

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

THE CASE FOR A FISA “SPECIAL ADVOCATE”

THE CONSTITUTION PROJECT’S LIBERTY AND SECURITY COMMITTEE

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I. INTRODUCTION

If one point of consensus has emerged in response to the disclosures of various U.S. foreign intelligence surveillance activities by former NSA contractor Edward Snowden, it is that Snowden’s disclosures have prompted a hitherto unimaginable public debate over the proper scope of the government’s surveillance authorities—and the efficacy of the largely secret oversight and accountability mechanisms Congress has designed to oversee them. And although reasonable minds continue to differ as to the necessity for—and desirability of—specific reforms, one of the more common themes of these discussions has been the possibility of creating some kind of “special advocate,” a security-cleared lawyer or group of lawyers to argue against the government in adversarial proceedings before the Foreign Intelligence Surveillance Court (FISC)—the body charged with overseeing government surveillance undertaken pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA).¹

In the pages that follow, we aim to situate these proposals against their historical and constitutional backdrop. As we explain, we strongly endorse the creation of such a position not just in the abstract, but in a specific and carefully circumscribed form that draws on, but is not currently reflected in, the various reform proposals currently under consideration. Borrowing themes from several of the competing approaches, we explain why we believe the constitutional and prudential objections to such legislation that have been raised elsewhere can largely—if not entirely—be ameliorated through careful policy choices and statutory drafting. And although we do not believe that the creation of a special advocate is a sufficient congressional response to the difficult policy questions arising from the surveillance programs disclosed by Edward Snowden, we do believe that it is a *necessary* step—regardless of what other reforms, if any, Congress ultimately embraces.

II. BACKGROUND

a. FISA and the FISC

There are a number of excellent overviews of the origins, history, and legal underpinnings of FISA.² For present purposes, it suffices to highlight the basic assumptions undergirding the original statutory scheme Congress created in 1978, and then trace the key amendments in the ensuing decades.

FISA itself was a response to two interrelated developments: the Supreme Court’s 1972 decision in the *Keith* case declining to articulate a domestic intelligence exception to the Warrant Clause of the Fourth Amendment,³ and a series of intelligence abuses documented by the Church

1. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

2. The authoritative overview remains DAVID KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS (2d ed. 2012).

3. *United States v. U.S. Dist. Ct.*, 407 U.S. 297 (1972).

Committee several years later.⁴ Together with the creation of the congressional intelligence committees and a series of other reforms, FISA was part of a larger structural accommodation between the three branches of government: The Executive Branch agreed to have many of its foreign intelligence surveillance activities subjected to far greater legal oversight and accountability, in exchange for which Congress and the courts agreed to provide such oversight and accountability in secret.

To that end, the core of FISA as originally enacted was the authority provided by Title II of the Act, which empowered the government to obtain secret warrants for electronic—and, later, physical—surveillance of individuals whom the government had probable cause to believe were acting as an agent, or on behalf, of a foreign power (so long as foreign intelligence surveillance was the “primary purpose” of the surveillance).⁵ Applications for such warrants were to be processed by the FISC—a court of seven (now 11) existing Article III district judges designated to serve seven-year terms by the Chief Justice of the United States.⁶ And in cases in which the FISC denied the government’s application, the government was authorized to appeal to the Foreign Intelligence Surveillance Court of Review (FISCR), staffed by three sitting circuit judges designated by the Chief Justice, and, from there, to the Supreme Court.⁷ As originally conceived, then, FISA contemplated that the FISC would resolve individualized warrant applications on a case-by-case basis, *ex parte* and *in camera*, with the government as the only party authorized to participate, and, if necessary, to appeal.⁸

Although Congress amended FISA a handful of times in its first two decades,⁹ the scope and effects of those amendments paled in comparison to the fundamental changes Congress introduced

4. Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee), Foreign and Military Intelligence, S. REP. NO. 94-755 (1976).

5. See generally 50 U.S.C. §§ 1802, 1822, 1842. By contrast, such applications in the non-FISA context require probable cause to believe that the suspect *committed a crime*. Although some have argued that the relaxed probable cause standard in the FISA context thereby violates the Fourth Amendment’s Warrant Clause, that argument was rejected by numerous courts prior to September 11, at least largely because of the “primary purpose” doctrine—which required the government to certify that the primary purpose of a FISA warrant was foreign intelligence surveillance, and not ordinary law enforcement. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); see also *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991). Even after Congress abolished the primary purpose doctrine in the USA PATRIOT Act, however, the FISCR—in its first-ever published decision—upheld FISA’s unique probable cause standard against a Fourth Amendment challenge. See *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (per curiam). But see *Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007) (holding that the lesser “significant purpose” standard in the PATRIOT Act violates the Fourth Amendment).

6. See 50 U.S.C. § 1803(a)(1). See generally Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 26, 2013, at A1 (noting critiques of the Chief Justice’s control of appointments to the FISC).

7. See 50 U.S.C. § 1803(b).

8. In the first case to reach the FISCR, the Court of Review received amicus briefs from several parties. See *Sealed Case*, 310 F.3d at 719 & n.1; *id.* at 737 (“We are, therefore, grateful to the ACLU and NACDL for their briefs that vigorously contest the government’s argument.”). But after the FISCR ruled for the government, the Supreme Court denied the ACLU’s motion to intervene for purposes of filing a petition for certiorari. See *ACLU v. United States*, 538 U.S. 920 (2003) (mem.).

