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Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate

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Summary

Recent revelations about the size and scope of government foreign surveillance efforts have prompted some to criticize the level of scrutiny that the courts—established under the Foreign Intelligence Surveillance Act of 1978 (FISA)—currently provide with respect to the government’s applications to engage in such surveillance. In response to concerns that the *ex parte* nature of many of the proceedings before the FISA courts prevents an adequate review of the government’s legal positions, some have proposed establishing an office led by an attorney or “public advocate” who would represent the civil liberties interests of the general public and oppose the government’s applications for foreign surveillance. The concept of a public advocate is a novel one for the American legal system, and, consequently the proposal raises several difficult questions of constitutional law.

First and foremost is the question of what is the legal nature of the office of a public advocate. Some may argue that the advocate is functioning as a non-governmental entity, much like a public defender in an ordinary criminal prosecution, in serving as an adversary to the government’s position. On the other hand, a public advocate, unlike a public defender, would not be representing the views of any particular individual, but rather the general interests of society in ensuring that the government’s foreign surveillance efforts adequately protect the public’s privacy rights. Given that a public advocate can potentially be deemed an agent of the government, perhaps as a member of the executive branch, the advocate could be viewed as an office that is subject to the general requirements of the United States Constitution.

Among these requirements is Article II’s Appointments Clause that requires that “principal officers” of the United States be appointed by the President and confirmed with the advice and consent of the Senate and “inferior officers” be appointed by the President, the courts of law, or the Heads of Departments. Depending on the scope of the authority and the supervisory controls provided over the FISA advocate’s office, the lawyer who leads such an office may be a principal or inferior officer of the United States whose appointment must abide by the Appointments Clause’s restrictions.

Moreover, Article III of the Constitution which vests the judicial power of the United States in the courts of law over certain “cases” or “controversies” may also restrict the role of a public advocate. The nature of the FISA courts and their analogous position to how federal courts approve ordinary search warrants may arguably limit the application of Article III’s case-or-controversy requirement to FISA proceedings. Nonetheless, Article III typically requires that parties asking a federal court to exercise its remedial powers on his or her behalf must either (1) have personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the other party before the court or (2) be authorized by or have some other connection to a party that has suffered such an injury to represent that entity. It is at the very least doubtful that a public advocate has either personally suffered a constitutionally sufficient injury or been properly authorized by or has a close relationship with an entity that has suffered a constitutionally sufficient injury. While a more permanent advocate could be potentially viewed as representing a sovereign interest in ensuring the privacy rights of the general public and could be viewed as having standing to assert that interest, such a position may raise other constitutional issues. For example, Article III generally prevents the government from litigating against itself, making it constitutionally problematic to have an intra-branch dispute over foreign surveillance resolved by a federal court. In addition, Article II has been interpreted to prevent the establishment of purely executive functions in independent entities, and, arguably, allowing a

public advocate protected by “for cause” removal restrictions to seek judicial relief on an issue of national security could invade core executive branch prerogatives. In other words, allowing a public advocate to formally seek judicial relief from an Article III court may present serious constitutional questions. Instead, a more modest proposal that would allow an advocate to generally share its views of the law as a friend of the court or *amicus curiae* is far less likely to run afoul of the Constitution’s restrictions.

Other constitutional questions are prompted by FISA public advocate proposals. For example, separation of powers concerns that no branch should aggrandize itself at the expense of a co-equal branch may prevent a public advocate from being housed within the judicial branch. Likewise, Article III of the Constitution may present an obstacle to efforts that would make appeals of FISA court decisions more frequent. Notwithstanding these concerns, there do exist constitutionally permissible means to ensure that the executive branch’s foreign surveillance practices are thoroughly vetted and scrutinized. This report will explore all of these difficult constitutional issues prompted by the idea of making FISA court proceedings more adversarial.

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Introduction

Recent controversies over the nature of the government’s foreign surveillance activity have prompted some to argue that the judiciary’s review of government surveillance requests under the Foreign Intelligence Surveillance Act of 1978 (FISA) should be far more exacting. Accordingly, some have proposed transforming proceedings before the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review, courts created pursuant to Article III of the Constitution,¹ into a far more adversarial process where a designated attorney or “public advocate” actively argues in opposition of some or all of the government’s foreign surveillance requests.² The concept of incorporating a public advocate into FISA proceedings is a novel one, as “[p]ublic [a]dvocates do not have any identical comparators in the American legal system.”³ The few analogues to the FISA public advocate proposals that do exist in American law appear in contexts far removed from the typical FISA proceedings, such as an administrative agency hearing or in a state court.⁴ While the novelty of such FISA reforms does not evidence that the law is constitutionally infirm,⁵ proposals recommending that a public advocate participate in the FISA court raise several difficult constitutional questions, the resolution of which will ultimately depend on the specific language of a particular law. This report will explore the novel legal concept that is the public advocate and discuss several major constitutional issues surrounding the FISA advocate idea, highlighting relevant issues to consider, including what is

* This report is an extended and more expanded discussion of an initial report provided on the FISA public advocate issue in October of 2013. See CRS Report, *Introducing a Public Advocate into the Foreign Intelligence Surveillance Act’s Courts: Select Legal Issues*, by (name redacted), (name redacted), and (name redacted) (October 25, 2013).

¹ See *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.) (“[Appellant] ... appears to suggest that the FISA court is not properly constituted under [A]rticle III because the statute does not provide for life tenure on the FISA court. This argument has been raised in a number of cases and has been rejected by the courts. We reject it as well.”); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (“The FISA court is wholly composed of United States District Court judges, who have been appointed for life by the President, with the advice and consent of the Senate, and whose salaries cannot be reduced. The defendants’ contentions that because of their limited term on the FISA court, these judges lose their Article III status, has no merit.”); *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1180) (same); *United States v. Falvey*, 540 F. Supp. 1306, 1313 n.16 (E.D.N.Y. 1982) (same); *In re Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) (“Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established under Article III.”).

² See *infra* notes 16, 18-48 and accompanying text. FISA generally establishes procedures for the Government, acting through the Attorney General, to obtain a judicial warrant for electronic surveillance in the United States to acquire foreign intelligence information. 50 U.S.C. § 1802(a)(1). “With limited exceptions, the Government may not conduct electronic surveillance without a court-authorized warrant.” *United States v. El-Mezain*, 664 F.3d 467, 564 (5th Cir. 2011). Application for a FISA warrant is made to the FISC, which is comprised of eleven district court judges designated by the Chief Justice of the United States. 50 U.S.C. § 1803(a)(1). The FISC’s rulings are subject to review by the Foreign Intelligence Surveillance Court of Review, which consists of three judges also designated by the Chief Justice, whose rulings are, in turn, reviewed by the Supreme Court. 50 U.S.C. § 1803(b). For more on the FISA courts and its procedures, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted).

³ Max Havelston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFFALO L. REV. 749, 799 (May 2012) (noting that skeptics to a proposal for allowing a public advocate to participate in class action lawsuits might object because the idea is “based around the creation of an entity that is unlike any that our legal system has recognized.”).

⁴ *Id.* at 799-800 (noting that certain public advocates have been employed by the U.S. International Trade Commission and in certain state regulatory and civil proceedings).

⁵ See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation.”); *but see Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 346 (1935) (“By the same token, the fact that a given law ... is efficient, convenient, and useful ... standing alone ... will not save it if it is contrary to the Constitution.”); *INS v. Chadha*, 462 U.S. 919, 944 (1983).

the legal role of a public advocate; how a FISA advocate can be constitutionally appointed; and whether employing a public advocate before a federal court adheres to the demands of the United States Constitution.

Background on the Concept of a “Public Advocate”

An underlying principle of the Anglo-American legal system is the adversarial process, whereby attorneys gather and present evidence to a generally passive and neutral decision maker.⁶ The basic assumption of the adversarial system is that a “sharp clash of proofs presented” by opposing advocates allows a neutral judge to best resolve difficult legal and factual questions.⁷ Nonetheless, there are rare exceptions to the adversary method wherein a court allows only one party to address the court without opposition. Such *ex parte* proceedings typically exist in the context of pretrial criminal procedure.⁸ For example, the only parties allowed to be present in a grand jury proceeding are the jurors, prosecutor, witnesses, and a court stenographer,⁹ and an authorized magistrate can issue a search warrant upon the request of an attorney for the government.¹⁰ In this vein, FISA proceedings are also primarily *ex parte* in nature, as the FISC is authorized to issue orders approving of electronic surveillance,¹¹ certain physical searches,¹² the use of a pen register or a trap and trace device,¹³ or the access to certain business records for foreign intelligence and international terrorism investigations¹⁴ upon a proper showing made in an application by a federal officer.¹⁵

In the wake of the recent revelations regarding the size and scope of the government’s foreign surveillance activities, lawmakers and others have suggested transforming FISA proceedings such that the process is more adversarial in nature.¹⁶ Critics of the current FISA proceedings have cited

⁶ See STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2-3 (1984).

⁷ *Id.*; 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[.]”); see also *Franks v. Delaware*, 438 U.S. 154, 168 (1978) (“The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous.”).

⁸ See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“Our system of [criminal] justice is, and has always been, an inquisitorial one at the investigatory stage ...”).

⁹ See Fed. R. Crim. P. 6(d).

¹⁰ See Fed. R. Crim. P. 41(b).

¹¹ See 50 U.S.C. § 1804.

¹² See 50 U.S.C. § 1824.

¹³ See 50 U.S.C. § 1843.

¹⁴ See 50 U.S.C. § 1861.

¹⁵ It should be noted that not all FISA proceedings are *ex parte* in nature, as certain government applications and directives can be challenged by either an electronic communication service provider, see, e.g., 50 U.S.C. § 1881a(h)(4), or by a criminal defendant against whom the government uses information derived from its foreign intelligence gathering, see *id.* §§ 1806(c), 1806(e), 1881e(a).

¹⁶ See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013); see also Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013); Orin Kerr, *A Proposal to Reform FISA Court Decisionmaking*, THE VOLOKH CONSPIRACY (July 8, 2013), <http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking/>; FISA Improvements Act of 2013, S. 1631, 113th Cong. § 4 (1st Sess. 2013); U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 (1st Sess. 2013); LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGY 203-04 (2013) [hereinafter REPORT OF PRESIDENT’S REVIEW GROUP ON INTELLIGENCE]; Privacy and Civil Liberties Oversight Board, REPORT ON THE TELEPHONE RECORD PROGRAM CONDUCT UNDER SECTION 215 OF THE USA PATRIOT ACT AND (continued...)

the infrequency of the FISC's rejections of government surveillance requests¹⁷ as evidence that the lack of an adversarial process has prevented the court from fully and properly scrutinizing the government's position.¹⁸ While some reject this line of reasoning,¹⁹ those who have found the *ex parte* nature of FISA proceedings troubling have argued that allowing another attorney to argue in opposition to the requests of the Department of Justice (DOJ) to conduct foreign intelligence activity would allow the FISC to better protect civil liberty interests.²⁰

(...continued)

ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 183-87 (2014) [hereinafter REPORT OF THE PCLOB].

¹⁷ For example, the Electronic Privacy Information Center, extracting statistics from a list of annual reports required under FISA, reports that since the court's inception the FISC has rejected eleven of over 34,000 FISA applications. See Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Court Orders 1979-2012*, May 4, 2012, http://epic.org/privacy/wiretap/stats/fisa_stats.html.

