BGH2-Q9CX].

12. *See* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 3:7 (2021).

13. *See* discussion *infra* Section I.A.

14. *Id.*

15. Off. of the Inspector Gen., *Audit of the Federal Bureau of Investigation's Execution of Its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons*, U.S. DEP'T JUST., at i (Sept. 2021) [hereinafter *September 2021 DOJ Inspector General Report*], https://oig.justice.gov/sites/default/files/reports/21-129.pdf [https://perma.cc/WQ6Q-9CSN].

16. *Id.* at 1.

17. *See* ACLU v. Clapper, 785 F.3d 787, 828 (2d Cir. 2015) (Sack, J., concurring). While wiretap applications and search warrant applications in ordinary criminal cases are also reviewed in ex parte hearings, there are important differences between ordinary criminal cases and FISA matters that make the direct analogy between them imperfect, if not misleading. *See* discussion *infra* Section I.B.

Reform measures passed by Congress in response to surveillance controversies have led to some innovations. After Edward Snowden disclosed the astonishing details of two National Security Agency (NSA) mass surveillance programs that had been approved by the FISC,[18] Congress responded with the USA FREEDOM Act of 2015.[19] The bill's reforms included the creation of a FISA amicus panel: a group of five, security-cleared, part-time, outside attorneys available to participate in FISC proceedings at the court's discretion.[20] Policy makers hoped to introduce an independent voice to the FISC and FISCR that could challenge the government's positions and represent the civil liberties interests of the American people.[21] While FISA judges already possessed the inherent authority to appoint amici, the availability of precleared attorneys formalized and increased the frequency of amicus appointments to what were previously ex parte hearings.[22]

With the Carter Page investigation raising new concerns about the FISC's one-sided proceedings, it is now imperative to assess the FISA amicus panel: how it has functioned in practice since 2015, what effects it has had on foreign intelligence collection, and whether it has achieved the objectives that motivated its creation. Outsiders seeking to study the impact of the amicus panel face significant challenges. Given the classified nature of proceedings before the FISC, only the few participants who are involved in its proceedings have direct access to them, and they are not permitted to discuss their work publicly. The FISC only selectively declassifies documents from its proceedings, and those that are made public are often heavily redacted and may not constitute a representative sample.[23]

To conduct this assessment and overcome the challenges of studying a secret court, this Note draws upon the first systematic set of interviews conducted with six of the current and former FISA amici. For this Note, I contacted all seven attorneys who have served on the amicus panel, as well as attorneys who have been appointed as amici in specific FISA cases. Six amici, past and present,

18. *See infra* text accompanying notes 41-43.

19. USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279-81.

20. *See id.*

21. *See infra* text accompanying notes 48-49.

22. *See infra* text accompanying notes 99-102, 148.

23. For an example of a heavily redacted, declassified Foreign Intelligence Surveillance Court (FISC) opinion, see [Redacted] (FISA Ct. Nov. 18, 2020) (Memorandum Opinion and Order).

agreed to be interviewed about their experiences.[24] While there have been other valuable reports on the FISA amicus provision based on the publicly available record and declassified FISA documents,[25] this Note contributes novel insights and details based upon the amici's first-hand accounts.[26] This Note also draws upon interviews with two former FISA judges and three former senior government attorneys intimately involved in the FISA process to present a more comprehensive picture of how the FISA amicus provision operates in practice.[27]

Part I of this Note evaluates the history and development of adversarial participation in the FISC, as Congress has periodically recalibrated the level of outside involvement in response to public controversies. Part II presents an insiders' view of FISC proceedings and amicus participation at the court. In particular, it assesses how the FISA amicus provision has worked in practice since 2015, drawing extensively upon interviews with not only FISA amici, but also a former FISA judge and high-level government attorneys. This Part finds that amicus participation at the FISC has not substantially interfered with the collection of timely foreign intelligence information. Yet the available record also suggests that the amici have had a limited impact on privacy and civil liberties.

Part III analyzes recent FISA reform proposals in light of this interview data and argues that incremental reform within the existing amicus system will be

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24. To preserve anonymity, members of the FISA amicus panel interviewed for this Note are not referred to individually. Instead, interviews are cited as "Interview with FISA Amicus" or "Interviews with FISA Amici." All quotes are based on notes taken by the author and have been reviewed by the editors of the *Yale Law Journal*.

25. *See* Faiza Patel & Raya Koreh, *Amicus Curiae in the FISA Courts: A Civil Liberties Impact Assessment*, N.Y.U. ANN. SURV. AM. L. (forthcoming); Faiza Patel, *Judicial Safeguards Against Transnational Surveillance and Jurisdiction Issues: The US Point of View*, *in* HUMAN RIGHTS CHALLENGES IN THE DIGITAL AGE: JUDICIAL PERSPECTIVES 139, 139-63 (2020).

26. FISA amici have generally been reticent in the public debates over FISA reform. One exception has been amicus David Kris, who has suggested several possible legislative reforms to FISA to address the issues raised by the Department of Justice (DOJ) Inspector General (IG) report. *See* David S. Kris, *Further Thoughts on the Crossfire Hurricane Report*, LAWFARE (Dec. 23, 2019, 4:19 PM), https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report [https://perma.cc/D2KQ-YSFU]. Prior to her appointment to the amicus panel, Laura Donohue also wrote prolifically about FISA reform. *See, e.g.*, LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE, at xiii, 136-160 (2016) [hereinafter DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE]. Donohue's most recent article presents an in-depth, academic study of the jurisprudence of the FISC and FISCR but does not undertake an assessment of the amicus provision. *See* Laura K. Donohue, *The Evolution of the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, 12 HARV. NAT'L SEC. J. 198 (2021).

27. The interviews conducted for this Note received an exemption determination from the Yale Human Research Protection Program. Email from LaToya Howard, Senior Regul. Analyst, Hum. Rsch. Prot. Program Operations Team, Yale Univ., to author (Sept. 23, 2020) (on file with author).

inadequate to protect the privacy and civil liberties interests of the American people implicated by the government's foreign intelligence surveillance activities. Instead, in Part IV, this Note argues for the creation of a FISA special advocate: a permanent, institutional presence to serve as a genuine adversary to the government in the FISC and FISCR. This argument builds upon the academic and policy proposals that first developed the concept of a FISA special advocate during the USA FREEDOM Act debate from 2013 to 2015,[28] but this Note reenvisions the original proposal by contributing procedural and substantive modifications reflecting the lessons of the past six years. This Note also proposes a novel duty of the special advocate: oversight of approved FISA applications. This Note's proposal would address both the limitations of the FISA amicus provision that have become manifest in practice and the new concerns raised by the Page investigation about individual surveillance under FISA.

I. THE FISC AND THE AMICUS PROVISION: BACKGROUND

A. History of Adversarial Participation in the FISC and FISCR

Introducing the FISA bill in 1977, then-Attorney General Griffin Bell proclaimed that the Carter Administration sought "to restore the confidence of the American people in all of our institutions," including "intelligence gathering," by "bring[ing] the judiciary into the process."[29] According to Bell, "the American people trust[ed] the judiciary, and they [would] have more confidence in the system if . . . the executive, the congressional and the judiciary [were] all tied into the process so as to have one check the other."[30] A new judicial role in authorizing electronic surveillance for foreign intelligence purposes allowed the

28. *See* Stephen I. Vladeck, *The Case for a FISA "Special Advocate,"* CONST. PROJECT (May 29, 2014), https://archive.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf [https://perma.cc/RLN4-WMZ2]; Richard A. Clarke, Michael J. Morell, Geoffrey R. Stone, Cass R. Sunstein & Peter Swire, *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies*, U.S. OFF. DIR. NAT'L INTEL., REV. GRP. ON INTEL. & COMMC'NS TECHS. (Dec. 12, 2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/4RDT-LZ4P]; *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*, PRIV. & C.L. OVERSIGHT BD. (Jan. 23, 2014) [hereinafter *PCLOB Section 215 Report*], https://fas.org/irp/offdocs/pclob-215.pdf [https://perma.cc/BQN2-HCXE]; Peter Margulies, *Dynamic Surveillance: Evolving Procedures in Metadata and Foreign Content Collection After Snowden*, 66 HASTINGS L.J. 1, 51-55 (2014).

29. Griffin Bell, *Foreign Intelligence Surveillance Remarks of the President, Attorney General Bell, and Several Members of Congress on Proposed Legislation*, AM. PRESIDENCY PROJECT (May 18, 1977), https://www.presidency.ucsb.edu/node/244373 [https://perma.cc/Q7UW-LAUZ].

30. *Id.*

bill's supporters to declare that FISA struck "a careful balance that [would] protect the security of the United States without infringing on the civil liberties and rights of the American people."[31]

In creating this new judicial role, FISA's drafters drew upon a readily understood and nearly universally accepted model of legal procedure: the judicial warrant.[32] Under FISA, a judge from the newly created FISC would review and approve each government application for electronic surveillance of a foreign power or agents of a foreign power in an ex parte, in camera proceeding[33] — a procedure modeled on criminal wiretap applications under Title III of the 1968 crime bill.[34] The FISC would consist of U.S. District Court judges designated for limited terms by the Chief Justice of the United States.[35] In congressional testimony, Bell invoked Title III to explain and defend several different provisions of the FISA bill, including the adequacy of ex parte hearings to serve as a procedural safeguard.[36]

The analogy to criminal warrants not only justified but also limited the scope of judicial review under FISA. Asked about the possibility of introducing an adversarial process at the FISC, Bell referenced his own judicial experience in arguing for holding the line at ex parte hearings.[37] Bell offered three main arguments against adversarial participation under FISA: (1) the existence of internal executive branch safeguards for the FISA process; (2) the need for expedition in authorizing foreign intelligence surveillance operations; and (3) the prospect that the government would be less willing to disclose sensitive information to the court in an adversarial proceeding with the possibility of leaks.[38] Bell testified

31. 124 CONG. REC. 10,888 (1978) (statement of Sen. Edward M. Kennedy).

32. *See* Bell, *supra* note 29.

33. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

34. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 197, 218-21 (codified as amended at 18 U.S.C. § 2518 (2018)); *see* Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1167-69 (2015) (discussing the analogy between "classic" FISA and "ordinary" warrant applications).

35. Foreign Intelligence Surveillance Act § 103.

36. *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intel.*, 95th Cong. 32-33 (1978) (statement of Griffin B. Bell, Att'y Gen. of the United States).

37. *Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcomm. on Intel. & the Rts. of Ams. of the Select Comm. on Intel. of the U.S. S.*, 95th Cong. 40 (1978) (statement of Griffin B. Bell, Att'y Gen. of the United States).

38. *Id.* at 40, 42.

that the executive branch was "willing to give up this power" over foreign intelligence surveillance by allowing for limited judicial oversight, but that he "[didn't] see how we [could] have an adversary proceeding."[39]

Whatever validity the analogy between ordinary warrant hearings and the operations of the FISC may have held in 1977 had all but eroded by the time of the Edward Snowden revelations. In 2013, the former NSA contractor-turned-whistleblower disclosed details of two classified NSA programs: the bulk collection of telephone records under Section 215 of the USA PATRIOT Act (sections 501-503 of FISA) and the unexpectedly expansive scope of warrantless mass surveillance under Section 702 of FISA.[40] After September 11, 2001, both the Bush and Obama Administrations had turned to the FISC to bless their classified surveillance programs.[41] The broad powers claimed under Section 215 and Section 702 were approved by FISA court orders resting on legal theories that were not obvious from the statutory texts and never subject to public scrutiny or adversarial challenge.[42] As several commentators have observed, the role of the FISC at this time shifted from issuing exclusively individualized surveillance orders on a case-by-case basis to approving mass surveillance on a programmatic level.[43]

In engaging in review of mass surveillance programs, the court moved away from its original limited role and undertook "a policymaking role that was more like an executive supervisor than a judicial decisionmaker."[44] Judge James Robertson, who resigned in protest from the FISC in 2005 over the Bush Administration's circumvention of the court on warrantless wiretaps,[45] observed that programmatic review "turned the FISA Court into something like an administrative agency which makes and approves rules for others to follow . . . [even

39. *Id.* at 40.

40. *See* H.R. REP. NO. 113-452, pt. 1, at 13-14 (2014); *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, PRIV. & C.L. OVERSIGHT BD. 1 (July 2, 2014) [hereinafter *PCLOB Section 702 Report*], https://fas.org/irp/offdocs/pclob-702.pdf [https://perma.cc/LK56-FAWK].

41. *See* CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 194-207, 557-58 (2d ed. 2017).

42. *See id.* at 162-223, 557-58.

43. *See* Elizabeth Goitein & Faiza Patel, *What Went Wrong with the FISA Court*, BRENNAN CTR. FOR JUST. 21-30 (Mar. 18, 2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Went_%20Wrong_With_The_FISA_Court.pdf [https://perma.cc/EM5K-M3KZ]; Vladeck, *supra* note 28, at 3-5.

44. SAVAGE, *supra* note 41, at 199. Another commentator has described the change in the FISC's role as one from "gatekeeper" to "rule maker." *See* Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1191 (2016).

45. Stephen Braun, *Former FISA Judge Says Secret Court Is Flawed*, ASSOCIATED PRESS (July 9, 2013), https://apnews.com/co5620723cf84648bf329242fe44a6be [https://perma.cc/VT74-XTWP].

though] [t]hat's not the bailiwick of judges. Judges don't make policy."[46] Even long-time intelligence lawyer Jim Baker, a staunch defender of FISA, observed that with Section 215 and Section 702 review, the FISC reached "the outer limits of what we can reasonably expect a court to do" before becoming a "super inspector general . . . conducting . . . free-ranging oversight of the activities of the intelligence community."[47] This new quasi-administrative role brought the FISC to the limits of, and perhaps beyond, a proper judicial function through oversight of mass surveillance programs implicating the rights of potentially all Americans.

The Obama Administration's framing of the post-Snowden conversation echoed the original debate over FISA in its calls to restore public confidence in intelligence oversight and strike the proper balance between security and civil liberties. In August 2013, President Obama pledged to support several FISA reforms, including the introduction of a more adversarial voice to the FISC:

> One of the concerns that people raise is that a judge reviewing a request from the government to conduct programmatic surveillance only hears one side of the story—may tilt it too far in favor of security, may not pay enough attention to liberty. And while I've got confidence in the court and I think they've done a fine job, I think we can provide greater assurances that the court is looking at these issues from both perspectives—security and privacy.
>
> So, specifically, we can take steps to make sure civil liberties concerns have an independent voice in appropriate cases by ensuring that the government's position is challenged by an adversary.[48]

When the government sought to renegotiate the political accommodation underpinning FISA, the executive and legislative branches once again turned to

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46. *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, PRIV. & C.L. OVERSIGHT BD. 36 (July 9, 2013) [hereinafter *July 2013 PCLOB Workshop*] (statement of James Robertson, Former U.S. District Judge and FISA Court Judge), https://permanent.fdlp.gov/gp041479/July-9-2013-Workshop-Transcript.pdf [https://perma.cc/27D6-3KL5].

47. *Public Hearing: Consideration of Recommendations for Change: The Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, PRIV. & C.L. OVERSIGHT BD. 202 (Nov. 4, 2013) [hereinafter *November 2013 PCLOB Hearing*] (statement of James Baker, formerly of DOJ, Office of Intelligence and Policy Review), https://web.archive.org/web/20190206091123/https://www.pclob.gov/library/20131104-Transcript.pdf [https://perma.cc/6UZU-CXVH].

48. Barack Obama, *Remarks by the President in a Press Conference*, WHITE HOUSE (Aug. 9, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/08/09/remarks-president-press-conference [https://perma.cc/95V4-HZAM].

the judiciary to help restore the appearance of legitimacy to the country's foreign intelligence operations. This time, an element of judicial proceedings rejected by the original framers of FISA—adversarial participation in the FISC—would be called upon to recalibrate the "tilt" of the security-liberty balance.[49] What would follow was incremental reform rather than sweeping change.

The result of this renegotiation came in the USA FREEDOM Act of 2015, which included among its reforms the creation of a panel of security-cleared, outside attorneys to serve as amici in FISA proceedings at the discretion of the judges.[50] This reform was not without precedent. In three post-9/11 statutes, Congress authorized limited inter partes participation in the FISC and FISCR, allowing third parties to challenge orders to produce business records or directives to assist the government in electronic surveillance.[51] The only publicly known use of these adversarial provisions came in Yahoo's unsuccessful challenge to the lawfulness of directives issued under the Protect America Act in the FISC and FISCR.[52] FISA judges also had the inherent authority to appoint amici at their discretion, though use of that authority was exceedingly rare.[53]

The preenactment debate over whether and how to implement adversarial participation elicited a wide range of legislative proposals, which mainly fell into one of two camps: (1) the introduction of a special advocate with broad authorities and a mandate to represent privacy and civil liberties interests at the FISC,[54]

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49. *See* 161 CONG. REC. 7932 (2015) (statement of Sen. Richard Blumenthal) (noting that the USA FREEDOM Act "for the first time . . . would create an adversarial process" for the FISC).

50. USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279-81.

51. *See* USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, § 3, 120 Stat. 278, 278-79; Protect America Act of 2007, Pub. L. No. 110-55, § 2, 121 Stat. 552, 554-55; FISA Amendment Acts of 2008, Pub. L. No. 110-261, § 101, 122 Stat. 2436, 2441-43 (codified as amended at 50 U.S.C. § 1801 et seq. (2018)). The 2006 amendment to the USA PATRIOT Act authorized an entity that received a FISA order to produce business records for a foreign intelligence or terrorism investigation under Section 215 to challenge that order in the FISA courts and the Supreme Court. The Protect America Act of 2007 (PAA) and FISA Amendment Acts of 2008 (FAA) similarly authorized electronic communications service providers to challenge foreign intelligence surveillance directives issued to them. The only publicly known use of these adversarial provisions came in Yahoo's unsuccessful challenge to the constitutionality of the PAA in the FISC and the FISCR. The USA FREEDOM Act differed from these three statutes in creating a panel of independent attorneys, not representing parties subject to FISA orders or directives, to serve as amici curiae.

52. *See In re* Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008).

53. *See infra* text accompanying notes 100-101.