9. Most significantly, Congress expanded FISA to cover physical searches in 1994. See Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3443 (1994) (codified as amended at 50

after—and in response to—the September 11 attacks. Thus, in the USA PATRIOT Act of 2001,¹⁰ Congress both (1) abolished the “primary purpose” doctrine,¹¹ and (2) enacted section 215—a provision that authorized the government to apply to the FISC for orders to businesses to produce records that were “relevant” to an ongoing foreign intelligence or terrorism investigation.¹² Critically, such production orders did not require any individualized probable cause determination by the FISC. Perhaps as a result, Congress for the first time authorized limited adversarial proceedings before the FISC, empowering the “recipient” of a production order issued under section 215 to challenge that order before the FISC¹³—and to appeal an adverse decision to the FISC and, if necessary, the Supreme Court.¹⁴

In the Intelligence Reform and Terrorism Prevention Act of 2004,¹⁵ Congress took another significant step away from the original 1978 FISA regime, for the first time authorizing the use of FISA for individuals who were *not* agents of a foreign power, so long as the government could demonstrate probable cause to believe that they were “engage[d] in international terrorism or activities in preparation therefore.”¹⁶ Unlike section 215, however, the “lone wolf” provision still required an individualized probable cause determination by the FISC.

Perhaps the most significant changes to the role of the FISC came in the temporary Protect America Act of 2007 (PAA),¹⁷ followed by the more permanent FISA Amendments Act of 2008 (FAA).¹⁸ Whereas section 215 had already abandoned the requirement of individualized suspicion for FISC-approved surveillance, the core provisions of the PAA and FAA went one step further, authorizing the government to engage in *programmatically* surveillance—mass interception of communications directly from electronic communications service providers—so long as the government certified to the FISC, on an annual basis, that such surveillance was targeted at non-U.S. persons reasonably believed to be outside the United States (*i.e.*, those individuals least likely to be protected by the Fourth Amendment),¹⁹ and so long as the government took affirmative steps to “minimize” the effects of such surveillance on the communications of U.S. persons.²⁰ And as with section 215, Congress again authorized the participation of adversarial parties, investing the

U.S.C. §§ 1821 *et seq.*). And, in 1998, Congress further amended FISA to create slightly different procedures for authorizing the use of pen registers and trap-and-trace devices for foreign intelligence information. *See* Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2405 (1998) (codified as amended at 50 U.S.C. §§ 1841 *et seq.*).

10. Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 18, and 50 U.S.C.).

11. *See* 50 U.S.C. § 1804(a)(7)(B).

12. *See id.* §§ 1861–63.

13. *See id.* § 1861(f)(2).

14. *See id.* § 1861(f)(3).

15. Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 18 and 50 U.S.C.).

16. 50 U.S.C. § 1801(b)(1)(C).

17. Pub. L. No. 110-55, 121 Stat. 552 (formerly codified in scattered sections of 50 U.S.C.).

18. Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C.).

19. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

20. *See* 50 U.S.C. § 1881a.

recipients of “directives” issued under both the PAA and FAA to challenge those directives before the FISC, FISCR, and Supreme Court.²¹ One such challenge, which we now know to have been pursued by Yahoo!, produced the second published decision in FISCR’s history—its 2008 ruling in the *In re Directives* case upholding such authorities against a Fourth Amendment challenge.²²

b. The Snowden Revelations

Although each month brings with it new disclosures derived from Edward Snowden’s revelations to journalists for *The Guardian* and *The Washington Post*, by far the two most significant disclosures for present purposes were the first two stories that broke—the existence of a bulk telephone “metadata” collection program authorized by the FISC under section 215 of the USA PATRIOT Act,²³ and the existence and scope of undertakings like the “PRISM” program implemented by the government under section 702 of FISA as amended by the FAA.²⁴ Among other things, Snowden’s revelations led, either directly or indirectly, to the public disclosure not just of the actual FISC *orders* approving these programs, but also of the opinions providing legal reasoning in support thereof.²⁵ And while there continues to be sustained disagreement over the persuasiveness of these analyses, it cannot be denied that at least some of the FISC opinions have been subjected to fairly withering criticism.²⁶

Separate from the scope of the government’s substantive surveillance authorities, another byproduct of the Snowden revelations was a July 29 letter from Judge Reggie Walton, then the presiding judge of FISC, to the Chairman and Ranking Member of the Senate Judiciary Committee, noting that, among other things, *no* recipient of a section 215 production order or a section 702 directive had *ever* availed itself of the adversarial process provided by the statute²⁷—that, in effect, the mass suspicionless surveillance programs disclosed by Snowden had also been approved almost entirely through *ex parte*, *in camera* judicial proceedings.²⁸

21. See *id.* § 1881a(h)(4), (6).

22. *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008); cf. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013) (denying standing to a group of private plaintiffs seeking to challenge the FAA on Fourth Amendment grounds).

23. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 6, 2013, <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

24. See Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2013, at A1.

25. See, e.g., *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109, 2013 WL 5741573 (FISC Aug. 29, 2013) (Eagan, J.).

26. See, e.g., Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215, VOLOKH CONSPIRACY*, Sept. 17, 2013, 7:39 p.m., <http://www.volokh.com/2013/09/17/thoughts-august-2013-fisc-opinion-section-215/>.

27. See Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Sen. Comm. on the Judiciary, at 8–9 (July 29, 2013), available at <http://www.leahy.senate.gov/download/honorable-patrick-j-leahy>.