¹⁸ See, e.g., Office of Senator Patty Murray, *Senator Murray Co-Sponsors Major Legislation To Reform FISA Courts*, press release, August 1, 2013, http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=a06c2586-06c6-45b9-be23-e22a0ae4f128, ("For example, in its 33-year history, the FISA courts have rejected just 11 out of nearly 34,000 surveillance requests made by the federal government, which raises questions about whether they provide a meaningful check and balance on government surveillance."); see generally Judge James Robertson, Comments before the Privacy and Civil Liberties Oversight Board, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, July 9, 2013, <http://www.pclob.gov/SiteAssets/9-july-2013/Public%20Workshop%20-%20Full.pdf> ("[T]he FISA process is *ex parte* ... and that's not a good thing ... anybody who has been a judge will tell you that a judge needs to hear both sides of a case before deciding."); *ACLU v. Clapper*, —F. Supp. 2d—, 2013 WL 6819708 at *27 (S.D.N.Y. Dec. 27, 2013) ("There is no question that judges operate best in an adversarial system ... [The FISC's] *ex parte* procedures are necessary to retain secrecy but are not ideal for interpreting statutes. This case shows how FISC decisions may affect every American-and perhaps, their interests should have a voice in the FISC."); REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 203 ("[T]he FISC is sometimes presented with novel and complex issues of law. The resolution of such issues would benefit from an adversary proceeding").

¹⁹ See, e.g., Robertson, *supra* note 18, ("The fact – the numbers that are quoted about how many reports – how many warrants get approved do not tell you how many were sent back for more work before they were approved ... the FISA process has integrity ... "); see also Robert Litt, General Counsel, Office of the Director of National Intelligence, testifying before U.S. Congress, House Judiciary, Crime, Terrorism, and Homeland Security, *PATRIOT Act Reauthorization*, 112d Cong., 2d Sess., March 11, 2011 ("FISA is not a rubber stamp but gives a searching review to each application that comes before it and often requires changes in modification ... [i]n addition FISA applications get extensive high level review within the executive branch even before they are submitted to the court."); see also Stewart A. Baker, Partner with Steptoe & Johnson LLP, testifying before U.S. Congress, Senate Judiciary, *FISA Surveillance Programs*, 113th Cong., 1st Sess. July 31, 2013 ("[T]he process is already full of such checks. The judges of the FISA court have cleared law clerks who surely see themselves as counterweights to the government's lawyers. The government's lawyers themselves come ... from a Justice Department office that sees itself as a check on the intelligence community and feels obligated to give the FISA court facts and arguments that it would not offer in an adversary hearing ... [t]here may be a dozen offices that think their job is to act as a check on the intelligence community's use of FISA."); The Honorable John D. Bates, Director of the Administrative Office of the United States Courts (in "consultation with the current Presiding Judges of the [FISC] and the Foreign Intelligence Surveillance Court of Review ... as well as with other judges who serve or have served on those courts"), *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act* 7 n.7, (Jan. 10, 2014), available at <http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/011413RecordSub-Grassley.pdf> ("Recent disclosures by the FISC and the Executive Branch have done much to dispel the misperception that the FISC 'rubber stamps' government requests.").

²⁰ See Senator Richard Blumenthal, *Blumenthal Applauds President Obama's Support for Special Advocate in FISA Courts*, press release, August 9, 2013, <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-applauds-president-obamas-support-for-special-advocate-in-fisa-courts> ("[T]he Constitution needs a zealous advocate. My legislation would empower ... an advocate to protect precious Constitutional rights if threatened by government overreaching, and thereby strike a critical balance that serves the interests of both liberty and security."); see also REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204 ("We recommend that Congress should create a Public Interest Advocate, who would have the authority to intervene in matters that raise such issues."); (continued...)

Proposals on the public advocate issue have varied, even with respect to the title of the attorney who would be charged with opposing the government's surveillance requests. For example, such an office has been referred to as the "Special Advocate,"²¹ the "Privacy Advocate General,"²² the "Public Advocate,"²³ the "Constitutional Advocate,"²⁴ a "public interest advocate,"²⁵ or an "ombudsman."²⁶ Beyond nomenclature, ideas for enhancing the adversarial nature of FISA proceedings have differed in structure. Several proposals envision having an office of a public advocate as part of the executive branch, either as a wholly new "independent" agency²⁷ or as a part of an existing agency, such as within the DOJ's National Security Division.²⁸ In contrast, others have suggested establishing the office of a public advocate as an independent entity within the judicial branch,²⁹ perhaps akin to the structure of Federal Public Defender Organizations that exist in many federal judicial districts in aid of providing criminal defense representation.³⁰

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REPORT OF THE PCLOB, *supra* note 16, at 184; Patricia L. Bellia, *Brave New World: U.S. Responses to the Rise in International Crime*, 50 VILL. L. REV. 425, 475-76 (2005) ("In terms of legitimacy, the benefits of having security-cleared opposing counsel argue before the FISC are obvious: doing so would ensure that, despite the secrecy of the FISA process, concerns about FISA's application in particular factual contexts were fully aired. Moreover, use of opposing counsel would relieve any pressure on both OIPR and the FISC itself to act as "devil's advocate" by narrowly interpreting the statute."). Others have voiced policy concerns with respect to the FISA advocate proposal. *See generally* *Hearing on Examining Recommendations to Reform FISA Authorities before House Permanent Select Committee on Intelligence*, 113th Cong., 1st Sess. 16-17 (2013) (statement of Steven G. Bradbury, former Asst. Att'y Gen., Office of Legal Counsel), available at <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Bradbury10292013.pdf> ("Moreover, if done in a constitutional form, introducing such an advocate position would not likely achieve the meaningful benefits that proponents hope for."); *see also* Bates, *supra* note 19 ("The participation of a privacy advocate is unnecessary and could prove counterproductive in the vast majority of FISA matters...."); The Honorable Bruce M. Selya, quoted in Khin Su, *Federal judge speaks on intelligence, surveillance*, *The Brown Daily Herald*, Feb. 11, 2013, available at <http://www.browndailyherald.com/2014/02/11/federal-judge-speaks-intelligence-surveillance/> ("I think it's an awful idea ... [an alternative voice would slow down the process and result in] no real gain."). These concerns, however, are outside the scope of this report, which focuses on the legal implications of a FISA advocate proposal.

²¹ FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(a) (1st Sess. 2013); *see also* U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 (1st Sess. 2013).

²² Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013) § 901(a).

²³ *See* Merton Bernstein, *One-Sided FISA Court Procedure Widely Distrusted as Unfair and Unreliable*, August 20, 2013, http://www.huffingtonpost.com/merton-bernstein/onesided-fisa-court-proce_b_3785797.html.

²⁴ Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(b) (1st Sess. 2013).

²⁵ Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(a) (1st Sess. 2013); *see also* REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204.

²⁶ *See* Greg Nojeim, Center for Democracy and Technology, Comments before the Privacy and Civil Liberties Oversight Board, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, July 9, 2013, <http://www.pclob.gov/SiteAssets/9-july-2013/Public%20Workshop%20-%20Full.pdf>.

²⁷ *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(a) (1st Sess. 2013); *see also* Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(a) (1st Sess. 2013); REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204 & n.166 (suggesting "housing" a public interest advocate into a newly proposed "independent agency" called the Civil Liberties and Privacy Protection Board and not the DOJ or the judicial branch).

²⁸ *See* Kerr, *supra* note 16 (suggesting establishing a public advocate in the Oversight Section of the National Security Division of the DOJ).

²⁹ *See* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(a) (1st Sess. 2013); *see also* Bernstein, *supra* note 23; Geoffrey R. Stone, *Reflections on the FISA Court*, July 5, 2013, http://www.huffingtonpost.com/geoffrey-r-stone/reflections-on-the-fisa-c_b_3552159.html (suggesting creating an office analogous to a public defender's office for FISA proceedings).

Moreover, with respect to who would appoint the attorney to lead a public advocate's office, a variety of government actors, including the President or a Cabinet officer, such as the Attorney General,³¹ the Privacy and Civil Liberties Oversight Board (PCLOB),³² or a federal court³³ have been suggested as potential appointing authority. Other proposals, including a recent suggestion by the President, have eschewed establishing a formal government office to serve in the devil's advocate role in favor of requiring the FISC court to appoint private, qualified attorneys to participate in discrete proceedings.³⁴

Nonetheless, while the various efforts aimed at making FISA proceedings more adversarial in nature differ, three unifying themes underlie all of the reform proposals. First, proposals for a FISA public advocate appear to be unified in the mission of the advocate. Specifically, FISA reform efforts envision a public advocate as providing an "opposing" voice to argue on statutory or constitutional grounds against applications made by the government under FISA.³⁵ In other

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³⁰ See 18 U.S.C. § 3006A(g)(2)(A) (providing for a "Federal Public Defender Organization" headed by a Federal Public Defender who is appointed by a "majority vote of the judges of the court of appeals" for a given circuit.); see generally Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, July 8, 2013, available at <http://www.lawfareblog.com/2013/07/making-fisc-more-adversarial-a-brief-response-to-orin-kerr/>.

³¹ See Kerr, *supra* note 16.

³² Cf. Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(a) (1st Sess. 2013). The PCLOB is an advisory and oversight body that consists of a chair and four additional members, all appointed by the President with the advice and consent of the Senate. See 42 U.S.C. § 2000ee.

³³ See FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(b) (1st Sess. 2013) (providing for an appointment by the presiding judge of the FISA Court of Review from a list of candidates submitted by the Privacy and Civil Liberties Oversight Board); see also Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(b)(1) (1st Sess. 2013) (allowing for a "joint" appointment by the Chief Justice the Supreme Court and the "most senior associate justice.... appointed by a President that at the time of appointment was a member of a political party other than the political party of the President that appointed the Chief Justice."); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(b)(2) (1st Sess. 2013) (allowing for appointment by the Chief Justice).

³⁴ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (requiring the FISC, FISA court of review or Supreme Court to appoint a public interest advocate in certain proceedings from an approved list provided by the Privacy and Civil Liberties Oversight Board); REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204-05 ("Another possibility is to outsource the Public Advocate responsibility either to a law firm or a public interest group for a sufficiently long period...."); President Barack Obama, White House, *Remarks by the President on Review of Signals Intelligence*, January 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence> ("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."); REPORT OF THE PCLOB, *supra* note 16, at 184 ("To serve this purpose, Congress should authorize the establishment of a panel of outside lawyers to serve as Special Advocates before the FISC in appropriate cases. These lawyers would not become permanent government employees, but would be available to be called upon to participate in particular FISC proceedings."). While these proposals envision a clear advocacy role for such an advocate, one commentator has suggested that a private attorney appointed by the FISC would not be representing a client, but instead would be serving as a consultant to the court and would be compensated pursuant to Title 5's provisions on employing temporary or intermittent experts and consultants. See David S. Kris, *On the Bulk Collection of Tangible Things*, Vol. 1, No. 4 LAWFARE RESEARCH PAPER SERIES 36 n.151 (September 29, 2013).