54. *See, e.g.*, USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (as introduced in House, Oct. 29, 2013); FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. (2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 3 (2013); Privacy Advocate

and (2) more limited measures designed to encourage the participation of amici curiae at the FISC and FISCR at the direction and discretion of the judges.[55]

In the wake of judicial intervention into the congressional debate,[56] as well as other constitutional objections raised at the time,[57] Congress adopted the weaker form of adversarial participation in the final version of the USA FREEDOM Act. Instead of empowering a permanent privacy and civil liberties advocate, the statute authorized the creation of a panel of precleared amici curiae — not necessarily representing a set of public interests — to be called upon at judges' discretion.[58] In effect, the three-way compromise among the branches resulted in a new provision that merely encouraged and facilitated the FISA courts' inherent and already existing authority to appoint amici, who by legislative design would be called upon only in exceptional cases.

Public controversy over FISC's ex parte proceedings erupted once again amid the firestorm surrounding the FBI's counterintelligence investigation into the ties between the Trump campaign and the Russian government, called Crossfire Hurricane.[59] In 2019, the DOJ IG's report on the Crossfire Hurricane investigation uncovered significant errors in the factual predication for four FISA applications for the surveillance of a former Trump advisor, Carter Page, including factual inaccuracies and omissions of exculpatory information.[60] The report noted that the initial application "received more attention and scrutiny than a typical FISA application in terms of the additional layers of review and number of high-level officials who read the application before it was signed"[61] — suggesting the presence of systemic and institutional deficiencies in the oversight of FISA applications in the executive branch. In view of these material misstatements and omissions, DOJ concluded that in at least two of Page's FISA renewal

General Act of 2013, H.R. 2849, 113th Cong. (2013); USA FREEDOM Act of 2014, S. 2685, 113th Cong. § 401 (2014); Clarke et al., *supra* note 28, at 183-89.

55. *See, e.g.*, FISA Improvements Act, S. 1631, 113th Cong. § 4 (2013).

56. *See* Stephen I. Vladeck, *The Wars of the Judges*, 92 WASH. L. REV. ONLINE 1, 1-3 (2017).

57. *See* ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RSCH. SERV., R43260, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 1 (2014).

58. *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279-81.

59. *See, e.g.*, *Former FBI Director James Comey Testimony on Russia Investigation*, C-SPAN, at 1:32:05 (Sept. 30, 2020), https://www.c-span.org/video/?475947-1/fbi-director-james-comey-testimony-russia-investigation [https://perma.cc/MY9G-54MM] (statement of Sen. Mike Lee) ("You don't install a wasp nest in your child's bedroom and then express surprise when the child gets bitten by wasps. You don't adopt an ex parte process and then express surprise and outrage when it goes completely unsupervised and off the rails.").

60. *December 2019 DOJ Inspector General Report*, *supra* note 9, at vii-xiv.

61. *Id.* at vii.

applications "there was insufficient predication to establish probable cause to believe that Page was acting as an agent of a foreign power."[62]

As the target of these FISA orders, Page never received the opportunity to examine and challenge the facts presented in the underlying FISA applications—and likely never would have had such an opportunity, even in the event of a criminal prosecution.[63] While the USA FREEDOM Act did create an amicus pool for adversarial participation at the FISA courts, the statute's legislative history makes clear that the scope of the amicus provision was "not intended to include routine, fact-based FISA applications that do not present novel legal or technological issues."[64] The amicus provision would not have applied to a case like Page's, which did not raise a novel or significant interpretation of law.

A subsequent report from the IG, which audited a sample of twenty-nine FISA applications, found widespread problems with the FBI's internal accuracy-review procedures.[65] These findings suggested that the deficiencies with Page's applications were not an aberration—let alone "one of the greatest political travesties in American history"[66]—but rather reflected pervasive and systemic problems in the FBI. The FBI's "Woods Procedures" require that the FBI create and maintain a subfile with supporting documentation for every factual assertion contained in a FISA application.[67] In the twenty-nine FISA applications reviewed by the IG, four of the Woods Files were missing completely.[68] Each of the twenty-five files that could be located contained apparent errors or inadequately

62. *In re* Carter W. Page at 1, Nos. 16-1182, 17-52, 17-375, 17-679 (FISA Ct. Jan. 7, 2020) (Order Regarding Handling and Disposition of Information) (quoting Additional Rule 13(a) Letter Regarding Applications Submitted to the Court Targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679, at 19 (Dec. 9, 2019)).

63. *See* Marcy Wheeler, *DOJ IG Report on Carter Page and Related Issues: Mega Summary Post*, EMPTYWHEEL (Jan. 6, 2020, 12:05 PM), https://www.emptywheel.net/2020/01/06/doj-ig-report-on-carter-page-and-related-issues-mega-summary-post [https://perma.cc/8WBH-UC2M] (noting the FBI's use of parallel construction in criminal cases to avoid giving notice of its FISA use to defendants).

64. H.R. REP. NO. 114-109, pt. 1, at 22 (2015).

65. *See* Off. of the Inspector Gen., *Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Courts Relating to U.S. Persons*, U.S. DEP'T JUST. 2-3 (Mar. 30, 2020) [hereinafter *March 2020 DOJ Inspector General Memorandum*], https://oig.justice.gov/sites/default/files/reports/a20047.pdf [https://perma.cc/6SSZ-BHET].

66. Kerri Kupec (@KerriKupecDOJ), TWITTER (Mar. 31, 2020, 3:21 PM), https://twitter.com/KerriKupecDOJ/status/1245068628694794252 [https://perma.cc/MC4W-BGXE].

67. *March 2020 DOJ Inspector General Memorandum*, *supra* note 65, at 3-4.

68. *Id.* at 8.

supported facts, with an average of twenty issues identified per file.[69] Of particular relevance to Page's case, the report found that "the FBI is not consistently re-verifying the original statements of fact within renewal applications," contrary to FBI policy.[70] As a result of these findings, the IG concluded: "[W]e do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy, or that the process is working as it was intended to help achieve the 'scrupulously accurate' standard for FISA applications."[71] A follow-on report from the IG found that out of an overall pool of 7,000 FISA applications authorized between January 2015 and March 2020, 183 had Woods Files that were missing in whole or in part.[72] The IG concluded that there was "widespread . . . noncompliance" with the Woods Procedures and "a significant lapse in the FBI's management of its FISA program."[73]

As Congress confronted yet another intelligence oversight controversy in 2020, Judge Laurence H. Silberman, one of the three panelists in the FISCR's first case in 2002 and now a senior judge on the D.C. Circuit, reflected on his opposition to FISA in 1978:

> It was a big mistake to give judges responsibility for non-judicial-like decisions, for two reasons. First, they're not appropriately commissioned for the role. It diminished their non-policymaking standing. And finally, they're not equipped to make these decisions. It's a big mistake to give too much power to judges. They're unelected and never should be given any authority over policy questions.[74]

Then, as now, Judge Silberman's reservations grew out of his "limited view of Article III" and his concern that judges under FISA would be deciding questions that "interlaced law and foreign policy."[75] Back in 1978, before he became a judge, he had feared that by shifting this quasi-policy making function to the judiciary, the executive branch would avoid responsibility for internal oversight of foreign intelligence investigations. Without alluding directly to the Page controversy, Judge Silberman simply observed, "I was prophetic, wasn't I?"[76]

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69. *Id.* at 2-3, 7.

70. *Id.* at 8.

71. *Id.*

72. *September 2021 DOJ Inspector General Report*, *supra* note 15, at 7.

73. *Id*. at ii.

74. Interview with Hon. Laurence H. Silberman, *supra* note 2.

75. *Id.*

76. *Id.*

B. The FISC's Ex Parte Proceedings

The FISC's ex parte setting is a product of both statutory design[77] and the evolution of institutional practice.[78] While judges and magistrates also consider applications for ordinary criminal search warrants and wiretaps in ex parte hearings, the FISC's proceedings have at least two distinctive features: the secrecy of the FISA application process and the potentially far-reaching national security policy ramifications of its decisions. These institutional features interact with the absence of adversarial process in the FISC to shape judicial decision-making, the range of legal arguments presented to the court, and the ability to challenge the legality of government actions.

The analogy between ordinary wiretap warrants and even individualized FISA applications falters because of the secrecy mandated by the FISA process, which makes it extremely difficult, if not practically impossible, for a surveillance target to bring a collateral attack against an approved FISA warrant. In congressional testimony, Judge James G. Carr, who served on the FISC from 2002 to 2008, explained this distinction between FISC proceedings and ex parte proceedings to obtain criminal warrants:

> [T]he subject of a conventional Fourth Amendment search warrant knows of its execution, can challenge its lawfulness if indicted, and can, even if not indicted, seek to recover seized property or possibly sue for damages.
>
> In contrast, except in very, very rare instances, suppression or other means of challenging the lawfulness of a FISA order is simply not available to the subject of a FISA order. Even on the infrequent occasion when a FISA target becomes charged in a criminal case, he will, as a result of the procedures mandated in the Classified Information Procedures Act almost never have the opportunity to challenge the FISA order.[79]

A primary obstacle to collateral attacks against FISA orders is the way courts have interpreted the disclosure provision of the FISA statute. Section 1806(f) provides that a district court "may disclose to the aggrieved person . . . portions

77. 50 U.S.C. § 1805(a) (2018).

78. For a description of the FISC's procedures and practices, see Letter from Hon. Reggie B. Walton, Presiding J., Foreign Intel. Surveillance Ct., to Hon. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (July 29, 2013), https://fas.org/irp/news/2013/07/fisc-leahy.pdf [https://perma.cc/DG5V-N3BZ].

79. *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 61 (2013) (statement of James G. Carr, J., U.S. District Court for the Northern District of Ohio).

of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."[80] As Judge Rovner explained in *United States v. Daoud*, courts have justified withholding FISA materials by declaring that "they have conducted their own careful review of the FISA materials and discovered no material misrepresentations or omissions in the FISA application."[81] But while a court may be able to spot a patent inconsistency in a FISA application, "its ability to discover false statements and omissions is necessarily limited, as it has only the government's version of the facts."[82] Without a defendant's knowledge of the underlying facts, a court "cannot, for the most part, independently evaluate the accuracy of that application on its own."[83] But without access to the FISA application, a defendant has no way of knowing whether and how the government may have misrepresented facts to the FISC and cannot make the preliminary showing required for an evidentiary hearing.[84] Despite this catch-22, courts have not ruled that disclosure is necessary for the accurate determination of the legality of surveillance and have instead "either overlooked the problem or acknowledged it without being able to identify a satisfactory work-around."[85]

These successive obstacles, taken together, effectively block the prospect of a surveillance target challenging the legality of a FISA order. Most FISA orders do not lead to criminal proceedings[86] and, therefore, are never disclosed to the targets. If there is a criminal prosecution, the government has historically adopted an unjustifiably narrow view of its statutory obligation to provide defendants notice of surveillance under FISA.[87] In addition, the ability of the government to develop a case against a FISA target without relying on FISA-derived evidence may, in some instances, enable the government to bring charges without ever

80. 50 U.S.C. § 1806(f) (2018).

81. 755 F.3d 479, 494 (7th Cir. 2014) (Rovner, J., concurring).

82. *Id.*

83. *Id.* at 486.

84. *Id.* at 490.

85. *Id.* at 486.

86. KRIS & WILSON, *supra* note 12, § 11:20.

87. *See* Patrick C. Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance—Again?*, JUST SEC. (Dec. 11, 2015), https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again [https://perma.cc/2Z7Y-YNKH]. Although the government has a statutory obligation to notify defendants when it intends to use evidence "obtained or derived from" FISA surveillance in a proceeding against them, 50 U.S.C. § 1806(c) (2018), the government has refused to disclose its interpretations of what constitutes evidence "obtained or derived from" FISA, *see* Toomey, *supra*.

disclosing that the defendant had been subject to FISA surveillance.[88] In the rare cases in which criminal defendants have received notice that evidence was derived from FISA, the government has never been required to disclose the documentation supporting a FISA application.[89] While the possibility of a collateral attack offers an external check on ex parte hearings in ordinary criminal proceedings, the secrecy shrouding FISA forecloses the realistic possibility of an individual FISA target ever litigating a surveillance order.[90]

The second distinctive feature of the FISC's ex parte setting is the broader national security context of the proceedings. The potential policy consequences of FISA orders became more profound after 9/11, when the government in 2004 turned to the FISC to approve bulk collection under Section 215 and later sought annual programmatic review of its overseas collection operations under Section 702.[91] One former FISC judge articulated his mindset when serving after the 9/11 attacks as one that explicitly balanced the government's assertions about national security against the requirements of the law:

> I certainly felt that in reviewing applications, I didn't want to turn something down and have a catastrophe occur. On the other hand, I didn't want to disregard what I understood to be the requirements not just of the [FISA] statute but also the Fourth Amendment. There's an inherent tension.[92]

Yet while reviewing cases that raised novel legal or technological issues in the context of the Global War on Terror, the FISC retained its ex parte process adapted from ordinary criminal warrant hearings — a judicial function that is essentially one of approval rather than adjudication.[93] Several former FISC judges

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88. On the controversial practice of "parallel construction," see *Dark Side: Secret Origins of Evidence in U.S. Criminal Cases*, HUM. RTS. WATCH (Jan. 9, 2018), https://www.hrw.org/report/2018/01/09/dark-side/secret-origins-evidence-us-criminal-cases [https://perma.cc/GQG8-NFVF]; John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013, 5:19 AM), https://www.reuters.com/article/us-dea-sod-idUSBRE97409R20130805 [https://perma.cc/2Z8L-EUBU]; and Wheeler, *supra* note 63.

89. *PCLOB Section 215 Report*, *supra* note 28, at 176 (citing Jimmy Gurulé, *FISA and the Battle Between National Security and Privacy*, JURIST (Feb. 17, 2012, 3:00 PM), https://www.jurist.org/commentary/2012/02/jimmy-gurule-fisa [https://perma.cc/8R2S-H99R]); Vladeck, *supra* note 34, at 1170-71.

90. As noted, *supra* note 51, while there is statutory authorization for businesses and electronic-communications providers — as opposed to the subjects of FISA surveillance — to challenge FISA orders and directives, such challenges have rarely been brought.

91. *See PCLOB Section 215 Report*, *supra* note 28, at 176-77.

92. Telephone Interview with Former FISC Judge (Mar. 19, 2020).

93. *See July 2013 PCLOB Workshop*, *supra* note 46, at 35 (statement of James Robertson).

have commented on how fundamental the adversarial process is to judicial decision-making, and how different the FISA process is from the way judges typically decide cases.[94] As Judge Robertson observed, "Judging is choosing between adversaries. . . . The ex parte FISA process hears only one side and what the FISA process does is not adjudication, it is approval."[95] Judge Carr reflected that "there were several occasions" during his tenure from 2002 to 2008 in which FISA proceedings presented novel legal issues and the court's judicial process would have benefited from an adversary challenging the government's legal assertions.[96] In 2013, President Obama identified the concern that hearing only the government's side in programmatic review cases "tilt[ed] [the FISC] too far in favor of security" and to "not pay enough attention to liberty."[97] While the reputation of the FISC as a "rubber stamp" for the government is an oversimplification at best,[98] it nonetheless seems apparent that one-sided legal representations in a national security context have restricted the range of arguments presented and created a serious tension with traditional judicial norms and decision-making processes.

C. The FISC Amicus Provision as Enacted

As part of the USA FREEDOM Act's reform and transparency measures, the statute included a provision to facilitate the appointment of amici curiae in FISA cases presenting novel or significant legal or technological issues.[99] While the original FISA statute did not include an amicus provision, the FISC and FISCR had the inherent authority to appoint amici at their discretion.[100] Before 2013, that discretion was exercised only once, by the FISCR, when Judge Silberman sought out amicus briefs for *In re Sealed Case*.[101] The Snowden leaks seemingly

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94. *See id.*; Interview with Hon. Laurence H. Silberman, *supra* note 2 (observing that the adversarial process is "fundamental" to judges); *November 2013 PCLOB Hearing*, *supra* note 47, at 151 (statement of James G. Carr) ("[W]e judges are accustomed [to] the adversary process . . . . That's how we usually make decisions.").

95. *July 2013 PCLOB Workshop*, *supra* note 46, at 35 (statement of James Robertson).

96. James G. Carr, Opinion, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), https://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html [https://perma.cc/EW2S-P4ZZ].

97. Obama, *supra* note 48.

98. *See, e.g.*, David S. Kris, *How the FISA Court Really Works*, LAWFARE (Sept. 2, 2018, 5:29 PM), https://www.lawfareblog.com/how-fisa-court-really-works [https://perma.cc/TE54-8WH7]. *But see* Savannah Turner, *The Secrets of the Secret Court: An Analysis of the Missing Party and Oversight of the Foreign Intelligence Surveillance Court*, 70 ADMIN. L. REV. 991, 993-96 (2018) (describing the history of "rubber stamping" at the FISC).

99. 50 U.S.C. § 1803(i) (2018).

100. *See In re* Application of the FBI for an Ord. Requiring Prod. of Tangible Things, No. BR 13-158, 2013 WL 12335411, at *2-5 (FISA Ct. Dec. 18, 2013) (Order and Memorandum Opinion).

101. *See* Interview with Hon. Laurence H. Silberman, *supra* note 2.

exercised some influence on the FISC, as FISC judges accepted seven amicus briefs in the two-year period between the disclosures in 2013 and the passage of the USA FREEDOM Act in 2015.[102]

The new statute formalized and facilitated the appointment of amici curiae in certain FISA cases, but it left the ultimate decision to call on an amicus to FISA judges and thus only nominally mandated amicus participation. Congress did, however, make amicus appointments significantly easier and more practical by authorizing the creation of a standing panel of security-cleared, outside attorneys eligible to be called upon by the FISA courts.[103] The USA FREEDOM Act required the presiding judges of the FISC and FISCR to appoint at least five individuals to the amicus panel "who possess expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise" to the courts.[104] The preclearance of amici removed at least one obstacle to the involvement of outside attorneys in courts that operate in a classified setting and often with great expedition.

The USA FREEDOM Act established two distinct bases for the appointment of amici. According to the statute, the FISC and FISCR:

> (A) shall appoint an individual who has been designated . . . to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; and
>
> (B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.[105]

The second provision merely formalizes, for the first time, the FISA courts' inherent and general authority to appoint amici or solicit amicus briefs in any case, for any reason.[106] The first provision calls for the appointment of amici in cases involving "a novel or significant interpretation of the law"[107]—the kinds of

102. Patel & Koreh, *supra* note 25, at 10.

103. 50 U.S.C. § 1803(i)(1), (3) (2018).