28. The challenge by Yahoo! that culminated in the FISCR’s decision in *In re Directives*, see *supra* note 22 and accompanying text, was pursued under the interim provisions of the now-defunct PAA, and remains, to date, the only apparent example of fully adversarial litigation before FISC and FISCR.

Unsurprisingly, the Snowden disclosures also precipitated a wave of litigation, primarily focused on the telephone metadata program under section 215. Although the Supreme Court turned away an early effort by the Electronic Privacy Information Center to seek direct review of the underlying FISC production orders,²⁹ two different district courts have allowed private plaintiffs to challenge the constitutionality of the metadata program, dividing as to the merits of the plaintiffs' Fourth Amendment claims in decisions handed down 11 days apart in December 2013.³⁰ Those cases are now pending in the Second and D.C. Circuits, respectively. Separate statutory and constitutional challenges to various of the government's foreign intelligence surveillance activities have also begun to surface in criminal cases,³¹ especially in light of the Solicitor General's admission that the Justice Department had not always provided the notice to criminal defendants required by Congress in cases in which evidence derived from FISA was utilized.³²

In addition to litigation, the Snowden disclosures also helped to spur a series of reform proposals from Congress, the Executive Branch, and the independent Privacy and Civil Liberties Oversight Board (PCLOB). And whereas most of the focus of these proposals has been on *substantive* reforms to the government's surveillance authorities, all three bodies have also proposed reforms to the FISC—and to the means by which it oversees the government's implementation of its substantive surveillance authorities. Indeed, calls for such reforms have even come from two of the FISC's former judges.³³

To that end, while some of these reforms would alter the process for appointment of FISC (and FISCR) judges; the transparency and public access to decisions by the FISC; or the interpretive rules FISC judges should follow in reviewing government surveillance applications, a common theme of the proposals to emerge from all three bodies is an increase in the opportunities for adversarial litigation before the FISC and FISCR to ensure that, even behind closed doors, the government's legal position is debated vigorously. Whether called a "special," "public," "public interest," or "constitutional" advocate, the core idea is the same—that a security-cleared lawyer should have the opportunity to challenge the government's case before the FISC.

1. The USA FREEDOM Act³⁴

The most far-ranging of these proposals is H.R. 3361, the USA FREEDOM Act, a bill introduced by Senator Leahy and Congressman Sensenbrenner, which, as initially drafted, would

29. See *In re Elec. Priv. Info. Ctr.*, 134 S. Ct. 638 (2013) (mem.).

30. See *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

31. See, e.g., *United States v. Daoud*, No. 12-cr-723, 2014 WL 321384 (N.D. Ill. Jan. 29, 2014); see also Defendant's Motion To Suppress Evidence Obtained or Derived from Surveillance Under the FISA Amendments Act and Motion for Discovery, *United States v. Muhtorov*, No. 12-cr-00033 (N.D. Colo. filed Jan. 29, 2014).

32. See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Oct. 17, 2013, at A3.

33. See Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, July 10, 2013, at A16 (noting testimony of Judge James Robertson); James G. Carr, Op-Ed, *A Better Secret Court*, N.Y. TIMES, July 23, 2013, at A21.

34. See H.R. 3361, 113th Cong., 1st Sess. (2013); S. 1599, 113th Cong. 1st Sess. (2013).

have created an Office of the Special Advocate within the judicial branch. The Special Advocate herself would be selected by the Chief Justice of the United States from a list of at least five candidates proposed by the PCLOB whom the PCLOB believe will be “zealous and effective advocates in defense of civil liberties.” The Special Advocate would serve a renewable three-year term, and may only be removed for cause. Substantively, “[t]he Special Advocate shall vigorously advocate before the [FISC] or the [FISCR], as appropriate, in support of legal interpretations that protect individual privacy and civil liberties.” To that end, the Special Advocate is entitled to the production of “any documents or other material necessary to carry out the duties [of the Special Advocate],” including *all* government applications to the FISC. She may also entertain requests for participation from any recipient of a FISC order. She is then entitled to seek leave to participate in proceedings before the FISC—and is invested with “standing” if such leave is granted. The Special Advocate “may move the Court to reconsider any decision” made after the enactment of the bill, and must so petition within 30 days after the availability of all relevant materials. Finally, the USA FREEDOM Act would also vest in the Special Advocate the authority to appeal a denial of leave to participate, or, in cases in which participation is granted, an adverse decision by the FISC. Review by the FISCR of any FISC decision appealed by the Special Advocate is mandatory, “unless it would be apparent to all reasonable jurists that such decision is dictated by statute or by precedent.” And the Special Advocate is further empowered to appeal adverse decisions by the FISCR to the Supreme Court. The Special Advocate may also petition the FISC or FISCR to order the disclosure of a decision containing classified information or a summary containing unclassified information. The Special Advocate must report annually to Congress regarding the activities of the office, the effectiveness of the authorizing title, and suggestions for improving the functioning of the office.