³⁵ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(c)(1) (1st Sess. 2013) ("[T]he Privacy Advocate General ... shall serve as the opposing counsel with respect to any application by the Federal Government . . ."); but see REPORT OF THE PCLOB, *supra* note 16, at 185 ("The Board does not propose requiring the Special Advocate to serve as the government's adversary, as opposing lawyers would do in traditional litigation. The Special Advocate should not be expected to oppose every argument made by the government."). To the extent the "advocate" proposal envisions the FISA advocate as merely presenting neutral, non-partisan legal views to the court, such a proposal is far removed from many of the advocate proposals that envision a formal advocacy role, see *supra* note 16, and appears to essentially be – no matter what title such an attorney is given – the addition of a fifth staff attorney for (continued...)

words, a public advocate would “represent the privacy and civil liberties” interests³⁶ of the general public by advocating for “legal interpretations that minimize the scope of surveillance and the extent of data collection and retention.”³⁷ Second, public advocate proposals generally contemplate the advocate taking on a robust role in FISA court proceedings.³⁸ While the various proposals differ at the margins,³⁹ public advocate measures generally envision the advocate having a range of responsibilities, such as being able to intervene in ongoing cases,⁴⁰ brief the FISC on relevant matters,⁴¹ conduct some forms of discovery,⁴² file motions seeking discrete forms of relief from the court,⁴³ move the court to reconsider past orders,⁴⁴ or even appeal an adverse ruling.⁴⁵ Finally, FISA reforms establishing a public advocate envision that the advocate will have some independence from the President and those seeking the approval from the FISC. While some proposals would provide that the advocate be in an entirely separate division of the DOJ aimed at providing oversight to the FISA process,⁴⁶ other proposals establish a public advocate in an “independent agency” or “independent establishment”⁴⁷ or the judicial branch⁴⁸

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the FISA court. *See* Kris, *supra* note 34, at 38-39. These types of FISA “advocate” proposals are not the focus of this report.

³⁶ *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013); *see also* REPORT OF PRESIDENT’S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 205 (“The central task of the Public Interest Advocate would be to represent the interest of those whose rights of privacy or civil liberties might be at stake.”).

³⁷ *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(d)(2) (1st Sess. 2013); *see also* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(2) (1st Sess. 2013).

³⁸ *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3) (1st Sess. 2013) (“A public interest advocate ... shall participate fully in the matter before the court ... with the same rights and privileges as the Federal Government.”).

³⁹ For example, H.R. 3159 would allow a public advocate to participate in any “covered court involving a significant interpretation or construction of a provision” of the FISA or “an issue relating to the fourth amendment to the Constitution of the United States.” *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(i) (1st Sess. 2013). Other proposals would allow the advocate to take on a broader role, such as being able to oppose “any application” by the Federal Government with respect to an order or directive under the FISA. *See, e.g.*, Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(c)(1) (1st Sess. 2013) (“[T]he Privacy Advocate General ... shall serve as the opposing counsel with respect to any application by the Federal Government . . .”); *see also* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d) (1st Sess. 2013) (providing a role for the advocate in nearly all stages of foreign surveillance requests before the FISA courts).

⁴⁰ REPORT OF PRESIDENT’S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204.

⁴¹ *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 4(c) (1st Sess. 2013) (allowing the advocate to participate as an *amicus curiae*); *see also* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 403(c) (1st Sess. 2013) (same).

⁴² *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3)(C) (1st Sess. 2013); *see also* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(4) (1st Sess. 2013).

⁴³ *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3)(C) (1st Sess. 2013); *see also* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(1)(H) (1st Sess. 2013); Kerr, *supra* note 16.

⁴⁴ *See, e.g.*, FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 4(b).

⁴⁵ *See, e.g.*, Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(d) (1st Sess. 2013); *see also* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 5(a)(1) (1st Sess. 2013); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(1)(I) (1st Sess. 2013).

⁴⁶ *See* Kerr, *supra* note 16.

⁴⁷ *See, e.g.*, Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(a) (1st Sess. 2013); *see also* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(a) (1st Sess. 2013). The term “independent,” in and of itself, has no “set meaning,” as the term can be used to signify agencies that are (1) not placed in “one of the old-line executive departments,” (2) “Article I” courts, or (3) agencies with structural protections that allow “substantial freedom” from (continued...)

with “for cause” removal protections.⁴⁹ Regardless of the specific structure, public advocate proposals appear to envision the advocate having nearly unfettered discretion with respect to types of argumentation and general strategy the advocate could employ.

The Role of a Public Advocate

It is a basic principle of American constitutional law that with one exception⁵⁰ the Constitution only applies to the federal government and, via the Fourteenth Amendment and certain other clauses, to the governments of the states.⁵¹ Accordingly, before evaluating the constitutional implications of including a public advocate in FISA proceedings a threshold issue is to assess what the exact role of the FISA advocate is as a legal matter and, more specifically, whether the advocate is a sovereign entity that can be subject to the constraints of the Constitution.⁵²

At first blush, one can argue that an opposition advocate in a FISA proceeding—no matter what exact form he takes—cannot be considered a government actor, as a public advocate represents the privacy interests of either the general public or those being targeted. Indeed, as one scholar noted in another context regarding the concept of a public advocate, the institution itself, in actively opposing the position of a government agent, is “so different from the traditional three branches of government” that the advocate “would be like a fourth branch of government, totally different from anything contemplated by the framers at the time of the ratification of the Constitution,” and, therefore, free of the constraints of the Constitution.⁵³

Moreover, if one assumes a public advocate is a direct analogue to that of a public defender in a federal criminal case, the adversarial relationship of the FISA advocate with the government arguably prevents consideration of the opposition advocate as an instrument of the federal

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presidential oversight. See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 50.

⁴⁸ See Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(a) (1st Sess. 2013). Attorney David Kris has suggested that Congress could expand the number of legal advisors employed by the FISC and allow them to be “formally” “appoint[d] ... as an opposition advocate or ‘red team,’ to write the opposing brief in appropriate cases ...” See Kris, *supra* note 34, at 38-39.

⁴⁹ See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(b)(2)(D) (1st Sess. 2013) (stating that the “Special Advocate” may be fired “only for good cause shown, including the demonstrated inability to qualify for an adequate security clearance.”); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(b)(2)(D) (1st Sess. 2013) (providing a good cause removal protection for the Constitutional Advocate).

⁵⁰ The Thirteenth Amendment is the only constitutional provision that directly regulates the conduct of private parties, as the amendment is “not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” See *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Twenty-first Amendment indirectly regulates the conduct of private parties by prohibiting the possession of intoxicating liquors when prohibited by the laws of a given states, functionally providing the states with the authority to prohibit intoxicating liquor.

⁵¹ See *San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 542 (1987).

⁵² Whether the office of a public advocate can be described as an arm of the federal government is particularly important with respect to whether appointment of an attorney to lead that office must comply with the Appointments Clause of Article II, see *infra* “Appointment of a Public Advocate,” and with respect to whether the public advocate is representing the views of a third party or the government for purposes of complying with Article III of the Constitution, see *infra* “Third-Party Standing and a Public Advocate.”

⁵³ See Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939, 952 (1982).

government.⁵⁴ Specifically, a public advocate, being bound by the canons of professional responsibility, must exercise independent judgment on behalf of his client—the public—and cannot be considered a “servant of an administrative superior”—that is, the government.⁵⁵ Put another way, an opponent of the government’s position cannot be converted into its “virtual agent.”⁵⁶ In this light, some proposals for including an advocate have described the advocate’s client as not being the government, but the “people of the United States” in “preserving privacy and civil liberties.”⁵⁷

Nonetheless, Congress’s disavowal of a federally created entity’s status as a government agent in a statute is not controlling.⁵⁸ After all, as the Supreme Court noted in *Lebron v. National Railroad Passenger Corporation*, Congress cannot merely label an entity as “nongovernmental” to “evade the most solemn obligations imposed in the Constitution.”⁵⁹ Instead, in evaluating whether an actor qualifies as a federal entity, courts will look to whether the (1) government created the entity by special law; (2) government created the entity to further governmental objectives; and (3) government retains a “permanent authority” to appoint the directors of the newly created entity.⁶⁰

With respect to the proposals for creating a permanent and on-going office of a public advocate, the first and third prongs of the test employed to determine whether an entity functions as a governmental unit are easily met, as most proposals entail a special law where a government actor retains the authority to appoint a public advocate.⁶¹ The central question is, therefore, whether the proposals to establish an office of a public advocate are created to further a governmental objective.⁶² Courts, applying the three-prong test, have envisioned a broad range of activities furthering government objectives, including functions that can be provided by private entities such as library services⁶³ and higher education facilities.⁶⁴ More broadly, courts have held that a legally authorized entity that carries out a benefit for the general public is engaging in a governmental function.⁶⁵ That description appears to describe the role of a permanent FISA advocate, as the public advocate would not be seeking private relief from the FISA courts, such as a damages remedy, but would instead be seeking broad based injunctive or declaratory relief arising from a violation of the government’s laws.⁶⁶ Given this, it appears that a permanent office

⁵⁴ Cf. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

⁵⁵ *Id.* This is not to say that the adversarial relationship of a public defender with the state precludes a finding of state action under certain circumstances, as the Supreme Court has found that the determination of whether a public defender is a government actor for a particular purpose “depends on the nature and context of the function he is performing.” See *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). In *Polk County*, the Court noted that a public defender could act under the color of law when performing certain administrative functions. 454 U.S. at 325.

⁵⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 304 (2001).

⁵⁷ See *Ensuring Adversarial Process in the FISA Court Act*, H.R. 3159, 113th Cong. § 2(b)(3)(B) (1st Sess. 2013); see also Blumenthal, *supra* note 20 (“The Special Advocate’s client would be the Constitution and the individual rights of the American people.”).

⁵⁸ See *Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado*, 84 F.3d 487, 492 (1st Cir. 1996).

⁵⁹ See 513 U.S. 374, 397 (1995).

⁶⁰ See *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 84 (2d Cir. 2000) (quoting *Lebron*, 513 U.S. at 400).

⁶¹ See, e.g., *Privacy Advocate General Act of 2013*, H.R. 2849, 113th Cong. (1st Sess. 2013).

⁶² *Lebron*, 513 U.S. at 400.

⁶³ *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 153 (2d Cir. 2004).

⁶⁴ *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 84 (2d Cir. 2000).

⁶⁵ *Ernst v. Rising*, 427 F.3d 351, 377 n.2 (6th Cir. 2005) (quoting *Black’s Law Dictionary* (7th ed.1999)).

⁶⁶ See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). It should be noted, (continued...)

of a public advocate would likely be considered a governmental entity, as that office would be created for the broad purpose of ensuring that the privacy interests of the general public are properly enunciated and respected in foreign intelligence proceedings.⁶⁷ In this sense, a permanent public advocate, in continually evaluating the applications before the FISC and in seeking judicial relief against the approval of a FISA application on behalf of the general public, would be engaging in the “very essence” of executing the law and would be subject to the Constitution’s requirements.⁶⁸ As a public advocate would be representing a generalized interest divorced from any particular individual’s harm, the FISA advocate’s role is likewise distinguishable from that of a public defender in an ordinary criminal case.⁶⁹

Far less clear is whether an otherwise private party appointed temporarily to represent the civil liberty and privacy interests of the public before the FISC in an isolated case can rightfully be considered an arm of the government. The *Lebron* test for determining whether an entity can be considered part of the government presupposes the existence of a permanently constituted corporate entity.⁷⁰ Moreover, the work of an independent party having the “temporary” authority to participate in a single case arguably is less likely to be seen as being “entwined” with official government policies or its management or control, leading to a conclusion that a temporary, private FISA advocate may not be considered a governmental actor.⁷¹

Appointment of a Public Advocate

Assuming that a *permanent* office of a FISA public advocate is an arm of the government and subject to the general requirements of the Constitution, several constitutional questions are raised

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however, that constitutional rights, like the Fourth Amendment’s protection against unreasonable searches and seizures, are personal in nature. *See Rakas v. Illinois*, 439 U.S. 128, 133 (1978)

⁶⁷ *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3)(B) (1st Sess. 2013) (noting that a public advocate would represent the “interests of the people of the United States in preserving privacy and civil liberties ...”). It should be noted there is some case law that distinguishes the *Lebron* decision when the government argues that a quasi-private institution is a governmental body as a means of *avoiding* a constitutional norm. *See Ass’n of Am. R.R. v. United States DOT*, 721 F.3d 666, 676 (D.C. Cir. 2013) (arguing that Amtrak, while viewed as a public institution in the context of the First Amendment, should be viewed as a private institution when determining whether the Due Process Clause prohibits delegating legislative authority to Amtrak). In the context of this report, however, the central constitutional questions focus on whether the public advocate’s quasi-private status could be used to avoid constitutional obligations, such as the Appointments Clause and, accordingly, its legal status should be viewed through the lens of *Lebron. Id.* (“Just as it is impermissible for Congress to employ the corporate form to sidestep the First Amendment, neither may it reap the benefits of delegating regulatory authority while absolving the federal government of all responsibility for its exercise. The federal government cannot have its cake and eat it too.”).