104. *Id.* § 1803(i)(1), (3)(A).

105. *Id.* § 1803(i)(2).

106. *Id.* § 1803(i)(2)(B).

107. *Id.* § 1803(i)(2)(A).

nonroutine matters the government was increasingly bringing to the FISC starting in 2004.[108] The House Judiciary Committee understood this provision to encompass FISA cases involving the "application of settled law to novel technologies or circumstances materially different from those in prior cases, or any other novel or significant construction or interpretation of any provision of law or of the U.S. Constitution."[109] Notably, while the provision states that the FISA courts "shall" appoint an amicus in such cases, it is only nominally mandatory. Instead, it allows a FISA judge the discretion *not* to appoint an amicus, even in cases presenting novel or significant interpretations of law, if he or she "issues a finding that such an appointment is not appropriate."[110]

Nor does the statute mandate that an amicus represent a specific set of public interests or even necessarily oppose the government's positions. The original version of the USA FREEDOM Act,[111] as well as competing FISA reform legislation,[112] contemplated requiring a special advocate to support legal interpretations protecting individual privacy and civil liberties interests. However, the enacted statute, just as it preserves judicial discretion over the appointment of amici, presents the specific duties of amici in the form of guidance rather than a mandate. The statute requires that an amicus provide:

> (A) legal arguments that advance the protection of individual privacy and civil liberties;
>
> (B) information related to intelligence collection or communications technology; or

108. *See PCLOB Section 215 Report*, *supra* note 28, at 174-77.

109. H.R. Rep. No. 114-109, pt. 1, at 22 (2015). The House Judiciary Committee report also noted that the provision "is not intended to include routine, fact-based FISA applications that do not present novel legal or technological issues." *Id.*

110. 50 U.S.C. § 1803(i)(2)(A) (2018).

111. USA FREEDOM Act, S. 1599, 113th Cong. § 902 (as introduced in Senate, Oct. 29, 2013) (providing that the "Special Advocate shall vigorously advocate . . . in support of legal interpretations that protect individual privacy and civil liberties").

112. *See, e.g.*, FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. § 3 (providing that the "Constitutional Advocate shall protect individual rights by vigorously advocating . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention"); USA FREEDOM Act of 2014, S. 2685, 113th Cong. § 401 (providing that a special advocate "shall advocate . . . in support of legal interpretations that advance individual privacy and civil liberties").

(C) legal arguments or information regarding any other area relevant to the issue presented to the court.[113]

Although the provision does specifically cite privacy and civil liberties interests, the statutory language leaves open-ended both the nature of the legal arguments an amicus could advance and the extent to which an amicus would oppose the government's positions in the FISA courts. When the absence of a mandated legal position is read alongside the discretionary nature of amicus appointments, it becomes evident that the function of a FISA amicus envisioned by the statute is to assist the court in resolving legal questions when called upon rather than to vigorously advocate on behalf of individual privacy or civil liberties.

Throughout the FISA amicus provision, the statutory language is careful to preserve judicial prerogatives and the fundamental balance of power at the FISA courts. Access of an amicus to "any legal precedent, application, certification, petition, motion, or such other materials" is at the discretion of the court.[114] An amicus appointed to a FISA case may only consult with other members of the precleared amicus panel with the court's approval.[115] Amici do not have standing as a party nor the ability to appeal FISC and FISCR decisions.[116] The statute also clarifies that the amicus provision does not limit the FISA courts' ability to engage in ex parte communications with the government "nor limit any special or heightened obligation in any ex parte communication or proceeding."[117] Whether, and to what extent, adversarial process is introduced to any FISA proceeding remains within the court's power to determine.

D. A Normative Framework for Assessing FISA Oversight

FISA has frequently been understood as a balance—a means of reconciling competing societal interests and values. During the post-Snowden debate, President Obama invoked the image of a "tilt," or imbalance, between security and

113. 50 U.S.C. § 1803(i)(4) (2018).

114. *Id.* § 1803(i)(6)(A)(i).

115. *Id.* § 1803(i)(6)(A)(ii).

116. *See* Faiza Patel & Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, JUST SEC. (Feb. 26, 2020), https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici [https://perma.cc/YG4W-8KY8] (noting that draft provisions to allow amici to appeal decisions were removed from the final version of the USA FREEDOM Act).

117. 50 U.S.C. § 1803(i)(10) (2018). This provision was intended to ensure that the government did not rely upon the possibility of an amicus appointment to withhold information from the courts or to present one-sided arguments. Email from Robert Litt, Former Gen. Couns., Off. of the Dir. of Nat'l Intel., to author (Sept. 19, 2021, 7:30 PM EDT) (on file with author).

liberty that needed to be corrected,[118] and one commentator has described the entire history of the FISA regime as a balancing of national security interests and privacy and civil liberties interests.[119]

This idea of balancing and recalibration may be an accurate descriptive account of the origins of FISA and its successive amendments, but it is not fully satisfying as a normative framework for assessing how the country ought to oversee foreign intelligence surveillance. It is a model that is fundamentally reactive and seemingly dependent upon embarrassing public disclosures, political outrage, and world-historical events like 9/11 to drive change. While this framework may tell us that FISA is, or has been, a statutory mechanism to balance security and liberty, it has little to say about where that balance should be struck, beyond an instinctive or intuitive political judgment.[120]

This Section examines three different sources of law and policy to draw out enduring values and principles to guide a FISA oversight regime that does not simply seesaw back and forth based on the latest controversy. After all, amicus participation at the FISC, and FISA oversight more generally, exist in a broader legal and constitutional context. The Fourth Amendment, the FISA statute, and FBI internal regulations offer guidance on the privacy and civil liberties interests that should be central to the FISA regime — interests that the current amicus system does not go far enough to protect.

An historical reading of the Fourth Amendment suggests, at the least, the need for heightened attention to judicial process and review in the case of mass surveillance programs. Laura Donohue, one of the current FISA amici, has made the argument that the mass surveillance programs initiated after 9/11 and currently authorized by FISA are constitutionally dubious, at best, under an

118. Obama, *supra* note 48.

119. Priv. & C.L. Oversight Bd., *Board Virtual Public Forum: FISA: Examination of the Past and Future*, YOUTUBE, at 04:16 (June 24, 2020), https://youtu.be/kha1KihllNQ [https://perma.cc/B2Z3-UJQ8] (statement of Kenneth L. Wainstein, Former Assistant Att'y Gen. for National Security and Former Homeland Security Advisor).

120. For an argument that the very idea of balancing security and liberty through FISA undermines the rule of law, see Conor Friedersdorf, *The Surveillance Speech: A Low Point in Barack Obama's Presidency*, ATLANTIC (Aug. 12, 2013), https://www.theatlantic.com/politics/archive/2013/08/the-surveillance-speech-a-low-point-in-barack-obamas-presidency/278565 [https://perma.cc/PBR7-VNEG], which states that "a judge's job is not balancing liberty and security, as if there is an objectively correct degree of 'tilt' that they can settle upon. Judges are there, first and foremost, to ensure that the Constitution is not violated, and then to ensure that the law is being followed."

originalist understanding of the Fourth Amendment.[121] While Donohue's underlying interpretation of the Fourth Amendment is contested,[122] and this Note takes no position on the legality of the post-9/11 surveillance programs, Donohue's analysis supports the idea that judicial scrutiny should be greater when the government undertakes surveillance without individualized suspicion.

Donohue analogizes programmatic surveillance under FISA to general warrants, which earned "the enmity of the founding generation"[123] because they did not require government officials to specify the person or place to be searched or to provide sworn evidence of a particular crime.[124] From an historical perspective, the Fourth Amendment unquestionably prohibits the use of general warrants, which were regarded by the Founders "as the worst exercise of tyrannical power."[125] At the Founding, three kinds of arguments circulated against the use of general warrants: (1) rights-based arguments that considered the preservation of a sphere of privacy to be essential to individual liberty and political freedom; (2) harm-based arguments that emphasized the opportunities for government to abuse the power to target individuals for searches and seizures without evidence of criminal wrongdoing; and (3) separation-of-powers arguments that were concerned about the concentration of unchecked surveillance authority in the executive branch.[126] The approval of mass surveillance programs by the FISC, without predication on evidence of specific and individual wrongdoing, appears to mark a return to the era of the general warrant, which Donohue argues was decisively rejected by the Founders.

The text of FISA itself offers insight into the privacy and civil liberties interests that Congress valued and sought to protect through its statutory plan. First and foremost, in designing the traditional FISA regime, Congress required particularized suspicion before the government could commence electronic surveillance of an individual target.[127] Before approving a surveillance order, the FISC must determine that probable cause exists to believe that the target is "a foreign power or an agent of a foreign power" and will use the specific phone number, email account, or physical location to be surveilled.[128] Second, the statute recognized the heightened privacy interests of U.S. persons versus non-U.S. persons.

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121. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE, *supra* note 26, at 75-135.

122. For an originalist argument against the "warrantist" view of the Fourth Amendment, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

123. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE, *supra* note 26, at 98.

124. *Id.* at 75.

125. *Id.*

126. *Id.* at 98-116.

127. *See* 50 U.S.C. § 1805(a)(2)(A)-(B) (2018).

128. *Id.*

Under traditional FISA, a U.S. person—a citizen or permanent resident—can be the subject of a surveillance order only if he or she knowingly engages in espionage, sabotage, international terrorism, or the use of a false identity on behalf of a foreign power, or aids, abets, or conspires to engage in such activity.[129] These are all crimes that could serve as the predicate for an ordinary criminal wiretap. In contrast, the bar is lower for the surveillance of non-U.S. persons, who can be targeted simply by virtue of being an officer or employee of a foreign government, a foreign-government-controlled entity, or a foreign political organization.[130] Third, Congress recognized the potential danger of the collision between foreign intelligence surveillance and constitutionally protected freedoms. Under FISA, a U.S. person may not be subject to surveillance solely on the basis of activities protected by the First Amendment.[131]

FBI internal guidelines appear to reflect similar values and priorities. Perhaps recognizing the history of domestic surveillance as a means of political monitoring, harassment, and the stifling of dissent, the FBI requires special approvals for electronic surveillance in the context of what it calls "[s]ensitive [i]nvestigative [m]atters"—investigations of domestic political officials, candidates, or organizations; religious organizations or prominent religious figures; the news media; and matters implicating questions of academic freedom.[132] Therefore, even in cases where electronic surveillance is permitted by statute, the FBI recognizes the need for greater concern for privacy and civil liberties interests based upon the broader political or societal context of its national security investigations.

The guidelines also reinforce other distinctions and protections created by FISA. The FBI may only use electronic surveillance under FISA's authority in three kinds of matters: (1) investigations of federal (and some state) crimes, (2) investigations of threats to national security, and (3) the collection of "positive foreign intelligence"—that is, broader information about foreign powers, organizations, or persons not within the FBI's core national security mission.[133] The FBI may open an investigation of a federal crime or national security threat only if there is an "articulable factual basis," while foreign intelligence collection need

129. *Id.* § 1801(b)(2).

130. *Id.* § 1801(a), (b)(1)(A).

131. *Id.* § 1805(a)(2)(A).

132. *See* FED. BUREAU INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 10.1.2 (Mar. 3, 2016), https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version%20Part%2001%20of%2002/view [https://perma.cc/F63V-VWAC].

133. *Id.* §§ 7.4, 7.9, 9.1.

only be predicated on an existing foreign intelligence collection requirement.[134] Thus, for example, while the investigation of a U.S. person whose status as an agent of a foreign power is in question may require particularized suspicion, the electronic surveillance of the Russian ambassador in Washington would most likely satisfy a standing collection requirement.

From these three sources, a hierarchy of privacy and civil liberties interests emerges. Given the history of the general warrant, the protection of privacy interests from the potential abuses of programmatic surveillance under FISA should receive serious scrutiny by any oversight body or potential adversarial party. The surveillance of U.S. persons, particularly those implicating constitutionally protected activities or sensitive investigative matters, should receive heightened attention. Under this framework, the investigation of non-U.S. persons, especially those whose status as an agent of a foreign power is unquestioned, would not implicate privacy interests as strongly. As demonstrated by the Carter Page controversy, the inconsistent appointment of amici to the FISC's review of programmatic surveillance discussed below in Section II.A.2, and the broader limitations on amicus participation, the current FISC review process is insufficient to protect the privacy and civil liberties interests enshrined in the FISA statute itself, FBI policy, and the Constitution.

II. THE FISA AMICUS SYSTEM: THE INSIDERS' VIEW

This Part draws upon the first systematic set of interviews conducted with six of the current and former FISA amici and contributes first-hand insights that can inform the ongoing scholarly and policy conversations about FISA reform. Based on these interviews, as well as interviews with a former FISC judge and former government attorneys, supplemented by declassified FISA material, this Part provides an insiders' perspective on how the FISA amicus provision has worked in practice. What emerges from these sources is a picture of limited, but positive, impact. The greatest fears of opponents of the introduction of outside attorneys at the court—namely, the disruption of foreign intelligence operations—have not been realized. The amici have slowly but surely been gaining the confidence of FISC judges, who are seeing the value that an extra set of eyes can bring. But the impact of the amici on outcomes of cases and the advancement of privacy and civil liberties interests have been muted by the narrow way judges have interpreted the amicus provision, the narrow way some amici themselves have interpreted their charge, and the limits on information access that amici have encountered.

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134. *Id.* §§ 7.4.3, 7.5.

A. Procedural Issues with the Amicus System

Interviews with amici, as well as the partially declassified record, reveal important procedural issues with amicus participation in the FISC. Initial statutory requirements led to the creation of an amicus panel dominated by former high-level government attorneys. The FISC's narrow interpretation of the amicus provision — arguably narrower than what Congress intended — has led to a system of discretionary appointments reserved for a small number of cases. Amici reported that judicial attitudes toward their presence and the logistical support they receive have improved, but they also reported crucial limitations in terms of information access and sharing. Finally, amici contrasted their role with the relatively unknown — but vitally important — work of the FISC's legal advisors.

1. The Composition of the Amicus Panel

In the absence of a statutory mandate for the amici to serve as privacy and civil liberties advocates, the backgrounds and personal views of the individual attorneys appointed are crucial to shaping the role of the FISA amicus panel. Notably, three of the original five members of the panel were former DOJ attorneys,[135] and currently four former DOJ attorneys sit on the panel.[136] The composition of the initial amicus panel was, in part, a product of the statutory design, which required the appointment of five amici within 180 days of the enactment of the USA FREEDOM Act.[137] According to one amicus, there was a relatively small set of lawyers to draw on by the statutory deadline, given the need to select attorneys who had high-level security clearances and FISA experience, but were not currently serving in government.[138]

Also notably, the only amicus at the time with significant criminal-defense experience in the FISA context, John D. Cline, resigned in December 2017 after not being assigned to a single case.[139] In his resignation letter, Cline wrote: "I

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135. *See* Bryan Koenig, *FISC Taps Advisory Attys Amid Surveillance Reforms*, LAW360 (Nov. 30, 2015, 7:01 PM EST), https://www.law360.com/articles/732307/fisc-taps-advisory-attys-amid-surveillance-reforms [https://perma.cc/LS7D-UKGL]. For an opinionated description of each of the original amicus's professional backgrounds, see Marcy Wheeler, *FISC Makes Far Better Choices than I Expected*, EMPTYWHEEL (Nov. 25, 2015), https://www.emptywheel.net/2015/11/25/fisc-makes-far-better-amicus-choices-than-i-expected [https://perma.cc/C6W7-EZJY].

136. *See infra* text accompanying notes 142-146.

137. *See* 50 U.S.C. § 1803(i)(1) (2018).

138. Interview with FISA Amicus.

139. *See* Letter from John D. Cline to Hon. Rosemary M. Collyer, Presiding J., Foreign Intel. Surveillance Ct., & Hon. William C. Bryson, Presiding J., Foreign Intel. Surveillance Ct. of Rev.

am concerned that my continued service as amicus might create the impression that I am participating in the courts' work, when in fact I am not."[140]

Five attorneys currently serve on the amicus panel[141]: Professor Laura Donohue, a privacy and surveillance expert at the Georgetown University Law Center;[142] Amy Jeffress, a former chief of the National Security Section in the U.S. Attorney's Office for the District of Columbia and a partner at Arnold & Porter;[143] David S. Kris, a former head of DOJ's National Security Division (NSD) and a partner at a strategic consultancy;[144] Mary McCord, a former acting head of DOJ's NSD and executive director of the Institute for Constitutional Advocacy and Protection at the Georgetown University Law Center;[145] and Marc Zwillinger, a privacy and data security lawyer who previously served as a DOJ trial attorney and later represented Yahoo in its challenge in the FISCR to directives to provide user communications to the NSA.[146] The FISC and FISCR designated three technology experts as additional amici in October 2018.[147]

2. *The Appointment of Amici to FISA Cases*

Declassified FISC opinions reveal that FISA judges have interpreted the scope of the amicus provision narrowly and appointed amici in a smaller number of cases than Congress likely intended. As Cline's experience shows, designation

(Dec. 19, 2017), https://www.emptywheel.net/wp-content/uploads/2018/02/2017-12-19-FISC-resignation-letter-1.pdf [https://perma.cc/WQ6D-7WAW]; Wheeler, *supra* note 135.

140. Letter from John D. Cline, *supra* note 139.

141. *Amici Curiae*, U.S. FOREIGN INTEL. SURVEILLANCE CT., https://www.fisc.uscourts.gov/amici-curiae [https://perma.cc/2J5C-ERXH].

142. *Laura Donohue*, GEO. L., https://www.law.georgetown.edu/faculty/laura-donohue [https://perma.cc/3JU8-TWN4].

143. *Amy Jeffress*, ARNOLD & PORTER, https://www.arnoldporter.com/en/people/j/jeffress-amy [https://perma.cc/X45V-2HV7].

144. *Partners*, CULPER PARTNERS, https://culperpartners.com/partners [https://perma.cc/BW46-9W5L].