2. The FISA Court Reform Act³⁵

A similar approach can be found in the FISA Court Reform Act (FISA CRA), introduced by Senator Blumenthal. Under the CRA, the Office of the Special Advocate would be a independent office situated within the Executive Branch, and headed by the Special Advocate, who would be appointed by the presiding judge of the FISCR from a list of candidates submitted by the PCLOB. In the event of a vacancy, the presiding judge of the FISCR can appoint an acting Special Advocate from “among the qualified employees of the Office,” or, absent such qualified employees, the presiding judge of the FISCR may make an acting appointment from the most recent list submitted by the PCLOB. The CRA provides that the Special Advocate “shall protect individual rights by vigorously advocating before the [FISC or FISCR], as appropriate, in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention.” Otherwise, the duties of the Special Advocate would be effectively similar to those proposed in USA FREEDOM Act: the Special Advocate, “shall review each application to the FISA Court by the Attorney General,” along with “each decision by the [FISC or FISCR] issued after the date of the enactment of this Act and all documents and other material relevant to such decision in a complete, unredacted form,” and may request to participate in proceedings before the FISC or FISCR based

35. See H.R. 3228, 113th Cong., 1st Sess. (2013); S. 1467, 113th Cong., 1st Sess. (2013).

upon such review, and to appeal both denials of leave to participate and adverse decisions in cases in which leave is granted to the FISC and, if necessary, the Supreme Court.

3. The Schiff Bill³⁶

A separate measure, introduced by Congressman Schiff and titled the “Ensuring Adversarial Process in the FISA Court Act,” would create a standing pool of *private* “public interest advocates” appointed by the PCLOB, but *not* serving within any branch of the government, to play a comparable role to that contemplated by the USA FREEDOM Act and FISA CRA. Unlike those measures, however, the Schiff bill would *require* appointment of a public interest advocate by the FISC in *any* matter “involving a significant interpretation or construction of a provision of [FISA], including any novel legal or technological issue or an issue relating to the fourth amendment to the Constitution of the United States.” Once appointed, the public interest advocate “shall represent the interests of the people of the United States in preserving privacy and civil liberties in such matter, including with respect to the impact of such matter on the rights of the people of the United States under the fourth amendment to the Constitution of the United States.” To that end, the public interest advocate “shall have access to all relevant evidence in such matter and may petition the court to order the Federal Government to produce documents, materials, or other evidence necessary to perform the duties of the public interest advocate.” And she may appeal adverse decisions to FISC and, if necessary, the Supreme Court.

4. The FISA Improvements Act³⁷

Perhaps the most modest of the proposals percolating through Congress is Senator Feinstein’s FISA Improvements Act (FIA). Rather than embrace the special advocate model, the FIA would encourage adversarial presentation entirely through participation by *amici curiae*. Thus, the bill would authorize the FISC or FISC and to appoint *amici* to assist the court in its review of a “covered application”—an application that presents “a novel or significant interpretation under the law.” Such *amici* would be designated by the court from a list of those deemed by “appropriate executive officials” to be eligible for the requisite security clearances. The *amici* would be charged with “carry[ing] out the duties assigned by the appointing court. That court may authorize, to the extent consistent with the case or controversy requirements of Article III of the Constitution of the United States and the national security of the United States, the *amicus curiae* to review an application, certification, petition, motion, or other submission that the court determines is relevant to the duties assigned by the court.” Although it is unclear why the FISC and FISC and could not appoint such *amici* under their existing rules, the FIA would at the very least codify Congress’s affirmative endorsement of the practice.

5. The President’s Review Group Report³⁸

36. See H.R. 3159, 113th Cong., 1st Sess. (2013).

37. See S. 1631, 113th Cong., 1st Sess. (2013).

38. See RICHARD A. CLARKE ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES

There is substantial overlap between the proposals to emerge from Congress thus far and the recommendations made by both the President’s Review Group on Intelligence and Communications Technologies (PRG) and the PCLOB. In its Recommendation 28(1), for example, the PRG proposed that Congress establish the position of “Public Interest Advocate” “to represent privacy and civil liberties interests before the [FISC].” Resting on the assumptions that “judges are in a better position to find the right answer on questions of law and fact when they hear competing views,” and “[w]hen the FISC was created, it was assumed that it would resolve routine and individualized questions of fact, akin to those involved when the government seeks a search warrant,” the PRG recommended bringing the FISC up to date vis-à-vis evolution in “both technology and the law.” As envisioned by the PRG, the Public Interest Advocate would “have the authority to intervene in matters that raise such issues” in an effort to “represent the interests of those whose rights of privacy or civil liberties might be at stake.” The intervention of the advocate could arise from invitation from a FISC judge, but the PRG also recommended “that the Advocate should receive docketing information about applicants to the FISC, enabling her to intervene on her own initiative (that is, without an invitation from a FISC judge).”

The PRG provided several options for housing the Advocate. First, the PRG suggested that the Advocate could be on the staff of the newly created Civil Liberties and Privacy Protection Board (CLPP), which would replace, with expanded authority, the PCLOB. Alternatively, the PRG suggests that the advocates could be drawn from the private sector (as in the Schiff bill), with appointments overseen by the CLPP. The PRG dismissed housing the Public Interest Advocate in the FISC because the Advocate might “often hav[e] little or nothing to do,” and opposed housing it in the Executive Branch because that may undermine its independence.

6. The PCLOB Report³⁹

Along similar lines, the PCLOB’s own report unanimously endorsed the creation of a Special Advocate “who would be called upon to present independent views to the court in important cases,” even as it divided with respect to some of the government’s specific surveillance authorities. In the Board’s view, *ex parte* review in “individualized surveillance applications is a function that judges in other courts all over the country routinely perform,” and this remains appropriate in cases “when the FISC is considering individualized applications presenting no novel legal or technical questions.” In cases that *do* present novel legal issues or that concern surveillance of “numerous individuals,” the Board recommended the creation of a pool of Special Advocates, available at the request of FISC judges, who could “call upon independent expert advocates for a broader range of legal views.” To implement such an approach, the Board proposed that Congress amend FISA, but also suggested that the FISC could amend its own rules to allow for such a change. The Board then outlined several

(2013), available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [hereinafter PRG REPORT].