⁶⁸ *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (explaining that exercising judgment concerning facts as they apply to a law and interpreting the provisions of the law is a decision that is typically made by an officer charged with executing a statute).

⁶⁹ In other contexts, where a public defender is not representing a client in a criminal proceeding, the Supreme Court has held that the public defender can be deemed an agent of the state for constitutional purposes. *See, e.g., Branti v. Finkel*, 445 U.S. 507, 533 (1980) (holding that a public defender is a state actor when he makes personnel decisions on behalf of the state).

⁷⁰ *See* 513 U.S. at 396-97 (discussing the historical and legal origins of “Government-created and controlled corporations.”).

⁷¹ *See Brentwood Acad.*, 531 U.S. at 296; *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (“[C]onstitutional standards are invoked only when it can be said that the [government] is *responsible* for the specific conduct of which the plaintiff complains.”).

by the proposals establishing such an entity. To begin, if a public advocate is “part of the [federal] government for constitutional purposes,” a congressional establishment of such an agency must adhere to the requirements of the Appointments Clause of Article II of the Constitution.⁷²

Appointments Clause

The Appointments Clause establishes that the President:

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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁷³

Under the text of the Clause, it is “[o]fficers of the United States” whose appointments are established by law that are to be subject to Senate confirmation. Thus, principal officers will be appointed in this manner; however, Congress may choose to vest the appointment of those they consider “inferior [o]fficers” in either the President, the courts of law, or in the heads of departments. The Supreme Court has deemed the Appointments Clause to be “among the significant structural safeguards of the constitutional scheme” and has acknowledged that its purpose is to “preserve political accountability relative to important government assignments.”⁷⁴

Is the Public Advocate an Officer of the United States?

The first key question with respect to appointing the public advocate is to determine whether the advocate would qualify as an officer of the United States, or whether a person is a non-officer, or employee, whose appointment is not of the kind that invokes the constitutional requirements of the Appointments Clause. The Supreme Court has long held that the term “[o]fficers of the United States” “does not include all employees of the United States.... Employees are lesser functionaries subordinate to the officers of the United States.”⁷⁵ In contrast, the Court has noted that an office or officer “embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary.”⁷⁶

The seminal case explicating what being an “officer” of the United States entails is *Buckley v. Valeo*, where the Court analyzed whether the appointment of certain members of the eight-member Federal Election Commission (FEC) established by the Federal Election Campaign Act of 1971 (Act) to oversee federal elections complied with the Appointments Clause. Specifically at issue was the congressionally mandated composition of the FEC, which was to consist of two non-voting ex-officio members and six voting members. According to the act, each of the six voting members were required to be confirmed by the majority of both houses of Congress, with

⁷² See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010).

⁷³ U.S. Const., art. II, § 2, cl. 2.

⁷⁴ See *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

⁷⁵ *Buckley*, 424 U.S. 1, 126 n. 162. (1976) (per curiam).

⁷⁶ *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (discussing the term “officers”) (*citing* *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867) (discussing the term “office”)).

two members being appointed by the President pro tempore of the Senate, two members by the Speaker of the House of Representatives, and two by the President.⁷⁷ The Court looked to the powers and duties of the FEC and described them as falling into three general categories: (1) functions relating to the flow of information—receipt, dissemination, and investigation; (2) functions with respect to promoting the goals of the act—rulemaking and advisory opinions; and (3) functions necessary to ensure compliance with the statute—informal procedures, administrative determinations and hearings, and civil suits.⁷⁸ Given the nature of the duties assigned by law to the FEC, the Court concluded that the FEC was exercising executive power, as the powers that the FEC exercised that were not exclusively “of an investigative and informative nature” amounted to “authority that cannot possibly be regarded as merely in aid of the legislative function of Congress.”⁷⁹ Thus, the Court held that the method of appointment prescribed in the Federal Election Campaign Act violated the Appointments Clause because certain powers of the FEC could only be discharged by “Officers of the United States,” who must be appointed in conformity with the Appointments Clause.

In reaching this conclusion, the Court held that the term “Officers of the United States” encompasses “any appointee exercising *significant authority* pursuant to the laws of the United States.”⁸⁰ The appointment of such officers, whether principal or inferior, must conform with the Appointments Clause. The Supreme Court determined that the FEC commissioners, at a minimum, were inferior officers whose appointment would be subjected to Senate confirmation or be vested in the President, the courts of law, or heads of departments as prescribed by the Appointments Clause.⁸¹ The Court did not engage in an extended substantive analysis of the meaning of “significant authority” to distinguish principal officers from inferior officers in order to determine what mode of appointment would be appropriate for FEC commissioners.

Nonetheless, an opinion from the DOJ’s Office of Legal Counsel (OLC) discusses what are in its view two essential elements of an office subject to the Appointments Clause.⁸² OLC stated that it took the phrase “significant authority pursuant to the laws of the United States,” and other similar phrases “to be shorthand for the full historical understanding of the essential elements of a public office.”⁸³ The first element is the delegation by legal authority of a portion of the sovereign powers of the federal government. OLC described the “delegation of sovereign authority” as involving “a legal power which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State, in contrast with a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature.”⁸⁴

The second element is that the position must be “continuing,” which OLC described as having two characteristics. The first is that “an office [for purposes of the Appointments Clause] exists

⁷⁷ *Buckley*, 424 U.S. at 113.

⁷⁸ *Id.* at 137.

⁷⁹ *Id.* at 138.

⁸⁰ *Id.* at 126 (emphasis added).

⁸¹ *Id.* Subsequent to the decision in *Buckley*, Congress in 1976 amended the appointments of the six voting members so that they are appointed by the President, with the advice and consent of the Senate. P.L. 94-283; 90 Stat. 475 (1976).

⁸² See *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459 at *3 (OLC) (April 16, 2007).

⁸³ *Id.* at *10.

⁸⁴ *Id.* at *17 (internal quotations omitted, quoting *Opinion of the Justices*, 3 Greenl. at 482).

where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very fact of performance.”⁸⁵ The second characteristic of “continuing” deals with a temporary delegation of sovereign authority. Whether such a temporary position qualifies as “continuing” depends on the presence of three factors. These three factors are:

- the position’s existence should not be personal, meaning that the duties should continue even though the person is changed;
- the position should not be “transient”; and
- the duties should be more than “incidental” to the regular operations of the government.⁸⁶

Pursuant to this analytical rubric, the central issue is whether, under the various proposals for establishing a formal and permanent adversary in certain FISA proceedings, the FISA advocate would be exercising “significant authority” on behalf of the United States. Assuming the office of a public advocate is an arm of the federal government, it appears likely that under many of the public advocate proposals the advocate would be exercising the sovereign authority of the United States in a “continuing” manner and therefore would be an “officer” of the United States whose appointment is subject to the Appointments Clause. Specifically, many of the proposals for establishing a public advocate envision the advocate having wide, significant, and permanent authority to litigate on behalf of the privacy and civil liberties interests of the general public⁸⁷ in the FISA court and seek judicial relief that would bar certain foreign intelligence gathering by the executive branch.⁸⁸ As the Court found in *Buckley*, the function of having “primary responsibility” to conduct “civil litigation in the courts of the United States for vindicating *public rights* ... may be discharged only by ... ‘Officers of the United States’ within the language of [the Appointments Clause.]”⁸⁹ In other words, just as the *Buckley* Court found that members of the FEC exercised significant authority insofar as they were empowered to conduct litigation with respect to the Federal Election Campaign Act of 1971, it may also be concluded that a public advocate vested with the authority to seek judicial relief against foreign surveillance applications is such a “significant” function that it can only be conducted by an officer of the United States.⁹⁰

⁸⁵ *Id.* at *30 (internal quotations omitted).

⁸⁶ *Id.*

⁸⁷ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3) (1st Sess. 2013) (“A public interest advocate ... shall participate fully in the matter before the court ... with the same rights and privileges as the Federal Government.”).

⁸⁸ See *supra* “Background on the Concept of a Public Advocate,” at pp. 5-7 (explaining that under many of the “public advocate proposals contemplate the advocate taking on a robust role in the FISA court proceedings.”). In this sense, the role of the public advocate under many of the proposals discussed earlier in this report is *not* solely devoted to presenting legal arguments to the FISC akin to a traditional *amicus curiae*.

⁸⁹ 424 U.S. at 140 (emphasis added); see also *Free Enter. Fund.*, 130 S. Ct. at 3179-80 (Breyer, J., dissenting) (noting that an officer of the United States includes those with responsibility for conducting civil litigation in the courts of the United States).

⁹⁰ *Buckley*, 424 U.S. at 140. In this sense, conducting litigation on behalf of the United States and formally invoking a court’s power to decide issues of public rights differs from the role of an entity that merely informs the court of its views. See *generally* Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459 at *17 (OLC) (April 16, 2007) (noting that an officer exercises authority the effect of which will bind the rights of others). As such, while the *Buckley* Court would not allow Congress to appoint individuals to conduct litigation on behalf of the United States, *id.* at 138, it is unlikely that the same limitation would apply to individuals who are merely empowered to serve as in the role of an *amicus curiae*.

(continued...)

Indeed, to say that a proposal establishing a public advocate with robust powers to challenge in federal court executive branch foreign surveillance requests does not establish an office exercising a significant authority would view the public advocate as a lesser position in the government than a district court clerk⁹¹ or an election supervisor,⁹² positions the Supreme Court has viewed as requiring adherence to the Appointments Clause. It should be noted that some proposals⁹³ that would allow for attorneys to be appointed from the private sector for a single case would likely not run afoul of the Appointments Clause because of the temporary nature of such a position.⁹⁴ Nonetheless, the bulk of public advocate legislation, if enacted, appears to establish an advocate who would have a broad role that would be “continuing and permanent” and “not

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In contrast to the views of several lawmakers who view the role of the advocate as a “critical piece of the [FISA] reform puzzle,” see Spencer Ackerman, *US senators push for special privacy advocate in overhauled FISA court*, THE GUARDIAN, August 1, 2013, <http://www.theguardian.com/law/2013/aug/01/fisa-court-bill-us-senate> (quoting Senator Ron Wyden), some proponents of having a FISA public advocate have argued that the position should not be viewed as possessing “significant” authority. See Marty Lederman and Steve Vladeck, *The Constitutionality of a FISA “Special Advocate,”* Nov. 4, 2013, <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/>. To support this argument, the suggestion has been made that *Buckley* stands for the narrow proposition that the authority to “bring suits against private parties” is the *sine qua non* of being an “officer,” *id.*, with the implication that a public advocate, that lacks the authority to “commence a lawsuit to compel compliance with federal law,” is not an “officer” under the Appointments Clause.