145. *Mary McCord*, GEO. L., https://www.law.georgetown.edu/faculty/mary-mccord [https://perma.cc/9ER2-Q9XB].

146. *Marc Zwillinger*, ZWILLGEN, https://www.zwillgen.com/people/marczwillinger [https://perma.cc/NLH3-A4EF]; *see also* Craig Timberg & Christopher Ingraham, *You Think You've Got Bills? Government Could Have Fined Yahoo Trillions of Dollars*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/09/15/you-think-youve-got-bills-government-could-have-fined-yahoo-trillions-of-dollars [https://perma.cc/XG8H-9LD7].

147. The additional amici are Ana I. Anton of the Georgia Institute of Technology's School of Interactive Computing, Ben Johnson of Obsidian Security, and Robert T. Lee of the SANS Institute. *Amici Curiae*, *supra* note 141.

to the amicus panel does not guarantee participation in the work of the FISC. Rather, FISC and FISCR judges must appoint individual amici in specific cases that come before their courts. The declassified information released by the FISC confirms that the appointment of amici has remained highly limited and subject to complete judicial discretion.

Since 2015, FISC and FISCR judges have appointed amici in only a tiny fraction of all FISA cases. The two courts reported four amicus appointments in 2015, one in 2016, none in 2017, nine in 2018, two in 2019, and three in 2020.[148] Cline, the amicus who resigned in frustration in 2017, wrote in his resignation letter that his "fellow amici have been assigned only a small handful of matters among them, and some have had no cases at all."[149] In an interview, Cline confirmed that after being named to the amicus panel in 2015, he had "no contact with the court" at all.[150] While it is impossible to assess from the outside how many of the approximately 1,200 FISA applications the FISC received annually from 2015 to 2020 met one of the statutory criteria for an amicus appointment,[151]

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148. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2015, at 4 (Apr. 2016) [hereinafter 2015 FISC ANNUAL REPORT]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2016, at 4 (Apr. 20, 2017) [hereinafter 2016 FISC ANNUAL REPORT]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2017, at 4 (Apr. 25, 2018) [hereinafter 2017 FISC ANNUAL REPORT]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2018, at 4 (Apr. 25, 2019) [hereinafter 2018 FISC ANNUAL REPORT]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2019, at 4 (Apr. 27, 2020) [hereinafter 2019 FISC ANNUAL REPORT]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2020, at 4 (Jul. 16, 2021) [hereinafter 2020 FISC ANNUAL REPORT]. But even these numbers are somewhat inflated. The annual reports count "each instance of an individual receiving an appointment . . . separately, including when more than one individual was appointed to the same matter," 2018 FISC ANNUAL REPORT, *supra*, at 4, and amicus Amy Jeffress, in at least two matters, appears to have brought on and received assistance from associates at her law firm, *see* 2018 FISC ANNUAL REPORT, *supra*, at 4 (naming "John Cella" as an individual appointed to serve as an amicus); *John Cella*, ARNOLD & PORTER, https://www.arnoldporter.com/en/people/c/cella-john [https://perma.cc/XXS6-J7NE]; 2020 FISC ANNUAL REPORT, *supra*, at 4 (naming "Tianyi Xin" as an individual appointed to serve as an amicus); *Tian Tian Xin*, ARNOLD & PORTER, https://www.arnoldporter.com/en/people/x/xin-tian-tian [https://perma.cc/DN62-2JK5].

149. Letter from John D. Cline, *supra* note 139.

150. Telephone Interview with John D. Cline, Former FISA Amicus (Feb. 26, 2020).

151. The FISC received 1,010 applications in 2015, 2015 FISC ANNUAL REPORT, *supra* note 148, at 1; 1,752 applications in 2016, 2016 FISC ANNUAL REPORT, *supra* note 148, at 1; 1,614 applications in 2017, 2017 FISC ANNUAL REPORT, *supra* note 148, at 1; 1,318 applications in 2018, 2018

there is reason to believe, as discussed below, that judges' narrow interpretation of the statute plays a role in the limited number of appointments.[152]

Amicus participation in the work of the FISC and FISCR has remained solely at the discretion of the judges, with amici waiting until they are formally called upon to serve the court. None of the amicus panel members interviewed reported proactively seeking to participate in any cases,[153] consistent with the statute not requiring amici to receive either FISA applications as they are submitted to the court or docketing information. Nor did any of the panel members interviewed report being asked to advise the court on any FISA matters outside of a formal appointment to a case.[154] One amicus observed that appointments appear to be "made on a rotating basis," with judges researching the backgrounds of amici for their suitability for a particular case.[155] This amicus described the appointment process as beginning with a phone call to check for availability and any potential conflicts.[156] Once in receipt of a formal appointment letter, amici obtain access to a part of the legal record for the case.[157] While appointment orders typically direct an amicus to address specific legal questions in cases,[158] two amici reported not feeling constrained in their ability to spot and address additional issues as they believed appropriate.[159]

The relative infrequency of amicus appointments stems, at least in part, from the narrow interpretation that FISC judges have imposed on the amicus provision. The first FISC opinion addressing amicus participation asserted broad judicial discretion over the appointment of amici, even in cases presenting novel

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FISC ANNUAL REPORT, *supra* note 148, at 1; 1,010 applications in 2019, 2019 FISC ANNUAL REPORT, *supra* note 148, at 1; and 579 applications in 2020, 2020 FISC ANNUAL REPORT, *supra* note 148, at 1.

152. *See infra* text accompanying notes 160-165.

153. Telephone Interview with John D. Cline, *supra* note 150; Interviews with FISA Amici.

154. Two amici mentioned that there are regular meetings with the FISC, though not on any specific legal questions. Interviews with FISA Amici.

155. Interview with FISA Amicus.

156. *Id.*

157. *Id.*

158. *See, e.g.*, *In re* Opinions & Ords. of this Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act at 1-2, No. Misc. 13-08 (FISA Ct. May 1, 2018) (Appointment of Amicus Curiae and Briefing Order); *In re* Application of the Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things at 3-4, No. BR 15-99 (FISA Ct. Sept. 17, 2015) (Order Appointing an Amicus Curiae); [Redacted] at 1-2 (FISA Ct. Aug. 13, 2015) (Notice Concerning the Court's Order of August 13, 2015 Appointing an Amicus Curiae).

159. Interviews with FISA Amici.

or significant interpretations of law and therefore nominally requiring an amicus.[160] In a 2015 case turning on the interpretation of the newly passed USA FREEDOM Act, Judge Saylor conceded that the legal question presented was both "undoubtedly 'significant'" and "likely 'novel.'"[161] But because he believed the answer to the legal question was "obvious," Judge Saylor found that consulting an amicus in this case would "not [be] appropriate."[162] In cases where "the legal question is relatively simple, or is capable of only a single reasonable or rational outcome," Judge Saylor wrote, the statute does not require an amicus.[163] In a footnote, Judge Saylor suggested an even more capacious understanding of when an appointment would be "not appropriate," asserting that "the potential expense or delay of appointing an amicus curiae may provide a basis . . . for declining to make such an appointment."[164] In effect, the "not appropriate" language in the statute has become an all-purpose escape valve for the court to avoid an amicus appointment. One amicus, while expressing a wry admiration for Judge Saylor's forthrightness, nonetheless said of the opinion: "It's probably not what Congress had in mind when giving a basis to avoid appointments."[165]

3. Evolution of Amicus Practice

Declassified FISC opinions and aggregate statistics tell only part of the story, and the interviewees report positive evolution in the amicus practice at the FISC along two dimensions: (1) judicial attitudes toward amicus participation and (2) the availability of logistical support. As the amicus practice has taken shape, certain structural disadvantages have also become apparent, including asymmetries vis-à-vis the government in terms of resources, staffing, and institutional knowledge.

After the initial hostility expressed by judges toward the introduction of adversarial process at the FISC, there has been a gradual, positive evolution in the attitude of FISC judges toward amici. One amicus has observed a growing acceptance and recognition of the value of amici at the FISC and FISCR:

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160. *In re* Applications of the Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things at 3-6, Nos. BR 15-77, 15-78 (FISA Ct. June 17, 2015) (Memorandum Opinion).

161. *Id.* at 5.

162. *Id.* at 6.

163. *Id.* at 5-6.

164. *Id.* at 5 n.7. For an argument as to why "expense" or "delay" are not convincing justifications for declining to appoint an amicus under the USA FREEDOM Act, see Stephen I. Vladeck, *"Expense," "Delay," and the Inauspicious Debut of the USA FREEDOM Act's* Amicus *Provision*, JUST SEC. (June 23, 2015), https://www.justsecurity.org/24152/expense-delayinauspicious-debut-usa-freedom-acts-amicus-provision [https://perma.cc/T6DH-MTMX].

165. Interview with FISA Amicus.

> When the system was created, most judges were not enthusiastic . . . . Now that the system has been operating for a few years, and the work of amici has proven to be of good quality and useful to many judges, I have the impression that judges have come around to the recognition that the program is not a threat or intrusion but is genuinely designed to assist the court.[166]

While amici are still appointed in a relatively small number of cases, several amici predicted that there would be more frequent appointments in the future and that amici would become more integrated into the work of the FISC.[167] One amicus attributed some of this shift in attitude to the change in the presiding judge of the FISC in January 2020 from Judge Collyer, who "was less inclined to use amici for a wide variety of topics," to Judge Boasberg, who "seems to think they are more valuable."[168] This amicus pointed to Judge Boasberg's appointment of David Kris to assist the court's high-profile review of the FBI's proposed reforms after the Carter Page investigation as a sign of the court's increasing willingness to use the amicus provision in "creative" ways.[169] Given the discretionary and flexible nature of amicus appointments, there appears to be some latitude for further evolution in adversarial participation at the FISC even without statutory intervention.

Practical improvements that the FISC has made in the working conditions for amici also appear to demonstrate that the court is invested in making the amicus program function better. Two amici described the logistical hurdles they encountered in the early days of amicus participation at the FISC: there was initially no dedicated work space for the outside attorneys, and amici had only time-limited access to a sensitive, compartmented information facility.[170] In her 2015 amicus brief, Jeffress described how she was only able to work with classified materials at a secure conference room in a DOJ office and that "the space was not available after 5:00 PM in the evening or on weekends or during periods of unexpected government closures."[171] According to one amicus, working at the

166. *Id.*

167. *Id.* ("I suspect we'll see more frequent appointment of amici."). Another amicus expressed confidence that as time goes by, the amicus program will become a more integrated and accepted part of the FISA process. *Id.*

168. *Id.*

169. *Id.* Judge Boasberg appointed Kris under 50 U.S.C. § 1803(i)(2)(B) (2018), the FISA Court's general authority to appoint amici, rather than 50 U.S.C. § 1803(i)(2)(A) (2018), the "novel or significant" provision. *See In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC at 1, No. Misc. 19-02 (FISA Ct. Jan. 10, 2020) (Order Appointing an Amicus Curiae).

170. *See* Interviews with FISA Amici.

171. Brief of Amy Jeffress as Amicus Curiae at 3, *In re* [Redacted] (FISA Ct. Oct. 16, 2015).

court was previously "at the whim of DOJ," and there was no ability for amici to work with the court advisors and access their institutional knowledge.[172] Now, amici have their own suite at the Prettyman Courthouse in Washington, D.C. with 24/7 access, secure computer systems, official guidance, and meetings with the court. "The logistics," according to one amicus, "are working well."[173]

Nevertheless, amici are not true adversarial parties or equal participants in the work of the FISC. One amicus could not help but note significant disadvantages in terms of resources, staffing, and institutional knowledge compared with their "opponent" in FISA proceedings, DOJ's NSD.[174] The work of a FISA amicus, at least in cases where only one is assigned, is "siloed and isolated" according to one amicus.[175] There is no security-cleared staff to assist with research, briefing, or even proofreading pleadings.[176] While the FISC's legal advisors assisted in the retrieval of prior filings and in communications with DOJ, this amicus considered the staff to be court employees rather than clerks who could be "conscripted" into reviewing a brief.[177] This amicus admitted, "I am confident that I could have done a better job if I had someone to look over my work."[178]

That said, there have been ways for amici to mitigate the disadvantages in staffing and access to technical expertise, at least in limited circumstances and with court approval. In especially complex matters, such as the FISC's annual reviews of major surveillance programs, the FISC has appointed multiple amici to participate.[179] The legal amici presumably may also tap into the expertise of the FISC's technical amici, who are computer scientists and cybersecurity experts, if appointed to the same case.[180] Amicus Amy Jeffress, in at least two instances, also appears to have enlisted the assistance of security-cleared associates at her law firm who were appointed as amici, on an ad hoc basis, to specific matters.[181] Nonetheless, these arrangements depend upon approval by the FISC,

172. Interview with FISA Amicus.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See* [Redacted] at 4 (FISA Ct. Oct. 18, 2018)(Memorandum Opinion and Order) (noting the appointment of multiple amici to assist the court's review of the 2018 FISA Section 702 certifications).

180. *See In re* [Redacted] Non-U.S. Persons at 2, No. 19-218 (FISA Ct. Mar. 5, 2020) (Opinion) (describing the joint participation of legal amicus David Kris and technical amicus Ben Johnson in a Title I electronic surveillance case targeting non-U.S. persons).

181. *See supra* note 148.

and as discussed below, the court has, at least on one occasion, rejected the request of an amicus to consult with another member of the amicus panel.[182]

Meanwhile, NSD can bring the full resources of the U.S. government to bear, including a cadre of career attorneys with deep FISA experience. This gap in institutional knowledge could lead, in one amicus's view, to the government side having a stronger grasp of the legal context and "more meaningful insight" into the surveillance activities of "constituent agencies: what they were trying to do, what went into previous [FISA] applications, and what went before previous judges."[183] Nevertheless, the amicus who noted the resource asymmetry did enjoy one advantage vis-à-vis the NSD attorneys: "I'm used to standing up and contesting the government. They weren't used to someone being on the other side of the lectern and pushing back."[184]

4. Information Access

While the FISC's logistical support for amici has improved, information access remains a major source of frustration for the amici. Two amici described the issue as the aspect of the amicus system most in need of reform.[185] As described above in Part I, the FISC and FISCR control the level of access amici have to FISA applications, certifications, motions, prior decisions, and other court documents, as well as their ability to consult other amici.[186] Two amici confirmed that on at least one occasion, the FISC denied the request of an amicus appointed to a matter to consult with another member of the panel.[187] The executive branch also retains its authority to control access to classified information,[188] and the statute makes clear that the amicus provision shall not "be construed to require the Government to provide information to an amicus curiae appointed by the court that is privileged from disclosure."[189]

The declassified documents from the 2015 amicus appointment of Amy Jeffress illustrate some of these issues in practice. After her appointment in connection with the FISC's annual Section 702 review, Jeffress reported receiving a copy of her appointment order and a briefing from Judge Hogan and court staff on

182. *See infra* text accompanying note 187.

183. Interview with FISA Amicus.

184. *Id.*

185. Interviews with FISA Amici.

186. *See supra* text accompanying notes 114-115.

187. Interviews with FISA Amici.

188. *See* 50 U.S.C. § 1803(i)(6)(C) (2018).

189. *Id.* § 1803(i)(6)(D).

the questions presented, copies of the government's submissions and certifications to the court, prior decisions of the FISA courts related to the matter, and an unclassified copy of the 2014 Privacy and Civil Liberties Oversight Board (PCLOB) Report on the Section 702 program.[190] A crucial part of Jeffress's legal analysis challenging the FBI's 2015 minimization procedures turned on an attempt to distinguish them from the FBI's 2011 procedures and the FISC precedent approving them.[191] Jeffress, however, reported not being able to access the 2011 procedures and thus could not "know whether the language was the same as the current version."[192]

Amici interviewed for this Note suggested three reforms related to information access. First, there should be a statutory presumption that amici be granted all relevant information from the government, unless there is a significant national security concern. Second, amici should have access to all prior decisions of the FISC and FISCR, so that amici understand the legal and historical context of the cases to which they are assigned. One amicus observed that all of the amici have high-level security clearances, and they should be trusted to access the unredacted versions of past decisions. Third, amici ought to be able to consult with another member of the precleared amicus panel without the government or the court's approval in each instance.[193]

5. The Role of the FISC Legal Advisors

The FISC's legal advisors—permanent staff attorneys employed by the court—play a significant but relatively unheralded role in the day-to-day workings of the court. Defenders of the FISC's ex parte proceedings have frequently pointed to the gatekeeping performed by the legal advisors as an invaluable vetting function that is not fully captured by the court's approval rate for FISA applications.[194] Interviewees described the FISC's legal advisors as integral to a dynamic FISA process that regularly involves informal communications between the government and the court that are not always—or even often—captured in formal written submissions.

The vetting performed by the FISC's legal advisors is one of the most unusual features of the FISC. By rule, the government must submit nonemergency

190. Brief of Amy Jeffress as Amicus Curiae, *supra* note 171, at 2-3.

191. *Id.* at 20-24.

192. *Id.* at 22 n.6.

193. Interviews with FISA Amici.

194. *See, e.g.*, Walton, *supra* note 78, at 3; *Examining Recommendations to Reform FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 143 (2014) (statement of Steven G. Bradbury) [hereinafter *2014 House Judiciary Hearings*].

FISA packages to the court at least seven days before the government seeks a formal ruling by a judge.[195] The package is then reviewed and vetted by one of the FISC's legal advisors before it is submitted to a judge.[196] The FISC legal advisor is able to raise issues with the DOJ attorneys and ask for additional information in an interactive and iterative process that can lead to revisions or even, on rare occasions, the withdrawal of a FISA application. Former FISA judges and government attorneys involved in the FISA process describe this back-and-forth process between the court staff and the government as dynamic and deformalized, involving phone calls and emails more frequently than in-person meetings.[197] Andrew Weissmann, a former FBI General Counsel, observed that while in ordinary criminal wiretap proceedings, "people are trained to make sure representations to the court get embedded in writing," he is "confident that does not happen in the FISA process," given the level of informal communication that takes place between the government and the FISC.[198] After vetting, a legal advisor will prepare a written analysis of the application, which in some cases will be sufficient for a FISA judge, who can choose not to hold a formal hearing before approving an order.[199]

When Stephen Bradbury, a former head of the Office of Legal Counsel under the Bush Administration, testified to Congress against the creation of a special advocate at the FISC, he argued that such a role would be duplicative of that of the "permanent legal advisers who are steeped in the precedents of the court and whose job it is to second guess the arguments and analyses of the executive branch."[200] While the FISC's legal advisors are undoubtedly steeped in the court's precedents, how much second-guessing they perform is another question. The strengths and weaknesses of the FISC's internal vetting process arise out of the legal advisors' status as permanent court employees. These career national security attorneys have more experience than typical law clerks and are well acquainted with the highly specialized legal and technological issues raised

195. U.S. FISA Ct. R.P. 9(a).

196. Walton, *supra* note 78, at 5-6.

197. *See id.* at 3; Interview with Former FISC Judge, *supra* note 92; Telephone Interview with Jim Baker, Former Gen. Couns., Fed. Bureau Investigation (Mar. 13, 2020); Andrew Weissmann, *The Need for Increased Amicus Role in the FISA Process*, Just Sec. (Jan. 14, 2020), https://www.justsecurity.org/68047/the-need-for-increased-amicus-role-in-the-fisa-process [https://perma.cc/G9HD-SEEP].