39. See PRIV. & CIV. LIBERTIES OVERSIGHT BD., 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 (2014), available at <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf> [hereinafter PCLOB REPORT].

“key elements of an advocacy process.” First, the Board highlighted the structural role of the panel of Special Advocates; these would be independent experts in the relevant issues who work in the private sector, and the FISC judge would select an advocate in cases where the judge deems it appropriate. Second, the FISC would have discretion over which issues it submits to the Special Advocate; this would allow the FISC to more quickly deal with cases that do not raise novel issues or concern mass or programmatic surveillance, while preserving its ability to call upon the advocates in more difficult cases. Third, the role of the Special Advocate would not be strictly adversarial; instead the “Special Advocate would review the government’s application and exercise his or her judgment about whether the proposed surveillance or collection is consistent with law or unduly affects privacy and civil liberties interests.”

Inclusion of a Special Advocate could be triggered by the government’s filing of memoranda in compliance with FISC Rule of Procedure 11, but FISC judges could also request the inclusion of a Special Advocate at their discretion. The Board further recommended that the Special Advocate have access to all government filings, and in emergency cases where surveillance commences prior to the possibility of involving a Special Advocate, she should be allowed to participate in subsequent review.

In its Recommendation 4, the Board supported the expansion of availability of appellate review; to that end, the Board recommended “[p]roviding a role for the Special Advocate in seeking that appellate review [to] further increase public confidence in the integrity of the process.” Procedurally, the Board recommended granting the Special Advocate the ability to appeal by “directly filing a petition for review with the FISCR of orders that the Special Advocate believes are inconsistent with FISA or the Constitution; or by requesting that the FISC certify an appeal of its order.”

In its Recommendation 5, the Board also proposed that the Special Advocate serve as a potential advisor to the FISC or FISCR in determining when amicus participation could be appropriate. The Board further hypothesized that the creation of a Special Advocate could help lead to the publication of more FISC opinions, and increase the number of cases heard by the FISCR.

7. The President’s January 17 Speech⁴⁰

Finally, in his widely noted January 17 speech, the President added his own voice in support of calls for the creation of a special advocate, noting that he supported the PRG’s recommendation for the creation of a “panel” of special advocates to increase adversarial participation before the FISC, albeit without further fleshing out the details. In his words, “To ensure that the court hears a broader range of privacy perspectives, I am also calling on Congress to authorize the establishment of a panel of advocates from outside government to provide an independent voice in significant cases before the Foreign Intelligence Surveillance Court.” Thus, there appears to be a fairly widespread consensus for some kind of special advocate position. There is far less consensus as to whom the

40. See President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

special advocate should represent, when and how it should participate before the FISC, or where and how the position should be constituted and overseen.

III. OBJECTIONS TO A SPECIAL ADVOCATE

Separate from the range of policy options raised by those questions (to which we return in Part IV), a series of potentially significant constitutional and prudential objections have also been raised concerning the general idea of a “special advocate,” along with some of the specific means pursuant to which such a proposal might be implemented.

a. Constitutional Concerns

In a report dated October 25, 2013 (and revised in March 2014),⁴¹ the Congressional Research Service (CRS) identified a series of potential constitutional concerns with a special advocate, beginning with potential objections to the creation of such a position under the Appointments Clause of Article II.⁴² In our view, such objections are unavailing. Even if the special advocate is created as an employee of the federal government (as opposed to a specially designated private lawyer), none of the proposals contemplate that she would exercise significant government authority pursuant to federal law.⁴³ Thus, it is clear that, in virtually *any* form, and regardless of her specific statutory responsibilities, the special advocate would *not* be an “officer of the United States” for Appointments Clause purposes.⁴⁴ As a result, Congress would have wide discretion to dictate not just the terms of the special advocate’s employment, but the placement of the office within the Executive Branch, the Judicial Branch, or elsewhere.

The same CRS report also raises a host of questions concerning Article III’s adverseness requirement—that cases before Article III courts feature concrete disputes between parties with sufficiently adverse interests. Especially if the special advocate is *not* charged with vindicating the interests of specific individuals who are subjected to potentially unlawful surveillance, the report suggests, there may not be a sufficiently “adverse” controversy to satisfy Article III.⁴⁵ As Professors Lederman and Vladeck have explained, the CRS report is correct to flag the serious constitutional questions concerning the “adverseness” of proceedings before the FISC, especially in light of the

41. See ANDREW NOLAN ET AL., CONG. RES. SERV., INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT’S COURTS: SELECT LEGAL ISSUES (2013), available at <http://justsecurity.org/wp-content/uploads/2013/10/CRS-Report-FISC-Public-Advocate-Oct.-25-2013.pdf> [hereinafter CRS REPORT]. For the March 21 update, see <http://www.fas.org/sgp/crs/intel/R43260.pdf>.

42. See U.S. CONST. art. II, § 2, cl. 2 (“He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law . . .”).

43. See generally Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA “Special Advocate,”* JUST SECURITY, Nov. 4, 2013, 1:34 p.m., <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/>.

44. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

45. See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 n.663 (2008).

post-September 11 departures from the traditional (and historically *ex parte*) warrant process.⁴⁶ But those concerns have nothing whatsoever to do with a special advocate (and have, in any event, historically been rejected by the federal courts).⁴⁷ If anything, such adversarial participation, like that contemplated by Congress in sections 215 and 702, should only *ameliorate* adverseness concerns, not exacerbate them.

The far more serious constitutional concerns with a special advocate involve her standing to appeal adverse decisions by the FISC. Before the FISC, standing is not a problem insofar as it is the government, and not the special advocate, who is the initiating party. But as the Supreme Court reiterated last Term in the Proposition 8 case, “a litigant must seek relief for an injury that affects him in a ‘personal and individual way.’ He must possess a ‘direct stake in the outcome’ of the case” in order to appeal an adverse decision.⁴⁸ If the special advocate is specifically tasked with representing affected but absent individuals who may be subjected to surveillance pursuant to the FISC order at issue, then it should follow that she would have standing to appeal on their behalf any decision purporting to authorize such surveillance. But if, as some of the proposals described above contemplate, the special advocate were instead given a more general charge to defend civil liberties and privacy and/or oppose the government, it may be far more difficult to satisfy the Article III requirement that she have a personal stake in the outcome sufficient to allow an appeal from an adverse FISC decision. At the very least, it would present a close constitutional question.

There are, however, other means of ensuring appellate review. Thus, for example, separate statutes already authorize the “certification” of issues for interlocutory appeal from federal district courts to circuit courts.⁴⁹ Although both courts must so certify, such certification can occur *sua sponte*.⁵⁰ To similar—if not stronger—effect, 28 U.S.C. § 1254(2) authorizes the Supreme Court to accept certified questions from the courts of appeals “at any time,”⁵¹ after which the Court may “decide the entire matter in controversy,” even on its own motion.⁵² So long as the appellate courts are seized of an *adverse* dispute for Article III purposes, it does not appear that a party’s putative lack of standing to appeal would divest the Supreme Court of the jurisdiction created by the certificate.⁵³ Moreover, Congress could also borrow from the context of bankruptcy and magistrate courts, where Congress has provided that the court of first impression may only make “recommendations” to the

46. See Lederman & Vladeck, *supra* note 43.

47. See, e.g., *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982) (rejecting Article III challenges to the non-adverse nature of FISC proceedings); cf. *United States v. Cavanagh*, 807 F.2d 787, 791–92 (9th Cir. 1987) (Kennedy, J.) (rejecting other Article III challenges to the FISC).

48. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

49. See 28 U.S.C. § 1292(b).

50. See, e.g., *Salt Lake Tribune Pub. Co. v. AT&T Corp.*, 320 F.3d 1081, 1087 (10th Cir. 2003).

51. 28 U.S.C. § 1254(2).

52. S. Ct. R. 19.2.

53. See Stephen I. Vladeck, *Standing and Secret Surveillance*, 9 I/S: J.L. & POL’Y FOR INFO. SOC’Y (forthcoming 2014) (manuscript at 27 n.115).

district court in certain cases, which must be reviewed as an “appellate” matter before they can be formally approved.⁵⁴

Whatever approach is adopted, a lack of direct standing to appeal would neither (1) foreclose *any* appellate review by the FISCR in cases in which the government prevails before the FISC: or (2) affect the ability of the special advocate to participate fully and effectively before the FISC. Simply put, appellate standing is a serious concern, but by no means an insurmountable one.

b. Prudential Objections

In addition to the constitutional concerns raised by the CRS report, a series of prudential objections to calls for a special advocate have also been advanced. Perhaps the most cogent and concise articulation of these concerns came in “Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act,” prepared by Judge Bates—who has also served on the FISC.⁵⁵ In addition to reiterating the appellate standing concerns articulated above, Judge Bates also suggested that a special advocate would be both unnecessary and unwise, stressing the extent to which the “vast majority of FISC matters” involve individualized applications under “classic” FISA. In those cases, Bates writes, there is simply “no need for a quasi-adversarial process,” and any such process would have the odd effect of “affording greater procedural protections for suspected foreign agents and international terrorists than for ordinary U.S. citizens in criminal investigations.” And in cases in which adversarial participation might be more appropriate, Judge Bates flagged the ability of the FISC, even under its current rules, to appoint *amici* to take positions adverse to the government.

As for why a special advocate would be unwise—“counterproductive,” in Judge Bates’ words—Judge Bates predicts that participation of a special advocate would affect, for the negative, the relationship between the Executive Branch and the FISC, undermining the government’s heightened duty of candor in *ex parte* proceedings. We do not concede that the government would be less willing to share information with a properly cleared special advocate than with the FISC itself. Indeed, to assume the government would be less forthcoming with a special advocate would be to anticipate and endorse impropriety. But it is worth noting the outsized context in which Judge Bates speculates this loss of candor would arise: he imagines the advocate participating in “substantial numbers”—“40 or more applications in a typical week”—of relatively routine national security investigations.

In our view, many of Judge Bates’s concerns merit serious consideration.⁵⁶ But they are targeted to especially expansive conceptions of the purpose, role, and structure of the special advocate. As we explain in Part IV, we believe that, through careful legislative drafting, the special advocate idea can be implemented in a manner that not only ameliorates these concerns, but that also ensures that it has the maximum desired effect at the minimum cost to the government and the FISC.

54. See, e.g., 28 U.S.C. §§ 157(c)(1); 636(b).

55. See Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, available at <http://www.lawfareblog.com/wp-content/uploads/2014/01/1-10-2014-Enclosure-re-FISA.pdf>.