While *Buckley* evaluated a position that did indeed have the power to initiate litigation against a private party, nowhere in the substance of *Buckley* is that characteristic of the position made controlling with respect to an understanding of what an “officer” entails for purposes of the Appointments Clause. Instead, the *Buckley* Court states “only ... persons who are ‘Officers of the United States’” can have the “discretionary power to seek judicial relief” and “conduct civil litigation in the courts of the United States for vindicating public rights” 424 U.S. at 138-140. In other words, having the authority to initiate litigation on behalf of the United States, while perhaps sufficient, is not a necessary condition to be an “Officer of the United States.” An alternative view that to exercise “significant authority” on behalf of the United States, a government litigator must not only have the power to *conduct* and *direct* the litigation but must also have authority to *initiate* litigation would potentially deem government officials that primarily direct defensive or appellate litigation to not be “Officers of the United States.” Accordingly, while a measure that merely allows a FISA advocate to participate as an *amicus curiae* before the FISA courts may not elevate the advocate to the status of an “officer,” a proposal that would provide the public advocate with the right to seek judicial relief through discovery, the ability to seek reconsideration of a particular order, the ability to formally move the court for particular relief, or the authority to appeal an adverse ruling of a court could arguably be viewed as bestowing the advocate with “significant authority” in line with *Buckley*’s holding. And as noted above, see *supra* “Background on the Concept of a ‘Public Advocate,’” pp. 5-7, several public advocate measures would purport to bestow an advocate with more robust powers than those of an *amicus*.

⁹¹ *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk).

⁹² *Ex parte Siebold*, 100 U.S. 371, 397-98 (an election supervisor).

⁹³ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (requiring the FISC, FISCR or Supreme Court to appoint a public interest advocate in certain proceedings from an approved listed provided by the Privacy and Civil Liberties Oversight Board); President Barack Obama, White House, *Remarks by the President on Review of Signals Intelligence*, January 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence> (“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.”); REPORT OF THE PCLOB, *supra* note 16, at 184 (“To serve this purpose, Congress should authorize the establishment of a panel of outside lawyers to serve as Special Advocates before the FISC in appropriate cases. These lawyers would not become permanent government employees, but would be available to be called upon to participate in particular FISC proceedings.”).

⁹⁴ Such temporary assignments would likely not be subject to the Appointments Clause. Cf. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (“His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an ‘officer’ within the meaning of the clause of the constitution referred to.”).

occasional and temporary,”⁹⁵ as such measures would create a FISA advocate that would be a non-personal position generally charged with continuously reviewing the requests made to the FISA courts and actively litigating in opposition of such requests.⁹⁶

Would a Public Advocate be a Principal or Inferior Officer?

Assuming that a public advocate would be an officer of the United States because he or she would be exercising significant authority pursuant to the laws of the United States, the next question is whether such an advocate would be considered a principal officer or an inferior officer. The Appointments Clause requires Senate confirmation for principal officers, but gives Congress the discretion to provide for the appointment of inferior officers without advice and consent.

Although the Supreme Court has determined various offices to be inferior,⁹⁷ the High Court has acknowledged that the case law has until recently “not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”⁹⁸ In fact, in *Morrison v. Olson*, the Court observed that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear”⁹⁹ and employed a multi-factor test regarding the nature of the officer’s duties to determine when an officer could be considered either inferior or principal.¹⁰⁰ In dissent in that case, Justice Scalia argued that an officer’s subordination to a principal officer, and not the nature of his or her duties, should guide the inquiry as to the officer’s status.¹⁰¹ In *Edmond v. United States*, the Court appears to have departed from the multi-factor test and adopted Justice Scalia’s position, holding that “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President ... [and] whose work

⁹⁵ *Germaine*, 99 U.S. at 511-12.

⁹⁶ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(c)(1) (1st Sess. 2013) (“[T]he Privacy Advocate General ... shall serve as the opposing counsel with respect to any application by the Federal Government”); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d) (1st Sess. 2013) (providing a role for the advocate in nearly all stages of foreign surveillance requests before the FISA courts). Some may argue that with respect to proposals that allow for the advocate to participate in only certain types of proceedings when called upon by the FISC, see, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(i) (1st Sess. 2013), the advocate would not be acting as an officer because the role would not be continuing and permanent. Cf. *Germaine*, 99 U.S. at 512 (holding that a surgeon appointed by the Commissioner of Pensions was not an officer because the surgeon was “only to act when called upon by the Commissioner ... in some special case, as when some pensioner or claimant of a pension presents himself for examination.”). Nonetheless, if the types of cases that the advocate can appear at are sufficiently broad, the role of the public advocate likely would be less of a fleeting and temporal role and more of a robust position that is subject to the Appointments Clause. Cf. *Auffmordt*, 137 U.S. at 327 (noting that actors that “act[] only occasionally and temporarily” are not an “officer” within the meaning of the Appointments Clause); see *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (holding that an office with a limited jurisdiction and limited tenure was an inferior officer).

⁹⁷ See *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk); *Ex parte Siebold*, 100 U.S. 371, 397-98 (an election supervisor); *United States v. Eaton*, 169 U.S. 331, 343, (1898) (a vice consul charged temporarily with the duties of the consul); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 252-54 (1931) (a “United States Commissioner” in district court proceedings); *Morrison*, 487 U.S. at 671-72 (an independent counsel).

⁹⁸ *Edmond*, 520 U.S. at 661. It should be noted that the Court did not explicitly overrule *Morrison*’s analysis of an inferior officer’s status, discussed *infra*, but instead stated that *Morrison* did not “purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause.” *Id.*

⁹⁹ *Morrison*, 487 U.S. at 671-72 (finding that the independent counsel clearly falls on the inferior side of the line).

¹⁰⁰ *Id.* at 671-672 (including factors, such as that the independent counsel being subject to removal by a higher officer, that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited to conclude that the independent counsel was an inferior officer).

¹⁰¹ See *Morrison*, 487 U.S. at 719-21 (Scalia, J., dissenting).

is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁰² The reasoning in *Edmond* was again confirmed by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁰³ which concluded that the members of an oversight board were properly appointed inferior officers because the Securities and Exchange Commission, consisting of five principal officers, oversaw the board’s conduct and had the power to remove members of the oversight board at will.¹⁰⁴ Thus, in analyzing whether an officer is an inferior one, the Court’s decisions appear to be centered on the ability of an officer’s conduct to be controlled by an officer who is politically accountable through a presidential appointment and Senate confirmation.¹⁰⁵

With respect to a public advocate, it appears that under many of the proposals for creating a FISA advocate, the advocate would likely be considered a principal officer. A unifying theme behind all of the proposals creating an office of the public advocate is to ensure that the advocate is independent from other entities within the executive branch, who would, presumably, be seeking an order from the FISA court authorizing foreign surveillance activities.¹⁰⁶ Few, if any, proposals envision any other entity supervising the public advocate by, for example, reviewing the advocate’s litigation strategies or by editing the submissions of the public advocate before they are filed with the FISA court. Moreover, several of the proposals would provide the advocate with “for cause” removal protections,¹⁰⁷ such that any other office of government is “powerless to intervene” if they disagree with the advocate’s decisions, unless the decisions are “so unreasonable as to constitute ‘inefficiency, neglect of duty, or malfeasance in office.’”¹⁰⁸ By ensuring that the public advocate is autonomous, a law creating an office of a public advocate would appear to be creating an office headed by a principal officer, as the advocate’s work would not be “directed and supervised at some level by” another principal officer.¹⁰⁹ As a consequence, in order to ensure the principles of political accountability that underlie the Appointments Clause,¹¹⁰ there is a substantial likelihood that a reviewing court would find that the Constitution requires that an autonomous public advocate exercising significant authority in litigating in the FISA courts be appointed by the President with the advice and consent of the Senate.¹¹¹ Nonetheless, if the Supreme Court retreats from the stance taken in *Edmond* and *Free Enterprise Fund* and instead embraces the multi-factor approach endorsed in *Morrison*, an argument could

¹⁰² *Edmond*, 520 U.S. at 662-63. This characterization of inferior officers by the Court presumably would not preclude the ability of the Congress to vest the appointment of an inferior officer in the President alone as prescribed by the Appointments Clause.

¹⁰³ 130 S. Ct. 3139, 3162-63 (2010).

¹⁰⁴ *Id.* at 3162. Earlier in *Free Enterprise Fund* decision, the Court struck down a provision that would have provided members of the oversight board with “for cause” removal protections on separation of powers grounds. *Id.* at 3151. Hence, when assessing the Appointments Clause issue raised in *Free Enterprise Fund*, the Court found that the Securities and Exchange Commission “properly viewed ... under the Constitution ... as possessing the power to remove” members of the oversight board at will. *Id.* at 3162.

¹⁰⁵ *Id.*

¹⁰⁶ *See supra* “Background on the Concept of a Public Advocate,” at p. 6-7.

¹⁰⁷ *See, e.g.*, Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(b)(2)(D) (1st Sess. 2013).

¹⁰⁸ *See Free Enter. Fund*, 130 S. Ct. at 3154 (internal quotations omitted).

¹⁰⁹ *See Edmond*, 520 U.S. at 661.

¹¹⁰ *Id.* at 663.

¹¹¹ In this sense, viewing the head of the office that would oppose the DOJ’s National Security Division’s applications before the FISA courts as a principal officer appears to be in line with how the law views the public advocate’s counterpart—the Assistant Attorney General for the National Security Division, a position that requires a Presidential appointment and Senate confirmation. *See* 28 U.S.C. §§ 506 & 507A.

be made that the public advocate is an inferior officer if the new office, similar to the independent counsel in *Morrison*, is created such that the FISA advocate can be removed in some way by a higher officer, has limited duties, a narrow jurisdiction, and a limited tenure.¹¹²

Inter-branch Appointments and the Public Advocate

Assuming that the Supreme Court, in analyzing the appointments question presented by establishing a public advocate, abandons the *Edmond* test in favor of the *Morrison* approach such that a permanent public advocate could be an inferior officer, an additional issue is raised for those proposals that would allow the advocate, who is arguably acting in an executive role,¹¹³ to be appointed by the courts of law. Specifically, apart from constitutional questions arising from Article III of the Constitution or general separation of powers concerns, the Court has recognized that Congress's decision to vest the appointment power in the courts would be in violation of the Appointments Clause if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.¹¹⁴ In *Morrison*, the Court, relying on cases allowing for judicial appointment of federal marshals and prosecutors, found no incongruity with having a court appoint an independent counsel, as "courts are especially well qualified to appoint prosecutors."¹¹⁵

Applying these principles, one could argue that the FISA advocate would be analogous to the independent counsel position in *Morrison*, in that the position would be one in which the government is especially concerned with avoiding a conflict of interest with the executive branch's prerogatives with respect to foreign surveillance, making appointment by the judiciary "logical."¹¹⁶ In addition, especially in light of the legal advisors already employed by the FISC to critically analyze government surveillance applications,¹¹⁷ the federal courts, especially the FISA courts, are "well qualified to appoint" a public advocate. In this sense, it would be appropriate for a court of law to appoint a public advocate housed within the executive branch. On the other hand, it could be argued that, in contrast to *Morrison*, where the Special Division appointing the independent counsel was "ineligible to participate in any matters relating to an independent counsel they have appointed,"¹¹⁸ the proposals allowing a public advocate to be appointed by a FISA court or even members of the Supreme Court do not appear to have such an ineligibility provision,¹¹⁹ raising the specter of an "incongruity" between the functions normally performed by

¹¹² Cf. *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (holding that the Special Division of the D.C. Circuit could appoint the independent counsel because the independent counsel was an inferior officer whose appointment can be vested in the "courts of law.").