198. Telephone Interview with Andrew Weissmann, Former Gen. Couns., Fed. Bureau Investigation (Feb. 15, 2020). Weissmann notes that one reason for the adherence to a more formal process in the criminal context is the greater likelihood of an adversarial challenge than in the national security context. Email from Andrew Weissmann, Former Gen. Couns., Fed. Bureau Investigation, to author (Aug. 15, 2021, 9:44 AM) (on file with author).

199. *See* Walton, *supra* note 78, at 2-3.

200. *2014 House Judiciary Hearings*, *supra* note 194, at 143 (statement of Steven G. Bradbury).

by FISA.[201] One former FISC judge characterized the five legal advisors who served during his tenure as the "keepers of institutional memory."[202] According to this judge, they "bring to their work, day by day, a more full and complete understanding of the law than some of us [judges] are able to acquire" and "vet the applications, and only after they pass that vetting is the application assigned to one of us."[203] One amicus also offered similar praise for the quality of the legal advisors.[204]

Nevertheless, the legal advisors are court staff rather than advocates. The PCLOB has found that their role "does not reach to contesting the government's arguments in the manner of an opposing party."[205] One FISA amicus also observed that the permanent nature of the role leads the FISC's legal advisors to view their jobs "as a fairly routine process."[206] The "flaw" in the vetting procedure is that it is "a repetitive process, with the same players, using the same forms, with no fresh eyes in the process."[207] The text messages of former FBI agent Peter Strzok, which were published in the DOJ IG's Crossfire Hurricane report, also reveal one agent's perception that DOJ's prehearing conversations with the FISC's legal advisors are a way for the government to influence and frame how the court will evaluate a FISA application.[208] There are, therefore, reasons to believe that the FISC's legal advisors do not always play a robust role in second-guessing the executive branch and that they are potentially susceptible to cultivation and socialization. At the same time, any effort at significantly expanding the role of amici will have to contend with the FISC's legal advisors' facilitation of a speedy and deformalized review process for the government.

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201. *See* David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SEC. L. & POL'Y 209, 251 (2014).

202. Interview with Former FISC Judge, *supra* note 92.

203. *Id.*

204. Interview with FISA Amicus.

205. *PCLOB Section 215 Report*, *supra* note 28, at 178.

206. Interview with FISA Amicus.

207. *Id.*

208. *December 2019 DOJ Inspector General Report*, *supra* note 9, at 137-38. In one text message to an attorney in the FBI's Office of General Counsel, Strzok wrote: "I'm concerned about how they [DOJ's Office of Intelligence] preload the Court/court advisor . . . ." In another text message sent to the Office of General Counsel's Unit Chief, Strzok wrote: "I'm worried about what [Stuart Evans, the Deputy Assistant Attorney General for Intelligence] whispers in Court Advisors ear." *Id.*

B. The Amici's Substantive Effects on the FISC

In terms of the substantive effects of the amicus panel on the FISC, interviews and the declassified record reveal a mixed bag. The role of an amicus at the FISC remains less than fully defined because the amici themselves hold differing views on what their duties and responsibilities should be. Meanwhile, the available record strongly suggests that amici have not significantly altered the substantive outcome of FISC opinions.

1. The Role of Amici

The interviews with amici revealed a stark absence of consensus on their role. There was a division between those amici who consider themselves privacy and civil liberties advocates and those who believe that they should present their own independent views to the court, whatever they may be. The original version of the USA FREEDOM Act, as well as competing FISA reform legislation, would have required a special advocate to support legal interpretations protecting individual privacy and civil liberties in FISA cases.[209] But in the absence of such a clear statutory requirement in the enacted law, it has been left up to the FISC and the amici themselves to define the role in practice.

The USA FREEDOM Act defines the duties of amici in the form of guidance rather than a mandate. The law provides:

> If a court . . . appoints an amicus[,] . . . the amicus . . . shall provide to the court, as appropriate –
>
> (A) legal arguments that advance the protection of individual privacy and civil liberties;
>
> (B) information related to intelligence collection or communications technology; or

209. *See* USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (as introduced in House, Oct. 29, 2013) (providing, in proposed section 902(c)(3) of FISA, that the "Special Advocate shall vigorously advocate . . . in support of legal interpretations that protect individual privacy and civil liberties"); *see also* FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. § 3(d)(2) ("The Constitutional Advocate shall protect individual rights by vigorously advocating . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention."); USA FREEDOM Act of 2014, S. 2685, 113th Cong. § 401 (providing, in proposed section 103(i)(4)(a)(i) of FISA, that a special advocate "shall advocate . . . in support of legal interpretations that advance individual privacy and civil liberties").

> (C) legal arguments or information regarding any other area relevant to the issue presented to the court.[210]

While the provision does cite the protection of privacy and civil liberties as one of several possible duties, the statutory language leaves unspecified the legal interests and arguments an amicus should prioritize, as well as the extent to which an amicus should oppose the government's positions. Amicus David Kris has observed that this statutory language "largely defer[s] to the preferences of the appointing court."[211]

In practice, amici have adopted a range of views. Two amici held the belief that they should present their own independent views to assist the court in reaching the right result. One amicus said that they understood the intent of the USA FREEDOM Act was for amici to "express our own views, and not necessarily represent . . . the ACLU's views."[212] Another amicus expressed a similar understanding in an interview: "My view was not to be an advocate for the public or any privacy interests."[213] Instead, the amicus viewed the role as akin to "a law clerk advising a judge."[214] This individual sought to arrive at an independent judgment of "what [they thought] the law permits" and advise the court accordingly.[215] While the amicus consulted with outside privacy advocates on the matter, this individual did not view the role as necessarily standing in opposition to the government or representing "an entity's privacy interests."[216]

Two other amici interviewed for this Note had a different understanding and viewed their role as representing the civil liberties of the American public. One of those amici believed their responsibility was "to advance arguments intended to protect privacy and civil liberties."[217] The other said that while "there hasn't been any direction," they understood their charge was "to represent the privacy rights and civil liberties of the American people" in opposition to the government.[218]

Another amicus attempted to reconcile these two perspectives. This amicus explained that it is understandable why some panel members believe they were appointed "most importantly to advocate for the privacy and civil liberties view"

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210. 50 U.S.C. § 1803(i)(4) (2018).

211. KRIS & WILSON, *supra* note 12, § 5:5.

212. Interview with FISA Amicus.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

because "their initial thought is the area the government might most need to be tested on is privacy and civil rights and civil liberties."[219] But other amici might "realize that they were appointed because they've got some national security chops . . . [and] some experience and knowledge about FISA and the way it should work."[220] This individual expressed the personal view that these two approaches might not be mutually inconsistent: "I would approach this as a little bit of both. If I feel like there's an important privacy and civil liberties argument to make, I would certainly raise it. But also, if I felt like it was overcome by other reasons or rationale, I might say that as well."[221]

This divergence in interpretations reflects not only the varying perspectives of the individual attorneys but also the absence of a clear statutory mandate for the FISA amici to represent the public or to support a particular set of interests.

2. *The Impact of Amici*

There are two important questions to pose about the impact of amici on the work of the FISC and FISCR. First, has the amicus panel had a negative effect on the collection of foreign intelligence information and efficient FISC operations, as many opponents of FISA reform predicted? Second, has the amicus panel had a positive effect on the advancement of privacy and civil liberties interests, as supporters hoped for? Based on my interviews, it is clear that the worst fears about the introduction of a more adversarial process at the FISC have not come to pass. Yet a study of the declassified record since 2015 also reveals that the impact of amici on FISC decisions has likely been limited.

Fears that the creation of a FISA amicus panel would chill the willingness of the executive branch to share national security secrets with the FISC or recreate the "cumbersome, over-lawyered" pre-9/11 FISA regime[222] have not been realized. Jim Baker, who served as General Counsel of the FBI from 2014 to 2017 and is also the former head of DOJ's Office of Intelligence Policy and Review, said he has observed no negative impact on foreign intelligence operations.[223] Baker assessed that the "limited" and "judicious" use of the amicus provision "has not substantially interfered with the collection of timely, accurate, and actionable foreign intelligence information."[224] Robert Litt, General Counsel for the Office of the Director of National Intelligence in the Obama Administration, said he

219. *Id.*

220. *Id.*

221. *Id.*

222. *2014 House Judiciary Hearings*, *supra* note 194, at 144 (statement of Steven G. Bradbury).

223. Telephone Interview with Jim Baker, *supra* note 197.

224. *Id.*

has seen no downsides to the appointment of amici in the FISC.[225] Litt, echoing President Obama's stated goals for FISA reform, said that the clearest impact of amicus participation has been its legitimating function: "[T]he appointment of amici curiae and the release of briefs and decisions have given a greater degree of transparency and public confidence in the [FISA] process."[226]

What is less clear from the available evidence is whether the amici have changed the outcomes of individual decisions at the FISC or influenced the court to be more protective of individual privacy and civil liberties. In interviews, amici have reported a purely subjective sense that their work has been seen as helpful and valuable to the FISC. In recounting their participation in a FISA hearing, one amicus described the value of having an additional layer of scrutiny and accountability present at the FISC:

> It was a contested hearing. I was on the opposite side of the lectern. I raised questions, and the judge pressed [the government] for answers on certain things. . . . I think the judge was happy that I helped him focus on what questions to ask and made the government articulate some areas more clearly.[227]

This amicus concluded that it was a positive that "the government . . . had to stand there and answer questions" and that "it was helpful for the judge to have a different set of eyes."[228]

Nevertheless, there is also the possibility that while amici may serve a legitimating function, their presence has not substantially altered the outcome of individual cases. The available evidence suggests that, to date, the amicus program has had a limited impact on the privacy and civil liberties concerns that led to its creation. In a forthcoming study, Faiza Patel and Raya Koreh carefully examined the amicus record since the passage of the USA FREEDOM Act, including the declassified documents from FISA cases in which amici have participated.[229] Patel and Koreh present two main findings: (1) there have been several FISA cases that appear to raise obviously novel or significant interpretations of law to which no amicus was appointed, and (2) the participation of amici has mostly not affected FISC decisions or the strong deference afforded to the government's positions.[230] Only in one case with amicus involvement from the publicly available

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225. Telephone Interview with Robert Litt, Former Gen. Couns., Off. of the Dir. of Nat'l Intel. (Mar. 4, 2020).

226. *Id.*

227. Interview with FISA Amicus.

228. *Id.*

229. Patel & Koreh, *supra* note 25.

230. *Id.* at 2.

record during the period of the study did the FISC impose even a modest procedural remedy—and then, only after evidence of the staggering scale of the FBI's repeated violations of the limits on Section 702 searches came to light.[231] Accordingly, Patel and Koreh conclude that the amicus record has been "mixed at best" in terms of ameliorating the civil liberties concerns that motivated the 2015 reforms.[232]

There are some self-acknowledged limitations to the Patel-Koreh study. Given the classification of FISA cases, there was only a partial record to examine and the full extent of amicus participation at the FISC and FISCR was not ascertainable.[233] Amicus briefs are publicly available in only six of the thirteen cases after the passage of the USA FREEDOM Act in which amici are known to have filed briefs, and the declassified records in those cases are themselves partially redacted.[234]

There could also be intangible benefits to the presence of amici. The FISC and FISCR have had to consider and weigh the civil liberties-based arguments advanced by amici, even if in most cases the judges have not accepted them. Starting in 2017, the FISC also began to report a small number of cases in which the government, after being advised that the FISC was considering an amicus appointment, either withdrew proposed applications or modified them so that they no longer presented a novel or significant question of law.[235] In those cases, however, it is unclear whether the government was genuinely deterred from seeking a surveillance order or capability or whether it simply pursued them under other authorities not requiring FISC approval. One amicus interviewed for this Note discussed the possible reasons for the withdrawals:

> The first thing that's going to come to anyone's mind is: Why did the government not want there to be an amicus appointed? Were they worried that the amicus would raise issues that would mean that the application would be declined? Were they worried that the amicus would make a persuasive legal argument that they couldn't rebut? Or were they worried that the amicus would push for information that they knew they wouldn't feel comfortable revealing to an amicus? That's also possible. It

231. *Id.* at 45-49.

232. *Id.* at 2.

233. *See id.* at 2, 13-14.

234. *Id.* at 13-14.

235. *Id.* at 35. The FISC's annual reports indicate that there were three instances of a modification or withdrawal of a FISA application under those circumstances in 2017, 2017 FISC ANNUAL REPORT, *supra* note 148, at 4-5; one such instance in 2018, 2018 FISC ANNUAL REPORT, *supra* note 148, at 5; two such instances in 2019, 2019 FISC ANNUAL REPORT, *supra* note 148, at 5; and one such instance in 2020, 2020 FISC ANNUAL REPORT, *supra* note 148, at 5.

> could also be through other sources they've found a way to find, maybe not the exact information, but information that could address the threat.[236]

Nonetheless, the evidence from the publicly available amicus record, taken together with FISA judges' narrow interpretation and application of the amicus provision, suggests that the amici have not significantly impacted how the FISC operates or how the government conducts foreign intelligence surveillance.

C. Amicus Participation in Different Categories of Cases

The different categories of cases that come before the FISC raise different issues for amicus participation. This Section will contrast two kinds of FISA matters: individual surveillance and mass surveillance programs. Interviewees were divided on the question of whether the presence of an amicus would be useful in individual, fact-driven FISA cases, like Carter Page's. But for the FISC's regular reviews of the government's large-scale surveillance programs, a view emerged that amicus participation would not significantly delay foreign intelligence collection and could offer a useful check on surveillance activity.

1. Participation in Traditional FISA Cases

The Carter Page matter raised the question of whether there should be amicus participation in traditional FISA cases, which typically turn on questions of fact rather than questions of law. The amici themselves were divided on this issue. Former government attorneys, a former FISC judge, and several amici interviewed for this Note held the view that an amicus would not be well-positioned to see through the government's misrepresentations or omissions of material fact in an individual FISA application. Amicus participation in traditional FISA cases, several interviewees warned, would be not only unnecessary but also counterproductive by risking delay in time-sensitive proceedings. But other amici believed that they could add value in these cases by probing for weaknesses in FISA applications and challenging the government in real time.

The conventional opinion on this question draws a clear distinction between questions of law and questions of fact. One former FISC judge said he believes an amicus would be "completely unnecessary in the vast majority" of FISA matters, which are "run-of-the-mill cases" that only involve questions of fact.[237] As

236. Interview with FISA Amicus.

237. Interview with Former FISC Judge, *supra* note 92.

in ex parte criminal wiretap hearings, judges reviewing individual FISA applications are typically not deciding novel questions of law, but are instead evaluating whether the government's "representations of fact . . . meet the requirements to authorize the issuance of the surveillance order."[238] In the context of this factual inquiry, this judge did not perceive a need for outside assistance: "The law is the law. Judges know the law, the legal advisors know the law, and we hold the applications up to the law."[239] If an individual FISA application poses a novel question of law, such as a First Amendment concern, a FISA judge could use "the discretionary authority to appoint an amicus as it now exists."[240]

Former government attorneys warned of the costs in delays and the potential loss of foreign intelligence information if amici were appointed to a significant number of individual FISA cases. For instance, Litt argued that "anything requiring the appointment of amici in a large number of cases would risk gumming up the works."[241] Litt observed that an adversarial party in traditional FISA proceedings would either be "of minimal utility" because an amicus would only be examining the face of an application or would require "access to the full investigative file, which has never been done before."[242] The issues with the Carter Page investigation, after all, were not apparent on the face of the FISA applications and required vast governmental resources and access to uncover. Baker similarly cautioned that expanding amicus participation to traditional FISA cases "would slow down foreign intelligence collection so substantially that it would be counterproductive."[243] Baker also argued that it is the proper responsibility of the government, and not an outside party, to ensure the accuracy of FISA applications: "It's the Justice Department's job to make sure the applications are full, complete, and accurate and don't contain misstatements. The FBI, the FBI's oversight mechanisms, DOJ attorneys, and DOJ's oversight mechanisms—all those people have to do their damned jobs."[244]

Among the amici themselves, there is divided opinion over the usefulness of an adversarial presence in traditional FISA cases. Four amici share the view that

238. *Id.*

239. *Id.*

240. *Id.*

241. Telephone Interview with Robert Litt, *supra* note 225.

242. *Id.*

243. Telephone Interview with Jim Baker, *supra* note 197.

244. *Id.*

an amicus is not well-positioned to see through the government's possible misrepresentations or omissions of material fact in a FISA application.[245] Cline observed:

> What amici cannot do, and what the court itself cannot do, is analyze particular applications for Franks issues—material misstatements or material omissions. You don't know the underlying facts of the matter and have no investigative tools. It's not like you can deploy the FBI or private investigators. The FISC, with or without amici, has to take what the government says pretty much at face value.[246]

Crucially, Cline linked the limited potential utility of amici in individual FISA cases to the underlying structural limitations of the FISC itself.