56. For a slightly more critical reaction, see Steve Vladeck, *Judge Bates and a FISA “Special Advocate,”* LAWFARE, Feb. 4, 2014, 9:24 a.m., <http://www.lawfareblog.com/2014/02/judge-bates-and-a-fisa-special-advocate/>.

IV. THE WAY FORWARD FOR CREATING A SPECIAL ADVOCATE

a. Policy Issue #1: Where and How Should the Position be Constituted and Overseen?

As detailed above, there are three principal approaches to how and where a special advocate should be constituted and overseen. Two of the more common variants favor the creation of a new government entity, located in either the Executive or Judicial Branch, with appointments controlled by a combination of the PCLOB, FISCR, National Security Division of the Department of Justice, and/or Chief Justice of the United States. A third iteration, seen for example in the Schiff bill, endorses a model more analogous to the “CJA panel” in federal criminal cases,⁵⁷ pursuant to which a rotating roster of specially selected and security-cleared private lawyers would be empowered to participate on similar terms, but would remain structurally independent from any branch of the government.

Although we believe that any of these approaches could be effective, there are several reasons that, we believe, commend the latter approach over the former: First, no matter how much independence Congress seeks to invest in the office, there will always be the perception that a special advocate who works in and for the government will not be as well situated to take positions adverse to the Executive Branch as these proposals appear to contemplate. To similar effect, concerns might also arise that, so long as the special advocate is only litigating a hyperspecific set of statutory and constitutional issues in a hyperspecific set of cases, she may be less able to capitalize upon developments in other areas of the law and/or become more subject to “capture” by the very entities she is seeking to serve as a check against. Whereas criminal lawyers would be especially privy to developments in, among other things, Fourth Amendment jurisprudence, one could worry that a uniquely tasked “special advocate” would develop such a niche practice as to become inappropriately insulated from such doctrinal evolution. And as the Schiff bill suggests, it would not be that difficult as a matter of drafting or policy to create a panel of specially designated, security-cleared lawyers with relevant experience who would rotate through such cases while maintaining their regular practice. Indeed, a variation on this theme already exists in criminal prosecutions involving classified information.⁵⁸ Nor is there anything to the argument that security-cleared private lawyers cannot be trusted to handle such sensitive information.⁵⁹ Indeed, there is no evidence to date that a security-cleared lawyer has ever been responsible for an unauthorized disclosure of classified information during a U.S. judicial proceeding.

Instead, the principal objection we anticipate to such an approach stems from the potential diffusion of responsibility (and, as such, of knowledge and experience) among a panel of private lawyers, as opposed to a hierarchical government office with a specific head. It might then become harder for the individual lawyers to keep abreast of developments in *other* FISC cases, and, as such,

57. See 18 U.S.C. § 3006A.

58. See, e.g., 18 U.S.C. app. 3 § 6; *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir. 2008).

59. See, e.g., *United States v. Daoud*, No. 12-cr-723, 2014 WL 321384 (N.D. Ill. Jan. 29, 2014).

to appreciate developments in the law from case to case—especially if such lawyers are only privy to classified information in cases to which they are assigned on a “need to know” basis. As we explain below, though, we believe this concern is largely mitigated by the relatively small number of cases in which we endorse the participation of special advocates—and by the ability of the special advocates in such cases to have access to similar materials, as is already true of security-cleared habeas counsel in the Guantánamo detainee litigation. Because we agree with Judge Bates that special advocates won’t be necessary in the vast majority of FISC applications, we anticipate that the ultimate pool of special advocates will be relatively modest in size—and that it will therefore not be particularly difficult for the members of that pool to share knowledge and otherwise collaborate across the spectrum of cases in which they would be authorized to participate.

b. Policy Issue #2: Who Should a Special Advocate Represent?

Largely because of the appellate standing issues outlined above, we believe that the pool of special advocates should be authorized to represent specific, albeit unnamed individuals—*i.e.*, those individuals whose communications would be intercepted or whose data would be collected pursuant to the FISC order at issue—rather than undifferentiated civil liberties and privacy interests. Precedent for such a model of representation can be found in class actions brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure,⁶⁰ or in cases in which lawyers act as guardians *ad litem*,⁶¹ in which they routinely “represent” parties who are unaware not only of the identity of their lawyer, but of the very existence of the litigation in which they are being “represented.” And just as lawyers in such cases are entitled to appeal adverse district court decisions on behalf of their “clients,” so too, here.

To be sure, there may be discomfort as a matter of policy in allowing lawyers to purport to represent individuals who *are* properly subject to surveillance under FISA, including, for example, non-citizen terrorism suspects located outside of the United States. Some might also object that a lawyer in that position may have clients with divergent interests, and so may be placed in a difficult position with respect to representing *all* of those whose privacy is at stake (unlike the class-action context, where commonality of claims is one of the requirements for class certification). Again, though, we believe these objections are largely overstated in light of the modest role we envision for the special advocate. Because of the small and specific class of cases in which we would provide for participation of a special advocate, and the generalized questions of statutory and constitutional interpretation that will be common to the potentially large number of “clients” on whose behalf the special advocate would be litigating in such cases, we think these concerns would necessarily be overstated.

c. Policy Issue #3: When and How Should the Special Advocate Participate?