¹¹³ See *supra* "The Role of a Public Advocate," p. 9.

¹¹⁴ See *Morrison*, 487 U.S. at 676 (citing *Ex Parte Siebold*, 100 U.S. 371, 398 (1880)). The Supreme Court has rejected the broader argument that Congress wholly lacks the authority to allow for inter-branch appointments. See *Morrison*, 487 U.S. at 673.

¹¹⁵ See *id.* at 676-77 & n.13. Other inter-branch appointments upheld include the court appointment of private attorneys to act as a prosecutor for judicial contempt judgments, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the court appointment of United States commissioners who exercised certain limited prosecutorial powers, *Go-Bart Importing Co.*, 282 U.S. at 344, the judicial appointment of federal marshals, *Ex parte Siebold*, 100 U.S. at 397, and the judicial appointment of temporary U.S. Attorneys. *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

¹¹⁶ *Id.* at 677.

¹¹⁷ See Kris, *supra* note 34, at 38-39.

¹¹⁸ See *Morrison*, 487 U.S. at 677.

¹¹⁹ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013).

the FISA court and the appointment power.¹²⁰ More broadly, in contrast to a federal court's general familiarity with criminal law that formed the basis for why the appointment in *Morrison* was appropriate,¹²¹ federal courts generally "lack ... competence" in the area of national security and foreign affairs,¹²² and, accordingly, it could be incongruent with a federal court's general competencies to be charged with appointing an individual authorized to litigate on behalf of the United States to ensure that foreign surveillance efforts respect the public's right to privacy.¹²³

Article III Issues Raised by a FISA Public Advocate

Apart from issues raised by the Appointments Clause of the United States Constitution, Article III of the Constitution, which vests the judicial power of the United States in the Supreme Court and any inferior courts created by Congress, also poses significant legal questions with respect to proposals creating a FISA public advocate.¹²⁴ Specifically, some commentators have questioned whether the judicial power, which extends to "cases" or "controversies,"¹²⁵ allows the government, through the National Security Division of the DOJ and the newly created public advocate, to "literally argue both sides of a legal case," which casts doubt on whether the court would truly be overseeing a contested action.¹²⁶ With this general concern in mind, there are two central lines of argumentation for how a public advocate can be included in current FISA proceedings without violating Article III, each of which will be analyzed *in seriatim*.

Morrison and *Mistretta* "Incidental" Argument

The first question that should be addressed with respect to Article III concerns over creating a FISA advocate is whether current FISA proceedings are even subject to Article III's general limitations. Arguably, because FISA proceedings are merely "incidental" or "ancillary" to the

¹²⁰ See *Morrison*, 487 U.S. at 676.

¹²¹ *Id.* at 676-77 & n.13.

¹²² See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

¹²³ Many of the proposals would set qualifications for the role of the public advocate, such as having them be one of a group recommended by the PCLOB. See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(b) (1st Sess. 2013) (providing for an appointment by the presiding judge of the FISA Court of Review from a list of candidates submitted by the Privacy and Civil Liberties Oversight Board). In *Myers v. United States*, the Supreme Court noted that "the legislative power" comprehends the authority "to prescribe qualifications for office, or reasonable classification for promotion, ... provided of course that these qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." See 272 U.S. 52, 129 (1926). It has been generally acknowledged that Congress has broad authority in this area. Executive branch views, as articulated through presidential signing statements and DOJ opinions have, however, ranged from the assertion that Congress has no such authority to an acknowledgment of some such authority that lacks clear boundaries. See, e.g., U.S. President (Clinton), "Statement on Signing the Lobbying Disclosure Act of 1995," Weekly Compilation of Presidential Documents, vol. 31, December 19, 1995, pp. 2205-2206; 3 Op. O.L.C. 388, 389 (1979); 20 Op. O.L.C. 279, 280-281 (1996).

¹²⁴ U.S. CONST. Art. III, § 1.

¹²⁵ *Id.*

¹²⁶ See, e.g., Kris, *supra* note 34, at 38; see also Robert Litt, General Counsel of the Office of the Director of National Intelligence, Comments before the Privacy and Civil Liberties Oversight Board, *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*, November 4, 2013, available at <http://www.pclob.gov/SiteAssets/PCLOB%20Hearing%20-%20Full%20Day%20transcript%20Nov%204%202013.pdf> ("As I said I think there are ... legal concerns with a special advocate. I think there's an Article III issue with respect to the standing that a special advocate would have in the court.").

federal judiciary’s general Article III powers, they may not be subject to the same requirements as other Article III judicial proceedings. To fully explore this argument, the nature of the “judicial power” as defined in Article III must first be assessed.

Judicial Power and Article III

As far back as 1792, the Supreme Court intimated that federal courts are limited to exercising Article III’s “judicial power,”¹²⁷ which, in turn, is limited to the adjudication of “cases” or “controversies.”¹²⁸ From this case-or-controversy concept, the Court has developed rules of justiciability such as standing, mootness, and ripeness to delineate which matters federal courts can hear and which ones must be dismissed.¹²⁹ These constraints promote separation of powers interests by ensuring the judiciary does not overstep the bounds of its constitutionally allocated power and encroach on those of its coordinate branches.¹³⁰

As part of the case-or-controversy requirement, the Court has generally required litigant adverseness—a live dispute that is “definite and concrete, touching the legal relations of parties having adverse legal interests.”¹³¹ This “concrete adverseness” helps to “sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitution questions[.]”¹³² It appears that the case-or-controversy requirement does not necessarily require the presence of two adverse parties, but rather there be adversity in legal interests. In *Pope v. United States*, for instance, the Court observed that “[w]hen a plaintiff brings suit to enforce a legal obligation it is not any the less a case-or-controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff’s claim is uncontested or incontestable.”¹³³

Several cases bear out this principle. In *United States v. Johnson*, the Supreme Court dismissed a suit brought by the plaintiff at the behest of the defendant, and in which the defendant had paid the plaintiff’s legal fees.¹³⁴ The Court explained that “the absence of a genuine adversary issue between the parties” precluded resolution of the case.¹³⁵ In *Muskrat v. United States*, the Court was assessing a federal statute which purported to confer authority upon specific litigants to challenge the constitutionality of a previously enacted statute.¹³⁶ In dismissing this case, the Court noted that “there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress.”¹³⁷

¹²⁷ See *Hayburn’s Case*, 2 U.S. 409, 410 n.* (1792); *United States v. Ferreira*, 54 U.S. 40, 48 (1851).

¹²⁸ U.S. CONST. art. III, § 2; see *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950) (“Federal judicial power itself extends only to adjudication of cases and controversies....”).

¹²⁹ See *Allen v. Wright*, 468 U.S. 737, 750 (1984).

¹³⁰ *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

¹³¹ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); but see *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that the parties had adverse interests even though the parties agreed that the law in question, the Defense of Marriage Act (DOMA), was unconstitutional).

¹³² *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹³³ 323 U.S. 1, 11 (1944).

¹³⁴ 319 U.S. 302, 304 (1943).

¹³⁵ *Id.*

¹³⁶ 219 U.S. 346 (1911).

¹³⁷ *Id.* at 361.

In deciding that this was not an exercise of the judicial power, and therefore prohibited by Article III, the Court observed that “judicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.”¹³⁸ In both cases, the Court held that the parties did not have adverse legal interests and therefore dismissed the suits as nonjusticiable.

Judicial Acts that are “Incidental” to the Judicial Power

Notwithstanding the general nature of the judicial power under Article III, it can be argued that the federal judiciary’s role in FISA proceedings is *incidental* to the exercise of the general judicial function and need not independently satisfy the case-or-controversy requirement. This line of reasoning derives from *Morrison v. Olson*¹³⁹ and *Mistretta v. United States*,¹⁴⁰ in which the Court held that Article III judges may, in certain limited instances, engage in non-adjudicatory, non-adversarial activities without flouting Article III restrictions.

In *Morrison*, the Court tested the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.¹⁴¹ The act created a Special Division of the U.S. Court of Appeals for the District of Columbia Circuit, a court presided over by federal judges, appointed by the Chief Justice. The Special Division was empowered to appoint an independent counsel, set the parameters of his jurisdiction, receive reports from the counsel, and terminate an independent counsel when his task was completed.¹⁴² In assessing whether these duties exceeded Article III constraints, the Court looked to analogous duties placed on federal judges, concluding that Article III judges could conduct certain non-adjudicatory functions:

By way of comparison, we also note that federal courts and judges have long performed a variety of functions that, like the functions involved here, do not necessarily or directly involve adversarial proceedings within a trial or appellate court. For example, federal courts have traditionally supervised grand juries and assisted in their “investigative function” by, if necessary, compelling the testimony of witnesses. Federal courts also participate in the issuance of search warrants, and review applications for wiretaps, both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.¹⁴³

Adopting a similar line of reasoning, the Court in *Mistretta v. United States* upheld the constitutionality of placing Article III judges on the United States Sentencing Commission.¹⁴⁴ In that case, the Court observed that “although the judicial power of the United States is limited by express provision of Article III to ‘Cases’ and ‘Controversies,’” the Constitution does not “prohibit[] Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are ‘necessary and proper ... for carrying into execution all of the judgments which the judicial department has

¹³⁸ *Id.* at 362-63.

¹³⁹ 487 U.S. 654, 654 (1988).

¹⁴⁰ 488 U.S. 361, 385 (1989).

¹⁴¹ *Morrison*, 487 U.S. at 659.

¹⁴² *Id.* at 680.

¹⁴³ *Id.* at 681 n.20 (internal citations omitted).

¹⁴⁴ *Mistretta*, 488 U.S. at 412.

power to pronounce.”¹⁴⁵ In this vein, the Court, citing to *Morrison*, noted that Article III courts can constitutionally perform a variety of functions not necessarily connected to adversarial proceedings, such as issuing search warrants and wiretap orders.¹⁴⁶

In 2002, the Foreign Intelligence Surveillance Court of Review adopted the reasoning from *Morrison* and *Mistretta* to uphold an Article III challenge to the FISA proceedings. In *In re Sealed Case*, the Court of Review noted that “[i]n light of *Morrison v. Olson* and *Mistretta v. United States* ... there is not much left to the argument ... that the statutory responsibilities of the FISA Court are inconsistent with Article III case-or-controversy responsibilities because of the secret, non-adversary process.”¹⁴⁷ It is unclear, however, whether the Court of Review was (1) asserting that the *ex parte* nature of the FISA proceedings did not necessarily mean that the proceedings were not grounded in adversity or (2) holding, based on *Morrison* and *Mistretta*, that FISA proceedings, like warrant proceedings, are wholly removed from the strictures of Article III because the proceedings are incidental to and merely carrying into effect the Article III judicial power.