Despite these limitations, three other amici offered the contrasting view that an outside attorney could be valuable even in traditional FISA proceedings turning on questions of fact. An experienced criminal litigator or national security attorney, they argued, would know how to probe for weaknesses in FISA applications, be able to point out areas where the court ought to inquire more skeptically, test facts, and ask questions of the government in a live, real-time setting.[247] One amicus said that observers should not "underestimate the potential of an attorney to add value" to otherwise ex parte proceedings.[248] Another amicus said that an experienced national security attorney could advise the court on "where the court might want to ask for more facts or might want to push the government for more information."[249] This amicus challenged the view that the government's representations of fact in FISA proceedings must be accepted at face value:

> I disagree that the amicus, or the court, should just accept whatever the government puts in its application and just analyze the legal issue based on those facts. There could be factual questions, and the answers to those factual

245. Telephone Interview with John D. Cline, *supra* note 150; Interviews with FISA Amici; David S. Kris, *Cyberlaw Podcast Episode 294: Examining the Inspector General's FBI-FISA Report*, STEPTOE & JOHNSON LLP, at 47:48 (Dec. 18, 2019), https://www.steptoecyberblog.com/2019/12/18/episode-294-examining-the-doj-inspector-generals-fbi-fisa-report [https://perma.cc/2TYJ-D27S].

246. Telephone Interview with John D. Cline, *supra* note 150.

247. Interviews with FISA Amici.

248. Interview with FISA Amicus.

249. *Id.*

> questions could very much influence the legal analysis. So why not ask those questions?[250]

This same amicus also argued against the view that effective amicus participation in traditional FISA cases would always require access to the underlying investigative materials or that such access should be a nonstarter: "It might be the case that access would be necessary in some applications, and . . . not . . . in others. And if the amicus thinks the court should have that access, or the amicus should have that access, then the amicus should say so and they can litigate about it."[251]

In sum, there is genuinely divided opinion over the utility of amici in traditional FISA cases, as well as over the level of information access that is required for effective amicus participation in those proceedings. The former government attorneys interviewed were protective of the underlying investigative materials and of executive branch responsibility for the factual accuracy of FISA applications. Meanwhile, the interviewed amici expressed divergent views on whether and how they could scrutinize the kinds of factual inaccuracies that plagued the Carter Page applications.

2. *Participation in Review of Programmatic Surveillance*

While Congress sought to enact a reliable trigger for amicus participation, the FISC's appointment of amici in practice has been inexplicably inconsistent, particularly in the FISC's regular reauthorizations of the government's mass surveillance programs. Section 702 of the FISA Amendments Act provides the government with one of its most powerful mass surveillance tools.[252] The statute authorizes the warrantless collection of hundreds of millions of electronic communications each year.[253] While the targets of Section 702 surveillance must be non-U.S. persons reasonably believed to be located overseas,[254] the program col-

250. *Id.*

251. *Id.*

252. *See* Press Release, Nat'l Sec. Agency, The National Security Agency: Missions, Authorities, Oversight and Partnerships (Aug. 9, 2013), https://www.nsa.gov/news-features/press-room/Article/1618729/the-national-security-agency-missions-authorities-oversight-and-partnerships [https://perma.cc/P29N-NCQ9] ("The collection under FAA Section 702 is the most significant tool in the NSA collection arsenal for the detection, identification, and disruption of terrorist threats to the U.S. and around the world.").

253. *See PCLOB Section 702 Report*, *supra* note 40, at 86, 89.

254. 50 U.S.C. § 1881a(a)-(b) (2018).

lects large volumes of communications from U.S. persons as a foreseeable consequence of the scope and scale of the program.[255] Given the significant privacy ramifications—including from statutorily permitted FBI queries of Section 702 data for information on Americans[256]—the statute requires the FISC to review the program annually to ensure compliance with both FISA and the Fourth Amendment.[257]

By almost any definition, the FISC's annual review of the government's Section 702 certifications involve significant, if not necessarily novel, interpretations of law. This is a program that facilitates thousands of queries for information on Americans each year, including six unlawful FBI searches in 2018 and one unlawful FBI search in 2019.[258] For the 2015 and 2018 reviews, the FISC appointed amici to offer their views.[259] But the FISC failed to appoint any amici for the 2016, 2017, or 2019 reviews, and did so without explanation.[260] The absence of an amicus for the 2019 review is especially puzzling, given the court's startling finding of continued "widespread violations" of FISC orders by the FBI's queries for information on U.S. persons.[261] The typical objections raised by government officials to amicus participation—namely, delay and the potential loss of foreign intelligence information—do not apply to programmatic review. In an interview, Baker expressed no objection to mandatory amicus participation in Section 702 reviews given the length of time the process already consumes:

> Those damned things take so long. The delay that would ensue [from

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255. *See Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties: Hearing on the FISA Amendments Act Before the S. Comm. on the Judiciary*, 115th Cong. 6 (2017) (statement of Adam Klein, Chairman, Privacy and Civil Liberties Oversight Board).

256. *See* Off. of C.L., Priv., & Transparency, *Statistical Transparency Report: Regarding the Use of National Security Authorities*, Off. Dir. Nat'l Intel. 16-18 (Apr. 2020) [hereinafter *2020 ODNI Transparency Report*], https://www.intel.gov/assets/documents/702%20Documents/statistical-transparency-report/2020_ASTR_for_CY2019_FINALOCR.pdf [https://perma.cc/LV6P-XU62]. "Statutorily permitted" is the most accurate way to describe Section 702 queries as the Second Circuit, in *United States v. Hasbajrami*, observed that these "backdoor searches" are distinct Fourth Amendment events and indicated that they may raise constitutional concerns. 945 F.3d 641, 670-72, 676 (2d Cir. 2019) (remanding for factfinding to determine whether the scope of the searches in that particular case violated the Constitution).

257. 50 U.S.C. § 1881a(j)(1)-(3) (2018).

258. *2020 ODNI Transparency Report*, *supra* note 256, at 15-17.

259. [Redacted] at 5-7 (FISA Ct. Nov. 6, 2015) (Memorandum Opinion and Order) (regarding the 2015 FISA Section 702 certifications); [Redacted] at 4 (FISA Ct. Oct. 18, 2018) (Memorandum Opinion and Order) (regarding the 2018 FISA Section 702 certifications).

260. [Redacted] (FISA Ct. Apr. 26, 2017) (Memorandum Opinion and Order) (regarding the 2016 FISA Section 702 certifications); [Redacted] (FISA Ct. Dec. 6, 2019) (Memorandum Opinion and Order) (regarding the 2019 FISA Section 702 certifications).

261. [Redacted] at 65 (FISA Ct. Dec. 6, 2019) (Memorandum Opinion and Order).

> amicus participation] would not likely cause harm to the collection of foreign intelligence on a timely basis. It's such a massive and intricate process that if you build in thirty days for an amicus to review it, I don't think that would cause substantial harm.[262]

Indeed, in the 2015 review, the government assessed that an additional sixty to ninety days for amicus review would still be "consistent with national security."[263] Given the stakes involved and the general lack of objection, it is inexplicable that the FISC does not appoint amici for programmatic reviews as a matter of course. This is one example of the inconsistencies that complete judicial discretion over amicus appointments at the FISC creates.

III. RECENT FISA REFORM PROPOSALS

After the Carter Page investigation ignited a political firestorm in Washington, FISA reform came to the fore of the congressional agenda.[264] A March 2020 deadline for renewing unrelated surveillance authorities under FISA presented Congress with an opportune moment to debate FISA reform.[265] While these proposals addressed a wide range of FISA-related issues and longstanding grievances with the surveillance regime, two broad categories of reforms related specifically to the FISA amicus provision emerged in academic and policy circles: (1) expansion of amicus participation at the FISC to allay concerns raised by the DOJ IG report, including amicus review of traditional FISA applications; and (2) reforms addressing other concerns related to the power of amici, such as information access and the authority to appeal FISC and FISCR decisions.[266] Gen-

262. Telephone Interview with Jim Baker, *supra* note 197.

263. [Redacted] at 5 (FISA Ct. Nov. 6, 2015) (Memorandum Opinion and Order) (regarding the 2015 FISA Section 702 certifications).

264. *See* Nicholas Fandos & Charlie Savage, *House Reaches Deal to Overhaul Surveillance Laws*, N.Y. TIMES (Mar. 10, 2020), https://www.nytimes.com/2020/03/10/us/politics/surveillance-laws-fisa.html [https://perma.cc/52H2-E6P2]; Charles "Cully" Stimson, *House OKs FISA Reforms in Wake of FBI's Carter Page Fiasco*, HERITAGE FOUND. (Mar. 12, 2020), https://www.heritage.org/crime-and-justice/commentary/house-oks-fisa-reforms-wake-fbis-carter-page-fiasco [https://perma.cc/3JK3-8FGP].

265. *See* Margaret Taylor, *The Senate Proposes Five Amendments to FISA Reform*, LAWFARE (May 12, 2020, 2:52 PM), https://www.lawfareblog.com/senate-proposes-five-amendments-fisa-reform [https://perma.cc/RN4F-2RBC].

266. *See, e.g.*, Patel & Koreh, *supra* note 116 (proposing to expand amicus participation to a broader range of FISA cases, augment information access, allow amici to request appellate review of

erally speaking, these proposals sought to work within and incrementally expand the amicus framework created in 2015, rather than fundamentally restructure or replace it with an institutional special advocate. This Part will analyze and assess these proposals in light of the insiders' view of the FISA amicus program offered in Part II, and it will argue that these proposals either do not go far enough or are inappropriately structured to address the underlying flaws of the FISA regime.

A. The Lee-Leahy FISA Amendment

Congress distilled several FISA amicus-related reform proposals into the bipartisan Lee-Leahy Amendment, which overwhelmingly passed the Senate in May 2020.[267] A FISA reauthorization bill, with the Lee-Leahy Amendment included, cleared the Senate but was ultimately derailed in the House after President Trump tweeted a last-minute veto threat.[268] The FISA authorities up for reauthorization—which were unrelated to the reform proposals but seemed to offer a focal point for legislation—lapsed,[269] and reform was left for another day. The legislation incorporated several valuable reforms, including measures addressing some of the concerns raised by the amici interviewed for this Note.[270] Nevertheless, even as it purported to expand amicus participation to some traditional FISA cases targeting U.S. persons—like the Carter Page investigation—

FISA cases, and increase transparency in the FISA Court); Weissmann, *supra* note 197 (proposing that all incoming FISA packages be reviewed, at least on an interim basis, by a member of the amicus panel); Julian Sanchez, *Fixing FISA After the Carter Page Report*, JUST SEC. (Jan. 15, 2020), https://www.justsecurity.org/68061/fixing-fisa-after-the-carter-page-report [https://perma.cc/BJF9-48Q3] (proposing the discretionary intervention of amici in FISA cases designated as "special investigative matters"); Bob Goodlatte & Gene Schaerr, *Recent FISA Court Orders Highlight the Need for a Key Reform*, WASH. EXAM'R (Feb. 6, 2020, 12:21 AM), https://www.washingtonexaminer.com/opinion/op-eds/recent-fisa-court-orders-highlight-the-need-for-a-key-reform [https://perma.cc/JUH5-UKGF] (proposing amicus appointments be required in FISA cases implicating the First Amendment rights of U.S. citizens and in other sensitive cases).

267. H.R. 6172, 116th Cong. (as passed by Senate, May 14, 2020).

268. *See* Donald Trump (@realdonaldtrump), TWITTER (May 27, 2020, 6:16 PM), *archived at* TRUMP TWITTER ARCHIVE V2, https://www.thetrumparchive.com/?dates=%5B%222020-05-27%22%2C%222020-05-28%22%5D [https://perma.cc/9826-EJ2U]; Sarah Ferris, John Bresnahan & Heather Caygle, *Bipartisan Revolt Upends Vote to Reauthorize FISA*, POLITICO (May 27, 2020, 11:04 PM), https://www.politico.com/news/2020/05/27/fisa-renewal-limbo-284025 [https://perma.cc/39KE-X72H].

269. *See* EDWARD C. LIU, CONG. RSCH. SERV., R40138, ORIGINS AND IMPACT OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) PROVISIONS THAT EXPIRED ON MARCH 15, 2020, at 2 (2021).

270. *See* H.R. 6172 §§ 1, 2, 4.

the Amendment retained a fundamental weakness of the existing system: complete judicial discretion over amicus appointments.

Increased oversight of traditional FISA cases through amicus participation was the major selling point of the Lee-Leahy Amendment.[271] Addressing concerns about the lack of an adversarial process in cases like Carter Page's, the Amendment would have expanded the categories of cases in which the FISC and FISCR were called upon to appoint an amicus.[272] The new categories included matters presenting "significant concerns with respect to the activities of a United States person that are protected by the [F]irst [A]mendment" and those involving "a sensitive investigative matter."[273] The Amendment would also have directed the appointment of an amicus in cases involving "a request for approval of a new program, a new technology, or a new use of existing technology"; "reauthorization of programmatic surveillance," like the Section 702 program; or "novel or significant civil liberties issues."[274]

The Lee-Leahy Amendment sought to define the role of an amicus more clearly as a privacy and civil liberties advocate. Under the Amendment, at least one amicus appointed to a matter would have been required to have "privacy and civil liberties expertise, unless the court finds that such a qualification is inappropriate."[275] An amicus's duties would also have expanded to encompass advancing "legal arguments regarding any privacy or civil liberties interest of any United States person that would be significantly impacted."[276] The Amendment would have authorized an amicus appointed in a matter "to raise any novel or significant privacy or civil liberties issue . . . regardless of whether the court has requested assistance on that issue."[277] Furthermore, the Amendment would have eliminated a significant power imbalance by granting amici the ability to petition for the review of cases in the FISCR and the Supreme Court—an authority amici currently lack.[278]

Increased information access, including to classified documents, was a central concern of the legislation. Several amici raised concerns about the limitations

271. *See* Press Release, Sen. Mike Lee, Senate Passes Lee-Leahy FISA Amendment (May 13, 2020), https://www.lee.senate.gov/public/index.cfm/press-releases?ID=56990D34-B897-4138-8F03-9D85464C7130 [https://perma.cc/8NNA-UNAT].

272. H.R. 6172 § 2.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

to their current access to prior FISC decisions, court documents, and other supporting materials relevant to their matters.[279] The Amendment would have entrusted the amici with "access to . . . unredacted copies of each opinion, order, transcript, pleading, or other document" from the FISC and FISCR, including "any classified documents, information, and other materials or proceedings."[280] Amici would have also been authorized to petition for access to the supporting documentation that the government would have been required to submit for "each factual assertion" contained in a FISA application.[281]

The major shortcoming of the Lee-Leahy Amendment and similarly structured reforms is that the appointment of amici would remain at the discretion of the FISA judges—and that discretion is unlikely to be exercised with any frequency in traditional FISA cases. As with the current amicus provision, FISA judges could opt out of the new statutory requirements to appoint an amicus with a finding that such an appointment is "not appropriate"—an exception that the FISC has interpreted expansively.[282] It is an exception that judges are even more likely to invoke when reviewing traditional FISA applications, which fundamentally pose questions of fact rather than questions of law.[283] In 2013 and 2014, public judicial attitudes toward a limited FISA amicus provision for cases involving novel questions of law ranged from proactive support[284] to pragmatic acquiescence.[285] FISA judges, and even many amici, appear to draw a clear line between questions of law and questions of fact.[286] One former FISC judge, who supported the creation of an amicus panel to assist with novel questions of law, said that proposals like the Lee-Leahy Amendment are unnecessary on two levels: first, amici are not helpful in the vast majority of FISA cases, which turn on questions of fact rather than questions of law; and second, if a traditional FISA application raises a constitutional concern, FISC judges already possess the inherent authority to appoint an amicus if desired.[287] If this perspective is representative of a not-insignificant portion of FISC judges, then the impact of a proposal that relies on discretionary amicus appointments is likely to be limited.

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279. *See supra* Section II.A.4.

280. H.R. 6172 § 4.

281. *Id.* §§ 4, 6.

282. *See supra* text accompanying notes 162-164.

283. *See supra* text accompanying notes 237-240.

284. Carr, *supra* note 96.

285. Letter from John D. Bates, Dir., Admin. Off. of the U.S. Cts., to the Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate 2 (Aug. 5, 2014).

286. *See supra* Section II.C.1.

287. *See supra* text accompanying notes 101-106.

Judicial discretion would also have likely muted the impact of the Lee-Leahy Amendment's efforts to shape the amicus role into that of a more vigorous privacy and civil liberties advocate. While the Amendment called for at least one of the appointed amici in a matter to possess privacy and civil liberties expertise, the FISC could justifiably deem any of the five attorneys currently on the amicus panel such an expert. Yet several FISA amici have made clear that they would not necessarily prioritize advocacy on behalf of civil liberties,[288] and it is ultimately up to a judge to select the individual amicus. The Amendment did incorporate more language directing amici to advance legal arguments protective of the privacy and civil liberties interests of U.S.-person targets of surveillance and also authorized amici to raise any issue to the court. But the statutory language, including an "as appropriate" proviso, is still open-ended enough to accommodate the range of opinions held by amici about their role. Furthermore, it is unclear how far a departure from the status quo the authorization for amici to raise any issue to the FISC would be. Two amici have reported that, after being appointed to a matter, they felt they had the latitude to spot and address any additional issues as they deemed appropriate.[289]

There were valuable, incremental reforms in the legislation. In interviews, amici have raised significant concerns about information access that would have been addressed, at least in part, by the Amendment.[290] The authority to petition for the review of FISC and FISCR decisions to a higher court also would have eliminated a major asymmetry that tilts the FISA courts against privacy and civil liberties interests. The ability of an amicus to request access to the documentation supporting FISA submissions also would have allowed some possibility for additional scrutiny of FISA applications. But ultimately there was less than meets the eye to the Lee-Leahy Amendment's expansion of the amicus provision to traditional FISA cases. As long as amicus appointments remain discretionary, their impact will be limited by judges who do not currently perceive the need for major reform of the FISC. Proposals that seek to work within the established amicus structure will not resolve the longstanding concerns about the absence of adversarial process, while attempts to address Carter Page-type FISA issues through the discretionary amicus provision will likely offer only minimal additional accountability in practice.

288. *See supra* text accompanying notes 212-218.

289. Interviews with FISA Amici.

290. *See supra* Section II.A.4.