Finally, and perhaps most significantly, we would only *require* the participation of a special advocate in cases in which the government is seeking authorization for *non-individualized* surveillance, whether under section 215, section 702, or any other current or future authorities subject

60. FED. R. CIV. P. 23(b)(2).

61. *Id.* R. 17(c)(2).

to FISC oversight. In all other cases, we would leave the participation of a special advocate to the discretion of the individual FISC judge. Whether or not he is correct that adversarial participation is unwise in “classic” FISA cases, we largely agree with Judge Bates that it would be unnecessary in that context, just as it is traditionally unnecessary in the context of ordinary warrant applications pursued in ordinary criminal cases. But in cases in which the government is seeking more than an individualized warrant—in which the FISC is, in effect, reviewing administrative action on a potentially mass scale, we believe adversarial presentation is especially appropriate (indeed, perhaps even constitutionally *necessary*), as Congress itself understood when it drafted section 215 and section 702.

To be sure, we share Judge Bates’s concern that the participation of the special advocate not unduly interfere with the government’s ability to conduct lawful foreign intelligence surveillance activities, especially *ex ante*. To that end, one possible approach would be to have the special advocate notified of a government application under the relevant authorities only after that application has been *granted* by FISC, at which time the appointed advocate would have a fixed period of time within which to seek reconsideration of the underlying ruling. Among other things, this approach would allow the government to act expeditiously when circumstances warrant (lest an expressly legislated emergency exception otherwise swallow the rule), and would preserve the status quo (in which authorization has been provided by the FISC) until and unless the special advocate convinces the FISC judge, the FISCR, or the Supreme Court to vacate such authorization. And, of course, if the special advocate prevails before either the FISC or FISCR, the government retains the option of seeking a stay of the ruling in question to continue the underlying surveillance pending appeal.

Moreover, involving a special advocate only once an application has been granted eliminates the potentially pointless participation of the advocate in the atypical but non-empty set of cases of non-individualized surveillance in which the FISC rules against the government *sua sponte*. Such an accommodation would also likely vitiate Judge Bates’s concerns with respect to information-sharing between the government and the special advocates, since such sharing would only come after there has already been judicial intervention and approval. Thus, in appropriate cases, an order by a FISC judge granting a government application would also identify the randomly selected member of the special advocate pool to whom such a decision—and all relevant supporting materials—would be forwarded to the special advocate.

To be sure, as the metadata program illustrates, many of the applications that would otherwise trigger such review are nothing more than requests to *re*-authorize programs already approved by the FISC under the same rationale. Thus, after a transitional period during which preexisting rulings could *all* be revisited at least once, Congress might further limit the special advocate’s mandatory participation to cases in which the government is either (1) seeking an *initial* authorization for a new program and/or recipient; (2) seeking a reauthorization under materially different facts / technological capabilities; or (3) seeking a reauthorization under a materially different legal theory.

But regardless of the specifics, because of the modest number of cases in which we believe the special advocates would thereby participate, we further believe that, as in the Schiff bill, their participation in such cases must be *mandatory*, and not up to the discretion of FISC judges. Of course, such a requirement is without regard to a protocol wherein FISC is separately empowered to invite the participation of a (again, randomly selected) special advocate in any other case in which her participation is not already provided for.

Finally, we support a procedure pursuant to which the special advocate could then seek declassification—or at least publication of a redacted version—of any decisions produced in cases in which she participates. At the very least, Congress could create a rebuttable presumption in favor of publication in such cases, in contrast to current FISC Rule 62, which leaves publication to the discretion of individual judges.

In all then, we believe that, properly constituted, a special advocate raises no serious constitutional or prudential concerns—and that, if anything, it only bolsters the government’s ability to undertake these surveillance programs, insofar as it will place those programs that are upheld on far firmer—and more legitimate—legal and constitutional footing. There are a number of ways for Congress to so constitute the special advocate, but we believe Congress should adopt an approach that best tailors the special advocate position to the specific cases in which it is most likely to be effective, and least likely to be unduly burdensome to the government. Where the special advocates are selected from a pre-cleared list of security-cleared private lawyers, where they are specifically empowered to act on behalf of clients with concrete interests in the underlying surveillance, and where they are only required to be involved in cases in which surveillance is being authorized on a non-individualized scale raising novel and material questions of law or fact, we believe Congress will have achieved the best possible fit between the need for meaningful adverse presentation in the FISC and the actual means of achieving it.

V. CONCLUSION

Of course, we very much doubt that many will find that which we have proposed above to be a perfect solution—and we stress, again, that we do not believe the creation of a special advocate is a remotely sufficient response to the myriad questions raised about U.S. surveillance programs over the past 11 months. But the fundamental premise of our legal system is that a “sharp clash of proofs presented” by opposing advocates is the hallmark of fairness, insofar as it best empowers a neutral judge to resolve whatever difficult factual or legal questions are presented by the instant dispute.⁶² At least where the FISC is signing off on non-individualized surveillance authorities, such a “sharp clash of proofs” is essential, even if it takes place behind closed doors.

62. See STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2–3 (1984); see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“[C]oncrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]”).

The creation of a special advocate along the lines we have sketched out above should be just the beginning of the reforms Congress considers in the context of the government's foreign intelligence surveillance authorities. But if nothing else is clear, it should be the extent to which we *all* have a vested interest—including those who would most ardently defend the government's authorities—in ensuring that they are subjected to the most searching judicial review. Only then can we, the People, have any confidence that the government acting secretly in our name is doing so pursuant to the rule of law, and not of men.

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