Assuming the Foreign Intelligence Surveillance Court of Review adopted the latter position, there is at least some authority for the proposition that just like the role of the Special Division in *Morrison* or the role of the United States Sentencing Commission in *Mistretta*, FISA proceedings are merely incidental to the federal judiciary’s broader Article III powers and not a formal exercise of the judicial power. Moreover, once the federal judiciary is engaging in a non-adjudicatory function, none of the typical constraints imposed by Article III, like the doctrines of standing, mootness, ripeness, and political questions,¹⁴⁸ would arguably govern. After all, the Special Division at issue in *Morrison* did not need a “ripe” controversy in order to appoint a special prosecutor to investigate a crime, and an expert testifying before the United States Sentencing Commission does not have to have “standing” to appear. Accordingly, assuming the FISA proceedings are merely incidental to core Article III functions, allowing a public advocate to appear before and obtain relief from the FISA courts would not be constitutionally infirm.

Problems with the *Morrison* and *Mistretta* Argument

However, the argument made above is premised on the assumption that FISA proceedings merely “carry[] into execution all of the judgments which the judicial department has power to pronounce.”¹⁴⁹ The central rationale for why FISA proceedings are incidental to the federal judicial powers is because such proceedings are directly analogous to a traditional warrant proceeding, an example of an incidental function of the judicial power provided in *Morrison* and *Mistretta*.¹⁵⁰ However, in a traditional warrant proceeding the results can be contested through some judicial process.¹⁵¹ In this regard, FISA proceedings differ from traditional warrant procedures. For instance, under Federal Rule of Criminal Procedure 41, an officer executing a warrant must give a copy of the warrant and a receipt of the property taken to the target of the

¹⁴⁵ *Id.* at 389 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 22 (1825)).

¹⁴⁶ *Id.* at 389-90 n.16.

¹⁴⁷ *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002).

¹⁴⁸ *Allen v. Wright*, 468 U.S. 737, 750 (1984)..

¹⁴⁹ *Mistretta*, 488 U.S. at 389 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 22 (1825)).

¹⁵⁰ *See Morrison*, 487 U.S. at 860 n.20; *Mistretta*, 488 U.S. at 389-90 n.16.

¹⁵¹ *See* TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 86 (1969).

search.¹⁵² Additionally, the target may request the return of his property¹⁵³ and may move to suppress the evidence if offered at trial.¹⁵⁴ As one esteemed commentator noted, with notice and an opportunity to contest the search, “a case or controversy is made, the issues are appropriate for judicial determination, and a final judgment can be rendered and reviewed on appeal.”¹⁵⁵ In other words, while a traditional warrant proceeding is incidental to a traditional adjudication by an Article III court, there is at least some connection that exists between the traditional warrant proceeding and the judicial power.

Targets of FISA orders, on the other hand, are generally not notified of the surveillance and have no statutory method of contesting their legality or requesting a return of the things taken unless gathered material is utilized in a criminal proceeding. And unlike the traditional warrant setting, information obtained from surveillance under FISA is infrequently used in a criminal prosecution that could independently satisfy the case-or-controversy requirement.¹⁵⁶ In this sense, FISA proceedings, to the extent they are not adversarial in nature, are engaging the federal judiciary in a role that is far removed from the traditional Article III functions and are, at least arguably, not incidental to the federal judicial power.¹⁵⁷

The Traditional Argument and the Role of a Public Advocate

Putting to the side the argument that a FISA proceeding is merely incidental to the traditional Article III powers of a federal court, a second line of argumentation for having a public advocate included in FISA proceedings stems from a more traditional understanding of the role of Article III powers that pre-dates *Morrison* and *Mistretta*. Specifically, assuming that the FISA proceedings do satisfy the general requirements of adversity that underlie Article III, a privacy advocate can participate in the FISC so long as he adheres, as necessary, to certain general requirements, such as standing, that a party must satisfy to seek relief from a federal court.

The Traditional Argument for the Constitutionality of FISA Proceedings

Relying on the traditional understanding of Article III, the DOJ opined during the late 1970s FISA debates that the FISA proceedings then under consideration satisfied Article III’s case-or-controversy requirement.¹⁵⁸ Acknowledging that the proceedings proposed under that bill “differ

¹⁵² FED. R. CRIM. P. 41(f)(C).

¹⁵³ FED. R. CRIM. P. 41(g).

¹⁵⁴ FED. R. CRIM. P. 41(h).

¹⁵⁵ Taylor, *supra* note 151.

¹⁵⁶ *But see* United States v. Isa, 923 F.3d 1300, 1305 (8th Cir. 1991) (information obtained from FISA surveillance used as evidence in state murder prosecution). If a criminal prosecution is brought against a target of the surveillance and the government intends on entering into evidence at trial or other court proceeding any evidence derived from “electronic surveillance,” the government must notify the target of this intended use prior to the proceeding. 50 U.S.C. § 1806(c); *see generally* CRS Report WSLG809, *Colorado Defendant Challenges Constitutionality of Expanded Foreign Surveillance Program*, by (name redacted) et al. (discussing Article III challenge to the FISA Amendments Act of 2008).

¹⁵⁷ This may be particularly true as Congress has recently authorized the FISC to adjudicate issues far removed from a concrete case-or-controversy, such as Section 702’s requirement that the FISC review certain “targeting” and “minimization” procedures adopted by the Attorney General with respect to the “targeting of persons reasonably believed to be located outside the United States.” *See* 50 U.S.C. § 1881a(i)(2)(B)-(C); *see also* Nolan, *supra* note 156.

¹⁵⁸ *See Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess. 26 (1978)* (statement of John M. Harmon, Asst. Att’y Gen., Office of Legal Counsel).

in many respects from the usual sort of case-or-controversy brought before Article III courts,” DOJ nonetheless argued that the bill satisfied Article III. In addressing the adverseness argument, DOJ posited that two parties need not be present in every case, but instead there need only be “adversity in fact”¹⁵⁹ or “possible adverse parties.”¹⁶⁰ The adverse interests of the United States in conducting surveillance and the interests of the target to not be surveilled were sufficient, DOJ argued, to satisfy the adversity requirement.¹⁶¹ Additionally, DOJ argued that the proposed FISA orders were sufficiently analogous to traditional warrants to uphold their constitutionality.¹⁶²

The DOJ’s argument appears to have been accepted by at least two courts. Specifically, in *United States v. Megahey*, the United States District Court for the Eastern District of New York rejected an argument that a court exercising exclusively *ex parte* powers exceeded the boundaries of Article III.¹⁶³ The court noted that “applications for electronic surveillance submitted to the FISC pursuant to FISA involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them.”¹⁶⁴ Similarly, the District Court for the Southern District of California rejected a similar argument in *In re Kevork*, accepting the warrant analogy:

“The *ex parte* nature of FISC proceedings is also consistent with Article III. Government applications for warrants are always *ex parte*. Authorizations under Title III are raised on an *ex parte* basis. The FISA Court retains all the inherent powers that any court has when considering a warrant.”¹⁶⁵

Standing and a Public Advocate’s Individual Capacity

Assuming that current FISA proceedings are an adjudicatory function of an Article III court and require adherence to Article III’s case-or-controversy requirements, the question that remains is whether a FISA advocate could constitutionally participate in the proceedings in some manner. While a FISA advocate can very likely participate in on-going FISA proceedings, the nature of that participation may be circumscribed by the requirements of Article III. Generally, whenever an individual “invo[kes] ... [a] federal court[’s] jurisdiction” and formally asks an Article III court to exercise its “remedial powers on his [or her] behalf,”¹⁶⁶ the Supreme Court has “consistently ... required” that the “party seeking judicial resolution of a dispute ‘show that he personally has

¹⁵⁹ *Id.* at 28 (citing 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3530 (1975)).

¹⁶⁰ *Id.* (citing *Muskrat v. United States*, 219 U.S. 346, 357 (1911)) (emphasis added).

¹⁶¹ *Id.* at 28.

¹⁶² *Id.*

¹⁶³ *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y.1982); *see also* *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982).

A somewhat tortuous argument advanced by one of the the defendants is that the Act violates Article I and III because the FISA Court is not a court, and because Article III judges are being converted into Article I judges by serving as FISA judges. I reject this argument. Applications for Title III wiretaps are often taken to magistrates who are neither Article I nor Article III judges. Similarly, the finding of probable cause for a search warrant in a criminal case is commonly made *ex parte* by a magistrate.

Id. at 1313 n.16.

¹⁶⁴ *Megahey*, 553 F. Supp. at 1196.

¹⁶⁵ *In re Kevork*, 634 F. Supp. 1002, 1014 (S.D. Cal. 1985).

¹⁶⁶ *See* *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

suffered some actual or threatened injury as a result of the putatively illegal conduct” of the other party.¹⁶⁷ The injury must be both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”¹⁶⁸ In addition to suffering an injury, the “irreducible constitutional minimum” of “standing” also requires that there be a “causal connection” between the injury and the conduct that is complained of, such that the injury is “fairly traceable” to the challenged action.¹⁶⁹ Finally, constitutional standing requires that it be likely that the injury will be redressed by a favorable decision.¹⁷⁰ The rationale for these requirements is that Article III courts, in exercising judicial power, have the ability to “profoundly affect the lives, liberty, and property of those to whom it extends,”¹⁷¹ and, accordingly, the power to seek relief from an Article III court must be placed in the hands of those who have a “direct stake” in the outcome of the case, and not merely in the “hands of ‘concerned bystanders.’”¹⁷²

Nonetheless, there is case law that indicates that when a federal court is *already* adjudicating over an adversarial proceeding, a third party that cannot satisfy Article III’s standing requirements can play a role in the proceeding. In *Bowsher v. Synar*, the Supreme Court reviewed a challenge to the Balanced Budget and Emergency Deficit Control Act of 1985 brought by Members of Congress, the National Treasury Employees Union (NTEU), and a member of the NTEU.¹⁷³ After concluding that the members of the NTEU had alleged an injury-in-fact necessary to provide them with standing, the Court held that it “therefore need not consider the standing issue as to the [NTEU] or Members of Congress.”¹⁷⁴ The statement from *Bowsher* has been interpreted to mean that the “presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement,” allowing “standingless” parties to continue to participate in the proceeding.¹⁷⁵

Nonetheless, the role that a standingless intervenor can play in an ongoing case-or-controversy in an Article III court is limited in nature. For example, in *Diamond v. Charles*, the Supreme Court stated that an entity that lacks Article III standing can “ride ‘piggy-back’ on” another active party that does have standing by filing briefs on that party’s behalf and by participating in argumentation before the court.¹⁷⁶ The *Diamond* Court held, however, that it could not adjudicate the standingless third party’s request for judicial relief—in that case a request to reverse the lower court’s ruling—because there existed no other party to the suit that fulfilled the requirements of Article III standing and was seeking the identical relief as the intervening party.¹⁷⁷ Likewise, in *McConnell v. FEC*, the Supreme Court allowed various Members of Congress who lacked Article

¹⁶⁷ See *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

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

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

¹⁷² *Diamond*, 476 U.S. at 62.

¹⁷³ 478 U.S. at 719-21.

¹⁷⁴ *Id.* at 721.

¹⁷⁵ See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

¹⁷⁶ 476 U.S. at at 64. In *Diamond*, the State of Illinois opted not to appeal a lower court ruling striking down an Illinois law, and the Supreme Court held that a private citizen could not continue the appeal without Illinois actually participating before the Court. *Id.*

¹⁷⁷ *Id.* (“But this ability . . . exists only if the State in fact is an appellant before the Court; in the absence of the State in that capacity, there is no case for *Diamond* to join.”).