B. Amicus Oversight of FISA Applications

An alternative to discretionary amicus appointments in a subset of traditional FISA cases is broader oversight by amici of all incoming FISA applications. Two proposals raised during the 2020 debate over FISA reform sought to introduce such oversight to the FISC. In the congressional debate, Representative Zoe Lofgren and Senator Ron Wyden introduced bills to grant amici access to all FISC documents, including incoming applications, and allow amici to raise any issue at any time with the FISC.[291] Weissmann proposed a similar idea, though with the ability of the government to ask for emergency approval of FISA applications before amicus review.[292]

While these proposals avoid the shortcomings inherent in judicial discretion over amicus appointments, interviews with amici and former government attorneys suggested several potential issues. Amicus review of large volumes of FISA applications would overwhelm the capacity of amici and upend the deformalized and iterative process of FISA review that has developed between the government and the FISC. Also, in order for amici to exercise meaningful oversight and not merely serve as rubber stamps, they would require an unprecedented level of access to underlying investigative materials.

The logic of these proposals is that by granting amici visibility into all incoming FISA submissions and other court documents, the outside attorneys could spot and raise any issues—including privacy and civil liberties concerns related to individual surveillance applications. The Lofgren and Wyden bills would have allowed amici to access all FISC documents and proactively raise any issues to the court, even without being appointed to a specific matter.[293] Under Weissmann's proposal, as an interim response to the DOJ IG report, all FISA submissions "would go to the [FISC] and to the amicus at the same time, and [the] amicus would have the ability to participate in the back-and-forth with the court staff on any revisions, and to submit briefs raising factual or legal issues in the FISA submission."[294] Weissmann's one concession to the need for expeditious review is to permit the government to request emergency approvals, with the court hearing the amici perspective after approval of the FISA application.[295]

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291. Safeguarding Americans' Privacy Records Act of 2020, H.R. 5675, 116th Cong. § 301; Safeguarding Americans' Privacy Records Act of 2020, S. 3242, 116th Cong. § 301.

292. Weissmann, *supra* note 197.

293. H.R. 5675 § 301.

294. Weissmann, *supra* note 197.

295. *Id.*

Interviewees raised several potential flaws with these proposals. First, visibility into a fraction of—let alone all—incoming FISA submissions would overwhelm the capacity of the court's amici, who serve only part-time and hold full-time jobs elsewhere.[296] From 2015 to 2020, the FISC received, on average, about 1,200 FISA applications annually, while over that same timespan, the court made an average of about three amicus appointments each year.[297] According to Baker, in order for amici to oversee the large volume of incoming FISA submissions, "you'd have to make them full-time government employees. I don't know how else you'd do that."[298] Such third-party oversight may or may not be desirable, but it would require the creation of a permanent office, rather than incremental reforms to the existing part-time amicus structure.

Second, looping amici into the back-and-forth revision process between the FISC and the government for all incoming FISA applications would require upending the deformalized FISA review process. The interviews conducted for this Note revealed a highly unusual vetting process based on informal ex parte communications that do not always, or even often, get captured in formal written submissions by the government to the court.[299] In order for an amicus to participate in the vetting process that takes place between the government and the FISC legal advisors, according to Baker, "you'd have to 'CC' them on every email that gets sent back and forth, even within the government. . . . You could formalize that, so you'd only have formal interactions with the court, but it'd be disastrous. It'd be so regimented and introduce prospects for major delays."[300]

Third, meaningful oversight of FISA submissions might require amici to have access not just to the individual applications but also to the underlying investigative materials supporting the government's factual assertions. In the interviews, many amici expressed skepticism that they could add value in traditional FISA cases that turn on questions of fact rather than questions of law. They hold this view because without access to the facts or the investigative tools to discover the facts, amici—as well as the FISC itself—must take the government's factual assertions at face value. In order for amici to serve not merely as rubber stamps for individual applications, they would require access to a body of underlying investigative materials, in real time, that would be unprecedented and voluminous.[301] In the wake of the DOJ IG report, additional oversight of the

296. *See supra* text accompanying notes 142-146.

297. *See supra* text accompanying notes 148-151.

298. Telephone Interview with Jim Baker, *supra* note 197.

299. *See supra* Section II.A.4.

300. Telephone Interview with Jim Baker, *supra* note 197.

301. *See supra* Section II.C.1.

factual accuracy of FISA submissions is clearly warranted. But the existing part-time amicus structure does not appear to be the right vehicle to provide it.

IV. AN INSTITUTIONAL SPECIAL ADVOCATE

There are clear structural limitations to what incremental FISA reforms within the existing amicus system can accomplish, as Part III showed. An acknowledgment of these limitations leads to looking outside the existing amicus structure for productive avenues for reform. This Part will argue it is now imperative to revisit one of the most ambitious post-Snowden proposals: the creation of an institutional special advocate for the FISC and FISCR. The public discussion over the merits of a special advocate during the USA FREEDOM Act debate was largely notional and uninformed by practice. The amicus panel had not yet been created, and the effects of systematic outside participation at the FISC were not yet known. It is now possible to discuss the special advocate proposal based on an understanding of how the amicus system has worked in practice, insights from the interviews conducted for this Note, declassified FISC and FISCR decisions, and the findings of the DOJ IG's Carter Page report.

This Part will argue that Congress should create an institutional special advocate, broadly conceived along similar lines as the original USA FREEDOM Act proposal, but with several important modifications. This special advocate should be empowered to accomplish two main objectives. First, the special advocate should have the right to participate in all FISC and FISCR cases raising novel or significant interpretations of law, requests for new surveillance programs or novel uses of technology, and annual reviews of mass surveillance programs, like the Section 702 program. The special advocate should also participate in the small subset of traditional FISA cases raising the exceptional concerns flagged by the Lee-Leahy Amendment and other recent reform proposals, such as First Amendment considerations or the targeting of U.S. persons involved in sensitive investigative matters. Second, in order to address the concerns raised by the DOJ IG report, the special advocate should conduct systematic oversight of individual FISA applications but do so on the back end. Specifically, the special advocate should be authorized to perform random sampling and auditing of approved FISA applications, thereby offering external accountability without compromising the timeliness and efficiency of proceedings. By combining these advocacy and oversight functions, a special advocate would address the known shortcomings of the FISA system without undercutting the timely collection of foreign intelligence.

A. The Original Special Advocate Proposal

The original version of the USA FREEDOM Act, as well as competing FISA reform legislation, contemplated installing a special advocate to support legal interpretations protecting individual privacy and civil liberties interests in FISA cases.[302] Academics and policy makers proposed the idea of an institutional adversary for the FISC and FISCR during the post-Snowden debate in 2013 to 2015[303] and have periodically revived the proposal in the years since.[304]

Under the original House legislation, Congress would have established a permanent office of the special advocate within the federal judiciary.[305] The special advocate would have been empowered to request to participate in any FISC proceeding and have standing as a party if appointed; vigorously advocate for individual privacy and civil liberties interests; receive and review every FISA application submitted to the FISC; access every decision of the FISC and FISCR and related documents in complete, unredacted form; move the FISC to permit the participation of outside amici curiae; move the FISC to reconsider any decision; appeal any decision of the FISC to the FISCR; and seek a writ of certiorari from the Supreme Court for review of any FISCR decision.[306] It was these ambitious measures that encountered vociferous opposition from the federal judiciary,[307] and by the end of the legislative process, Congress opted for a weaker

302. USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (as introduced in House, Oct. 29, 2013) (providing that the "Special Advocate shall vigorously advocate . . . in support of legal interpretations that protect individual privacy and civil liberties"); *see also* FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. § 3 (providing that the "Constitutional Advocate shall protect individual rights by vigorously advocating . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention"); USA FREEDOM Act of 2014, S. 2685, 113th Cong. § 401 (providing that a special advocate "shall advocate . . . in support of legal interpretations that advance individual privacy and civil liberties").

303. *See supra* note 28.

304. *See* Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2297-98 (2016); Peter Margulies, *Searching for Federal Judicial Power: Article III and the Foreign Intelligence Surveillance Court*, 85 GEO. WASH. L. REV. 800, 855 (2017); Peter Margulies, *Searching for Accountability Under FISA: Internal Separation of Powers and Surveillance Law*, 104 MARQ. L. REV. 1155, 1206-07 (2021) [hereinafter Margulies, *Searching for Accountability Under FISA*].

305. H.R. 3361 § 401.

306. *Id.*

307. *See* Letter from John D. Bates, Dir., Admin. Off. of the U.S. Cts., to the Hon. Dianne Feinstein, Chairman, Select Comm. on Intel., U.S. Senate (Jan. 13, 2014); John D. Bates, *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act* (Jan. 10, 2014), https://www.feinstein.senate.gov/public/_cache/files/7/0/70bed5e2-c28f-4f3c-ad94-

set of reforms that did not fundamentally alter the ex parte operations of the FISC and FISCR.[308]

B. Reenvisioning the FISA Special Advocate

This Section revisits and reenvisions the proposed office of the FISA special advocate by incorporating the insights gained from the past six years of amicus practice at the FISC and the interviews conducted for this Note. With the benefit of hindsight and experience, we can see the original proposal had much to commend it. The basic argument for preferring a special advocate to part-time amici remains valid: an institutional adversary would be better positioned to develop and apply institutional knowledge about FISA and its judicial interpretations and to adopt consistent legal positions and ensure the government is taking consistent positions across cases. But policy makers could improve the original proposal with substantive and procedural modifications, which are also discussed below, that address issues identified by this Note, such as the judicial choke point on amicus appointments.[309] This Section also proposes one novel reform: post hoc review of approved FISA applications by the special advocate as an external source of accountability.

1. The Value of an Institutional Adversary

The experience of amicus practice at the FISC and interviews with amici have reinforced a key virtue of the original special advocate proposal: institutional knowledge and continuity. A permanent FISA special advocate, by virtue of its institutional standing and resources, would offer far more robust oversight than the current FISA amici over the categories of FISA cases that Congress has singled out for additional oversight. With broader access to the FISC's docket, cases, and decisions, a special advocate would have a stronger basis to weigh in on cases and genuinely exercise the authority to raise privacy and civil liberties issues proactively with the court. The ability to see a larger volume of applications and decisions would allow the special advocate to acquire a deeper understanding of the unique FISA legal context and recognize when practices or precedents depart from the norm. Broad access to FISA material would resolve the longstanding concerns about how limitations on information access and sharing have impeded the effectiveness of amici arguing before the court. A statutory

7cb6d647f328/97252A901839D876C51EA0D65FA99E13.1-10-2014-enclosure-re-fisa.pdf [https://perma.cc/QF5V-CTXY]; Letter from John D. Bates to the Hon. Patrick J. Leahy, *supra* note 285.

308. *See supra* text accompanying notes 56-58.

309. *See supra* text accompanying notes 160-165.

mandate to advocate for individual privacy and civil liberties interests would also undergird and bring consistency to the advocate's substantive positions.

A special advocate would also have greater institutional capacity, in the form of permanent staff and augmented resources, which would be especially important if the special advocate were called upon to intervene in traditional FISA cases. Part-time amici could not possibly vet every FISC opinion and hearing transcript to which the public may want an adversarial or quasi-adversarial party to have access. A permanent institutional advocate could also reduce the variance in FISA case outcomes, given the circumstantial evidence that the prospect of an amicus appointment in individual cases has changed the government's behavior and may have a deterrent effect.[310]

A special advocate would also establish a fundamentally different and potentially more valuable relationship with the court, with the expectation by the FISC and the government that there will be a permanent adversarial presence at the court. One amicus has observed that the FISC itself has acknowledged the value of some level of institutional continuity:

> The court's decision to reappoint some of the original amici when their terms have come up suggests that they, too, find benefits to hav[ing] players a little more institutionalized. I'm not necessarily the only attorney capable of fulfilling the role, but I am very experienced. By reappointing us, it shows there's a value in institutional knowledge.[311]

This institutional presence may provide not merely continuity, but also the opportunity for flexibility in developing oversight models. One amicus suggested that the FISC and an institutional advocate could experiment with different levels of access and intervention in FISA cases, and the court could adopt its own rules, rather than strictly reacting to statutory mandates, based on what works well and what does not.[312] After all, the structure and procedures of the FISC have been the result of political bargaining since its inception, and an institutional advocate could itself become a stakeholder representing privacy and civil liberties interests in future negotiations over the evolution of FISA.

2. *Procedural and Substantive Modifications*

The original special advocate proposal will require procedural and substantive modifications to incorporate the lessons of the FISC's amicus practice and avoid a judicial bottleneck on the advocate's participation in FISA cases. Under

310. *See supra* text accompanying notes 235-236.

311. Interview with FISA Amicus.

312. *Id.*

the initial House proposal, the special advocate would have had visibility into all incoming FISA applications and the ability to request to participate in any FISC proceeding—but participation would have required the permission of the court.[313] This Note, recognizing how FISC judges have significantly narrowed the scope of the amicus provision through judicial discretion,[314] proposes a different approach. The special advocate should receive every formally submitted FISA application but should not need the FISC's permission to intervene in a given proceeding. However, the special advocate should not be authorized to intervene in every FISC proceeding. Instead, before intervening, the advocate should be required to certify that a case falls into one of the statutorily defined categories of cases that Congress intends to receive heightened scrutiny. This proposal strikes a better balance between managing the FISC's workload and ensuring adversarial scrutiny of the cases that raise privacy and civil liberties concerns.

The special advocate should have visibility into all formally submitted FISA applications. Potentially reviewing the hundreds of FISA applications submitted annually will tax resources of the office. An alternative, which would lighten the workload, would be for the FISC to prescreen FISA applications and only forward those cases to the special advocate that, in the opinion of a FISC judge or court staff, raise potential concerns that would merit the advocate's attention. Yet access to all incoming FISA applications is critical to building the advocate's base of institutional knowledge. Furthermore, the experience of the FISC's amicus practice demonstrates the downsides of relying on judicial discretion and the FISC's interpretation of when certain criteria are met or an appointment is appropriate. It would be better to allow the special advocate's office to engage in triage and decide for itself how best to allocate its time.

For similar reasons, the special advocate should simply have the right to intervene and have standing before the court in a FISC proceeding, rather than depend on the court's permission. An arrangement that relies on judicial discretion runs the risk of merely replicating the narrowly interpreted amicus provision and not meaningfully increasing adversarial participation at the FISC. This proposal would also eliminate one possible source of delay: time-consuming litigation over whether an advocate's appointment in a given case is required or appropriate. Indeed, one of the federal judiciary's major criticisms of the original special advocate proposal was precisely this potential for gumming up the works: "merely determining in every case whether or not the [statutory] language . . . requires the designation of a special advocate, and, if so, whether such a designation would be appropriate under the circumstances, and then reducing

313. USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (as introduced in House, Oct. 29, 2013).

314. *See supra* text accompanying notes 160-165.

many of those determinations to writing, is itself likely to add significantly to the FISA courts' overall workload and could impair the courts' ability to complete their work in a timely fashion."[315] This Note's proposal would sidestep this problem entirely.

This right to participate in the court's proceedings should not be entirely unconstrained, however. The special advocate should be required to certify that a case meets one of the criteria established by Congress for intervention.[316] These criteria should include the categories of cases identified by the USA FREEDOM Act and the Lee-Leahy Amendment for amicus participation: cases presenting novel or significant interpretations of law;[317] matters raising First Amendment concerns or involving sensitive investigative matters;[318] requests for the approval of a new surveillance program, a new technology, or a new use of existing technology;[319] the reauthorization of mass surveillance programs;[320] and cases presenting novel or significant civil liberties issues.[321] These categories encompass the post-Snowden concerns about novel interpretations of law, novel uses of technology, and mass surveillance, as well as the subset of individual FISA cases that Congress flagged in the post-Carter Page debate—cases raising First Amendment issues, involving sensitive investigative matters, or otherwise implicating civil liberties concerns.

Earlier proponents of a FISA special advocate drew a distinction between intervention in programmatic review and in traditional FISA cases, arguing that external review of individual FISA cases would be unnecessary.[322] But such a distinction was grounded in the pre-Carter Page world before the DOJ IG reported on the systematic deficiencies in traditional FISA cases. Under this Note's proposal, a special advocate would not be empowered to intervene in all individual FISA cases, but rather would be limited to those small number of cases raising the greatest concerns about possible constitutional violations. Such a proposal strikes a sensible balance between the objective of external scrutiny for the most sensitive matters and the need not to impede the FISA machinery in the vast majority of cases.

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315. Letter from John D. Bates to the Hon. Patrick J. Leahy, *supra* note 285.

316. Peter Margulies has proposed a similar certification requirement. *See* Margulies, *Searching for Accountability Under FISA*, *supra* note 304, at 1207.

317. 50 U.S.C. § 1803(i)(2)(A) (2018).

318. H.R. 6172, 116th Cong. § 2 (as passed by Senate, May 14, 2020).

319. *Id.*

320. *Id.*

321. *Id.*

322. *See, e.g.*, Vladeck, *supra* note 28, at 15-16.

3. Post Hoc Auditing of Approved FISA Applications

This Note's most novel proposal is the addition of a second function to the office of the special advocate: oversight of approved FISA applications. The special advocate should be authorized to conduct random audits of FISA applications as an independent means of promoting accountability. The purpose of these audits would be less to catch specific mistakes than to keep the FBI and DOJ honest. The DOJ IG's Crossfire Hurricane report showed that the FBI and DOJ's internal oversight mechanisms did not sufficiently incentivize scrupulous accuracy in the preparation of FISA applications.[323] Addressing the Carter Page concerns through post hoc auditing by a special advocate, rather than massive intervention on the front end of FISA applications, would respect the existing FISA process and concerns about timeliness and efficiency, while providing an external check to deter misleading, inaccurate, or incomplete work from the FBI.

In the FISC's post-Carter Page review of the FBI's procedures, then-Presiding Judge Boasberg broadly endorsed the idea of randomly sampling FISA case files for accuracy and completeness reviews. In his recommendations for FBI reform to the FISC, amicus David Kris argued that the "selection of cases for such reviews should be unpredictable" so that there is "the possibility that any case might be reviewed."[324] This possibility "should help concentrate the minds of FBI personnel in all cases."[325] Judge Boasberg found that "[t]he Court sees value in more comprehensive completeness reviews, and random selection of cases to be reviewed should increase that value."[326]

While Judge Boasberg and Kris were writing in the context of a proposed internal DOJ oversight mechanism, there is good reason to be skeptical of the executive branch's ability to police itself, and to argue for an independent source of accountability.[327] Between May 2020 and March 2021, DOJ conducted audits of ninety-five FISA applications for accuracy and completeness — a process that

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323. *See supra* text accompanying notes 52-64.

324. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC at 15, No. Misc. 19-02 (FISA Ct. Mar. 5, 2020) (Corrected Opinion and Order).

325. Letter Brief for David Kris as Amicus Curiae at 12, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02 (FISA Ct. Jan. 15, 2020).

326. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC at 16, No. Misc. 19-02 (FISA Ct. Mar. 5, 2020) (Corrected Opinion and Order).

327. The DOJ IG's report on the FBI's "Woods Procedures" found that in the FBI Chief Division Counsels' and National Security Division Office of Intelligence's annual accuracy reviews of FISA applications, FBI "field offices are given advance notification of which FISA application(s) will be reviewed and are expected to compile documentary evidence to support the relevant FISA application(s)." *March 2020 DOJ Inspector General Memorandum*, *supra* note 65, at 4-5.

was "labor-intensive" and "represent[ed] a major investment of oversight attorneys' time and attention."[328] This is a valuable function, and a special advocate cannot hope to replicate the scale of DOJ oversight. But what a special advocate can provide is an external check that is independent of how DOJ chooses to devote its resources or direct its attention. There are indications that this level of intense, internal scrutiny within DOJ may not be sustained, as policy makers already appear to be exploring ways to "ease the burden" on NSD's lawyers.[329] The DOJ IG has also expressed concern that during its recent audit "some FBI field personnel minimized the significance of Woods Procedures non-compliance," even after the FBI developed new training modules in response to the Carter Page investigation.[330] While it is possible that the FBI may right its ship and DOJ may develop more efficient audits without sacrificing accuracy, it is also possible that the passage of time will simply bring waning attention and a shift in resources elsewhere. This is why having a special advocate—who could report independent findings to the FISC—to conduct external, post hoc reviews is so important.

Post hoc auditing by a special advocate would also fill the oversight gap that is left by the practical inability of defendants to access and collaterally attack approved FISA orders.[331] While courts approve ordinary criminal warrants in ex parte proceedings and do not regularly subject warrants to external audits, defendants do have the ability to bring adversarial challenges to warrants and warrant affidavits in criminal proceedings.[332] Allowing for defendant review of FISA materials could be a valuable accountability measure[333] in addition to supporting

328. Adam I. Klein, *Chairman's White Paper: Oversight of the Foreign Intelligence Surveillance Act*, PRIV. & C.L. OVERSIGHT BD. 15 (June 2021), https://documents.pclob.gov/prod/Documents/EventsAndPress/ec2bfc95-f111-4123-87d5-8a7827bf2fdd/Chairman's%20FISA%20White%20Paper.pdf [https://perma.cc/A6BX-4UY3].

329. *See id.* at 23 (discussing the possibility of using automated tools to substitute for manual reviews of FISA applications).

330. *September 2021 DOJ Inspector General Report*, *supra* note 15, at ii, 26.

331. *See supra* text accompanying notes 77-83.

332. *See* 18 U.S.C. § 2518 (2018) (establishing the procedures for criminal wiretap warrants).

333. *See* Marcy Wheeler, *Amid Discussions of FISA Reform, James Boasberg Pushes for Greater Reform*, EMPTYWHEEL (Mar. 5, 2020), https://www.emptywheel.net/2020/03/05/amid-discussions-of-fisa-reform-james-boasberg-pushes-for-greater-reform [https://perma.cc/4DT6-MQPG]. Former FISA amicus John Cline has also endorsed the idea of defendant review. *See* Telephone Interview with John D. Cline, *supra* note 150. In contrast, Jim Baker asserts that from the perspective of the FBI, the potential for defendant review of FISA files is "too attenuated, too removed. If you're thinking about a counterterrorism case, you're worried about prevention and less worried about some criminal case down the road." Telephone Interview with Jim Baker, *supra* note 197.

defendants' due process and Fourth Amendment rights.[334] But in the absence of defendant review, or even alongside it, the special advocate's random sampling of applications could effectively concentrate the minds of FBI and DOJ personnel.

This proposal does have one open empirical question: the degree of review required to concentrate minds and have a deterrent effect on the government. Presumably, if a special advocate audited one out of every 1,000 FISA applications, an FBI agent's internal calculus would likely be unchanged. But the review of one of every two or three FISA applications would place an enormous burden on the special advocate and the government. Post hoc reviews, and in particular in-depth reviews for omissions of material fact, are "extremely resource intensive."[335] A special advocate would require the appropriate resources, staffing, legal authorities, and information access to undertake this task. The crucial challenge would be to identify the sweet spot that achieves effective deterrence without overwhelming the FISA system and consuming all of the special advocate's attention. A special advocate could potentially get more bang for the buck by concentrating audits on the most sensitive classes of FISA applications—those involving U.S. persons, sensitive investigative matters, or other constitutional concerns. Despite these uncertainties, this is a challenge worth undertaking, given the FISC's endorsement of the concept of post hoc review and the need for an independent source of accountability.

C. Addressing Counterarguments

Notably, the greatest hostility toward the idea of an institutional special advocate emanated from members of the judiciary who appeared affronted by the notion that the FISC was a mere "rubber stamp" for the executive branch.[336] In 2014, Judge John D. Bates, then the director of the Administrative Office of the United States Courts and a former Presiding Judge of the FISC, sent several letters to Congress "on behalf of the Judiciary"[337] objecting to the creation of a FISA

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334. *See* Ashley Gorski, Patrick C. Toomey & Kate Ruane, *The Future of U.S. Foreign Intelligence Surveillance*, JUST SEC. (Nov. 11, 2020), https://www.justsecurity.org/73321/the-future-of-u-s-foreign-intelligence-surveillance [https://perma.cc/R9N3-3ERH].

335. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC at 15, No. Misc. 19-02 (FISA Ct. Mar. 5, 2020) (Corrected Opinion and Order).

336. *See* Letter from John D. Bates to the Hon. Dianne Feinstein, *supra* note 307; Bates, *supra* note 307; Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285.

337. Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 1. Then-Chief Judge of the Ninth Circuit, Judge Kozinski, subsequently sent his own letter to Congress arguing

special advocate. Judge Bates's letters raised both prudential and constitutional concerns.[338] Marty Lederman and Steve Vladeck have convincingly responded to most of the legal objections,[339] and the one genuinely open constitutional question—whether a special advocate would have standing to appeal adverse decisions—could be addressed through various legislative mechanisms.[340] This Section will address the prudential concerns raised by Judge Bates, as well as other potential objections to a FISA special advocate.

1. Reductions in Efficiency and Timeliness of FISA Proceedings

Judge Bates argued that a special advocate would reduce the efficiency and timeliness of the FISC's proceedings.[341] The participation of an advocate in "a substantial number of FISC proceedings would likely slow down and complicate" the court's work.[342] The FISC's "operational realities," Judge Bates asserted, "make it unrealistic to expect meaningful participation by a special advocate in a substantial number of matters."[343] To accommodate a special advocate, "the government would have to submit a proposed [FISA] application substantially earlier than the seven-day period required by the FISC[]," and "meaningful input" into emergency FISA applications "would not be feasible."[344]

Each of these objections is overstated. First, while Judge Bates did not define what a "substantial number" of FISC cases is, the number of matters in which a

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that Judge Bates's letters did not officially represent the views of the federal judiciary and noting "serious doubts about the views expressed by Judge Bates." Letter from Alex Kozinski, C.J., Ninth Cir. Ct. of Appeals, to the Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate 1-2 (Aug. 14, 2014).

338. Letter from John D. Bates to the Hon. Dianne Feinstein, *supra* note 307, at 2; Bates, *supra* note 307, at 3-9; Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 2-5.

339. *See* Marty Lederman & Stephen I. Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SEC. (Nov. 4, 2013), https://www.justsecurity.org/2873/fisa-special-advocate-constitution [https://perma.cc/W99Y-VRHL]. In the post-Snowden debate, constitutional objections to the special advocate proposal were raised most prominently by the Congressional Research Service, whose reports were cited by Judge Bates. *See* ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RSCH. SERV., INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES 8-29 (2013); NOLAN ET AL., *supra* note 57, at 9-49; Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 5.

340. Lederman & Vladeck, *supra* note 339.

341. Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 4.

342. Bates, *supra* note 307, at 5.

343. Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 4.

344. *Id.* at 4-5.

special advocate would participate would likely be manageable — and would certainly not even begin to approach the total number of applications the FISC reviews annually. As interviews with amici and a former FISC judge have emphasized, the vast majority of FISC cases involve "run-of-the-mill" or "garden-variety applications"[345] and would not meet this Note's proposed criteria for a special advocate's intervention. In 2020, the government sought FISA warrants for only an estimated 102 U.S.-person targets,[346] and it can be fairly surmised that only a subset of those cases implicated the kinds of issues or sensitive investigative matters that would prompt participation. The limited resources and staffing of a special advocate would also act as a constraint on the number of contested cases, as would a repeat institutional player's desire not to anger the FISC with frivolous filings.

The experience of the past six years also shows that the FISC can accommodate the delay occasioned by the participation of an outside attorney, at least in a limited number of cases, without substantial interference with the timely collection of foreign intelligence information.[347] Indeed, there might even be a gain in efficiency with a special advocate with a broad base of institutional knowledge, as opposed to part-time amici, who may need more time to get up to speed. But even if the presence of a special advocate would require some significant changes to the FISC's operational realities, the FISC has the authority to manage those changes in order to mitigate timeliness, efficiency, or any other concerns. By statute, the FISC and FISCR have the power to write their own rules of procedure.[348] The FISC could establish time limits for the special advocate to decide to intervene in a matter and set briefing schedules to accommodate the needs of judges, court staff, and the government. For emergency applications, the FISC could, as Andrew Weissmann and others have suggested, rule on those matters immediately but still allow the special advocate to be heard after the fact.[349] Ultimately, through their rulemaking authority, the FISC and FISCR have significant latitude to address the operational concerns raised by Judge Bates.

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345. Interviews with FISA Amici; *see supra* text accompanying notes 237–240.

346. Off. of C.L., Priv., & Transparency, *Annual Statistical Transparency Report: Regarding the Intelligence Community's Use of National Security Surveillance Authorities*, Off. Dir. Nat'l Intel 11 (Apr. 2021), https://www.dni.gov/files/CLPT/documents/2021_ASTR_for_CY2020_FINAL.pdf [https://perma.cc/A6RN-E3SC].

347. *See supra* text accompanying notes 206–209.

348. *See* 50 U.S.C. § 1803(g) (2018).

349. Weissmann, *supra* note 197; Interview with FISA Amicus.

2. *A Chilling Effect on Assistance to the FISC by the Government*

Judge Bates also raised the concern that the presence of a special advocate would lead the government to withhold valuable information from the FISC.[350] In the FISC's ex parte proceedings, the government takes on and "generally abid[es] by . . . a heightened duty of candor to the Court."[351] But if FISC proceedings become adversarial with the intervention of a special advocate, there is "the risk that representatives of the Executive Branch . . . would be reluctant to disclose to the courts particularly sensitive factual information, or information detrimental to a case, because doing so would also disclose the information to an independent adversary."[352] A special advocate, Judge Bates argued, would not compensate for this potential loss of information, "degrading the quality of [the FISC's] opinions."[353]

While there is some basis for concern about a potential chilling effect, the risk once again is overstated and can be mitigated by the FISC itself. Even with a special advocate as envisioned by this Note, the vast majority of FISC proceedings would remain ex parte, and the government's "heightened duty of candor"[354] in those matters would be undiminished. It is also not at all obvious, given the findings of the DOJ IG's Crossfire Hurricane report,[355] that the government is generally abiding by its duty of candor and therefore that the added accountability of a special advocate would not offer a net benefit to the FISC. But at an even more fundamental level, the government has an obligation, which the FBI has formalized in policy, to ensure that *all* FISA applications are "scrupulously accurate,"[356] and the government must be held accountable to that standard. As Judge Collyer wrote in one of the FISC's post-Carter Page opinions, "[t]he FISC expects the government to provide complete and accurate information in *every* filing with the Court."[357] If a FISC judge feels that the government is withholding information or is otherwise not being candid, the court can

350. Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 3-4; Bates, *supra* note 307, at 7.

351. Bates, *supra* note 307, at 7.

352. Letter from John D. Bates to the Hon. Patrick Leahy, *supra* note 285, at 3.

353. *Id*. at 3-4.

354. *See* [Redacted] at 59 (FISA Ct. Nov. 6, 2015) (Memorandum Opinion and Order) ("[T]he Court . . . expects the government to comply with its heightened duty of candor in ex parte proceedings at all times. Candor is fundamental to this Court's effective operation.").

355. *See supra* text accompanying notes 59-64.

356. *See March 2020 DOJ Inspector General Memorandum*, *supra* note 65, at 3-4.

357. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC at 3, No. Misc. 19-02 (FISA Ct. Dec. 17, 2019) (Order).

make its displeasure known and demand more information or remedial action, as it has done in the past.[358]

3. Other Potential Objections

Judge Bates made the rhetorical point that a special advocate "would create the unusual situation in our judicial system of affording, at this stage of the proceedings, greater procedural protections for suspected foreign agents and international terrorists than for ordinary U.S. citizens in criminal investigations."[359] This argument is yet another example of a misleading comparison between individual FISA orders and ordinary criminal warrants.[360] It is true that the intervention of a special advocate would afford targets of FISA orders greater protection "at this stage of the proceedings"—the warrant hearing—than is enjoyed by subjects of Title III criminal warrants.[361] However, what Judge Bates omitted to mention is that an ordinary criminal warrant affidavit and the warrant itself are subject to adversarial scrutiny in the course of the subsequent criminal proceeding.[362] Meanwhile, a FISA target does not have the same recourse to bring a collateral attack against an approved FISA order.[363] Therefore, either greater adversarial scrutiny in the initial FISA hearing or post hoc auditing by a special advocate would serve an accountability function that is currently absent in the FISA process.

More valid are concerns about the political feasibility of this Note's special advocate proposal. Congress decided against a special advocate during the USA FREEDOM Act debate in 2015,[364] and even the Lee-Leahy Amendment's incremental reforms to the amicus system were ultimately derailed by President Trump's veto threat in 2020.[365] This most recent congressional push for FISA

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358. *See*, *e.g.*, [Redacted] at 58 (FISA Ct. Nov. 6, 2015) (Memorandum Opinion and Order) ("Perhaps more disturbing and disappointing . . . was the government's failure to convey to the Court explicitly during that time that the NSA was continuing to retain this information in [redacted] . . . . [I]t should not have taken four years for the government to explain its proposed resolution of this issue to the Court.").

359. Letter from John D. Bates to the Hon. Dianne Feinstein, *supra* note 307, at 4.

360. *See supra* text accompanying notes 37-40.

361. *See* 18 U.S.C. § 2518(1)-(4) (2018) (establishing the procedures for issuing an ex parte surveillance order under Title III).

362. *See id.* § 2518(10) (authorizing a criminal defendant to move to suppress wiretap evidence on various grounds).

363. *See supra* text accompanying notes 68-78.

364. *See supra* text accompanying notes 54-59.

365. *See supra* text accompanying note 268.

reform failed even at the cost of lapsed surveillance authorities.[366] Meanwhile, it could be argued that the process initiated by the DOJ IG's report and the FISC's review of the FBI's procedures is sufficient both to address the problems surfaced by the Carter Page investigation and to satisfy the public appetite for FISA reform.

This Note's special advocate proposal admittedly is not the most realistic policy option. The overwhelming bipartisan vote in favor of the Lee-Leahy Amendment in the Senate[367] did demonstrate broad support for FISA reform on both sides of the aisle, but the Senate coalesced around incremental improvements to the amicus system rather than more far-reaching institutional change. And as of October 2021, there has been no significant congressional movement to revive even the more limited reforms of Lee-Leahy.

Nonetheless, Congress should reconsider the special advocate proposal because neither the Lee-Leahy Amendment nor DOJ's internal oversight is sufficient to address the issues about the FISA process raised by this Note. The many shortcomings of Lee-Leahy have been addressed in Section III.A.[368] DOJ's internal reviews of FISA applications, while valuable and necessary, are also no substitute for an independent source of accountability, as discussed in Section IV.B.[369] More broadly, DOJ's internal audits only deal with one part of the problem—the accuracy and completeness of FISA applications—and do not address the larger privacy and civil liberties issues that a special advocate would.

CONCLUSION

In his ruminations on the history of FISA, Judge Silberman reflected that it was "a big mistake to give judges responsibility for non-judicial-like decisions."[370] And it very well may have been a mistake to graft judicial-like processes onto foreign intelligence collection, like putting a square peg into a round hole. But over forty years into their existence, the FISC and FISCR are not going away anytime soon. The country, therefore, should seek to ensure that these courts are fulfilling the original promise of FISA and functioning as effective checks on the executive branch. The way to accomplish this objective, this Note has argued, is

366. *See supra* text accompanying notes 267-270.

367. *Roll Call Vote 116th Congress—2d Session: On the Amendment (Lee Amdt. No. 1584)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00090 [https://perma.cc/RV4J-QHJ5].

368. *See supra* text accompanying notes 282-289.

369. *See supra* text accompanying notes 327-329.

370. Interview with Hon. Laurence H. Silberman, *supra* note 2.

to bring the FISA courts more in line with the core Article III values of transparency and adversarialism.

When FISA reform returns to the legislative agenda, Congress will again face a fateful choice. Members could reach back to a preexisting legislative compromise, like the Lee-Leahy Amendment, and call it a success. The Amendment would bring small but meaningful improvements to the FISA system. Legislators seeking the most politically feasible solution can find it there and move on. But as this Note has argued, there are severe limitations to what incremental modifications to the existing amicus system can do. The Amendment would bring the appearance of significant reform more than its accomplishment.

Instead, Congress must revisit the road not taken during the post-Snowden debate: an office of the FISA special advocate. A permanent special advocate at the FISC and FISCR, as this Note has proposed, is needed to serve as a genuine adversary to the government. This proposal would mitigate the risks to ongoing foreign intelligence operations while bringing a vital independent voice to FISA proceedings. A special advocate would help the FISA courts fulfill core Article III values, improve accountability, and safeguard the privacy and civil liberties interests enshrined in the Constitution and FISA itself.