III standing to intervene as defendants to support the constitutionality of the Bipartisan Campaign Reform Act because “the Federal Election Commission ... [had] standing, and therefore [the Court did not need to] address the standing of the intervenor-defendants, whose position [was] *identical* to the FEC’s.”¹⁷⁸ Collectively these cases suggest that while third parties can participate in on-going matters in an Article III court, such intervenors are limited in their ability to seek relief from the court and take independent action in the suit.¹⁷⁹ In other words, even if there is an existing case-or-controversy, Article III prohibits a federal court from exercising the judicial power and providing judicial relief beyond that which an already existing party with standing has sought.¹⁸⁰ This makes sense because, in contrast to other aspects of justiciability, such as mootness, ripeness, or political questions, standing is not determined by looking at the case as a whole, but instead is focused on the party and the party’s relationship to the judicial relief requested.¹⁸¹ While many have assumed that an intervenor joining an on-going case-or-controversy “may participate as a fully-recognized party,”¹⁸² such a presumption is complicated by the requirements of Article III, as articulated by the Supreme Court, and may limit the role an intervening party can play in an on-going proceeding.¹⁸³

More generally, the Supreme Court has recognized the power of Article III courts to appoint friends of the court or *amici curiae* “to represent the public interest in the administration of

¹⁷⁸ 540 U.S. 93, 233 (2003) (emphasis added).

¹⁷⁹ See generally Elizabeth Zwickert Timmermans, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*, 84 NOTRE DAME L. REV. 1411, 1425 (2009); see also Kerry C. White, *Rule 24(a) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527, 553-54 (2002). Such a limit on the legal rights of third party intervenors in Article III courts is confirmed by the case law that has developed in the lower courts in the wake of *Diamond*. While a circuit split exists with respect to whether an intervenor must establish standing to intervene, compare *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (“[D]ecisions of this court hold an intervenor must also establish its standing under Article III of the Constitution.”), with *San Juan Cnty v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (“On rehearing ... we ... hold that parties seeking to intervene ... need not establish Article III standing ‘so long as another party with constitutional standing on the same side as the intervenor remains in the case.’”), even in circuits that accept that a party without standing can intervene in an on-going federal case, those courts generally require that at least one party exists that adopts the same position as the intervenor. See, e.g., *San Juan Cnty*, 503 F.3d at 1172; see also *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (“An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing.”); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 & n.17 (11th Cir. 1989) (holding that Article III is relevant to “define the type of interest” that a standingless intervenor can assert in front of a federal court).

¹⁸⁰ Cf. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press ... The Court has never ... permit[ted] a federal court to exercise supplemental jurisdiction over a party’s claim that does not itself satisfy [the] elements of the Article III inquiry”); see also 13B WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 3531 (“[A] party who might have standing to advance a claim not made may lack standing to advance a different claim that is made. And a party with standing to advance one claim actually stated may lack standing to advance other claims, just as a claim as to which one party has standing may lie beyond the standing of another party.”).

¹⁸¹ See *Flast v. Cohen*, 392 U.S. 83, 99 (1968); see generally 13B Wright, Miller, & Kane, FEDERAL PRACTICE AND PROCEDURE § 3531 (“Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination ... The focus is on the party, not the claim itself.”).

¹⁸² See White, *supra* note 179, at 550.

¹⁸³ As noted by the Supreme Court, the standing inquiry focuses on the party and whether that party can raise a particular “claim.” See *Warth*, 422 U.S. at 500 (“Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons ... a right to judicial relief.”). A claim, of course, is not isolated to the request for relief in the initial complaint, but has a far broader legal meaning. See, e.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining a claim as “[t]he assertion of an existing right; any right to payment or to an equitable remedy.”).

justice.”¹⁸⁴ In this vein, it is generally recognized and “uncontroversial” that a federal court can obtain briefing from a third party functioning as an *amicus*.¹⁸⁵ Having said that, the exact limits on the role of an *amicus* are unclear, as courts have had a range of opinions on when and how *amici* can participate in an Article III proceeding. Some courts have limited when an *amicus* can participate in a proceeding to instances where the *amicus* would be offering (1) a different perspective than the named parties;¹⁸⁶ (2) impartial information on matters of public interest;¹⁸⁷ or (3) observations on legal questions, as opposed to “highly partisan ... account[s] of the facts.”¹⁸⁸ Other courts have allowed *amici* to take a far broader role in Article III proceedings, including allowing *amici* to conduct discovery,¹⁸⁹ to present and question witnesses,¹⁹⁰ and even to enforce the district court’s judgment.¹⁹¹ If courts begin to allow a broader role for *amici* in Article III proceedings beyond merely providing a non-partisan account of the law in briefing, however, the *amicus* could become, as one commentator has noted, a “vessel enabling third parties, lacking the requisite standing, to enter federal courts” and make an end-run around Article III standing requirements.¹⁹²

With these principles in mind, it appears that a public advocate who has a more limited role in the FISA proceedings, such as through providing briefing on a topic of general interest as an *amicus*, would not be constitutionally infirm under Article III.¹⁹³ However, if a public advocate is envisioned to take on a broader role than that of the traditional third party *amicus*, it appears more likely that the privacy advocate would need to satisfy the traditional requirements of

¹⁸⁴ See *Universal Oil Products Co. v. Root Rfg. Co.*, 328 U.S. 575, 581 (1946) (Frankfurter, J.). For an extended discussion of the history and legal origins of *amici curiae*, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted), at pp. 9-11.

¹⁸⁵ See Rebecca Haw, *Amicus briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1250 (May 2011) (“But *amicus* participation has opened a constitutional back door to interested third parties who want to influence a judicial decision but lack standing or injury. Although the constitutionality of *amicus* briefs is uncontroversial, at times the Court has seemed ambivalent about their proper role.”).

¹⁸⁶ See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) (opining that the “vast majority of *amicus curiae* briefs are filed by allies of litigants” and “[t]hey are an abuse.”).

¹⁸⁷ See *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991); see also *Miller-Wohl, Inc. v. Commissioner of Labor & Indus., Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (describing *amicus curiae*’s role as directing court on matters of public interest to law); see generally 4 Am. Jur. 2d *Amicus Curiae* § 1 (1995) (describing traditional *amicus curiae* as neutrally providing information to court).

¹⁸⁸ See *New England Patriots Football Club, Inc. v. University of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979).

¹⁸⁹ See *Northside Indep. Sch. Dist. of Bexar v. Texas Educ. Agency* 410 F. Supp. 360, 362-63 (W.D. Tex. 1975)

¹⁹⁰ See *United States v. Dougherty*, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972).

¹⁹¹ See *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972).

¹⁹² See Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1280-82 (1992) (warning that expanded use of the *amicus* device allows would-be litigants to circumvent the standing requirements of Article III); see also *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (Easterbrook, J.) (noting that an *amicus*’ standing is typically overlooked because the *amicus*’ “presence makes no difference”); *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things*, No. BR 13-158 at *6-7 (FISA Ct. Dec. 18, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf> (“An *amicus curiae* has no standing to move for reconsideration of a decision nor does the Center have standing to seek *en banc* review by the Court.”).

¹⁹³ See *Universal Oil Products Co.*, 328 U.S. at 581 (“No doubt a court ... may avail itself ... of *amici* to represent the public interest in the administration of justice.”). For a full discussion of the legal issues raised by congressionally mandating or permitting the use of *amici* in the FISA courts, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted), at pp. 11-16.

constitutional standing.¹⁹⁴ Indeed, in a recent opinion, the FISC, while granting the motion of a public interest group to submit an *amicus* brief, denied the public interest group's motions that the court (1) reconsider a previous order of the court; (2) establish a docket for the United States' "next application" pertaining to the collection of bulk telephony metadata; (3) require the United States to file a public legal brief or declassify certain legal arguments about the bulk metadata collection program; and (4) order a hearing *en banc* to reconsider the United States' request for authorization of bulk telephony metadata collection.¹⁹⁵ For the FISC, "[t]he other relief requested by" the public interest group went "well beyond the appropriate limits of an *amicus curiae*," as the *amicus* had "no standing" to move for such relief.¹⁹⁶ Likewise, for a public advocate to formally seek some sort of judicial relief from an Article III court, such as having the ability to move for a judgment, move for reconsideration of a prior order, or file an appeal of an adverse ruling, the advocate would need to satisfy Article III's standing requirements. This is particularly true because the advocate would be intervening in a case where there is likely no existing party that is already moving for the "identical" relief that the advocate would seek.¹⁹⁷

And it seems unlikely that the FISA advocate, in his or her individual capacity, would have personally suffered any form of non-generalized injury as a result of the government's foreign surveillance activities.¹⁹⁸ Even if the FISA advocate could show an "objectively reasonable likelihood" that, for example, the government, pursuant to Section 702 of FISA, collected the communications of the advocate, standing remains as "an obstacle for litigants [to] challenge government surveillance programs" because the advocate did not personally suffer a concrete and particularized and actual or imminent injury.¹⁹⁹ Moreover, Congress cannot obviate Article III's

¹⁹⁴ See generally Bates, *supra* note 19, at 8 ("Proposals that would empower a permanent advocate to independently seek reconsideration of FISC decisions, or to appeal them to the Court of Review, would pose difficulties ... substantial standing and other constitutional issues would be presented if the advocate sought to challenge an authorization granted by the FISC."); see also Bradbury, *supra* note 20, at 16 ("Among other things, the Public Advocate would lack the Article III standing necessary to initiate an appeal.")

¹⁹⁵ *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158 at *1-2 (FISA Ct. Dec. 18, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf>.

¹⁹⁶ *Id.* at *6.

¹⁹⁷ *Cf. McConnell*, 540 U.S. at 233.

¹⁹⁸ See generally *Allen*, 468 U.S. at 754 ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). This is not to say that the advocate could not be bestowed with procedural rights, such as the right to acquire information in the course of a proceeding in which he is participating. *Cf. FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that a failure to obtain information that is required to be disclosed pursuant to statute can constitute a sufficient injury for Article III standing purposes). Nonetheless, relief pursuant to that procedural right cannot be utilized to pursue relief in the name of other statutory or constitutional rights without having standing to pursue such relief. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court.")

¹⁹⁹ See CRS Report R43107, *Foreign Surveillance and the Future of Standing to Sue Post-Clapper*, by (name redacted), at p. 12 (examining *Clapper v. Amnesty International USA*, 568 U.S.—, 133 S. Ct. 1138 (2013)). Relying on an officially acknowledged, but expired order of the FISC allowing for the collection of telephony metadata from the Verizon Business Network, two recent federal court decisions found that plaintiffs who were one of millions who allegedly had non-content information concerning their phone calls collected by the government had standing to challenge the government's program purportedly authorized under Section 215 of the PATRIOT Act. See *Klayman v. Obama*, —F. Supp.2d —, 2013 WL 6571596, at *14–17 (D.D.C. Dec. 16, 2013); *ACLU v. Clapper*, —F. Supp. 2d—, 2013 WL 6819708 at *9 (S.D.N.Y. Dec. 27, 2013). In one case, the court relied on the fact that the government had admitted that the program was "comprehensive" in nature and presumably included the data from major telecommunications providers to hold that plaintiffs had standing to challenge both the *collection* and *analysis* of the telephone data. See *Klayman*, 2013 WL 6571596, at *27. Another opinion viewed any questions regarding the implications of whether the collection of metadata constituted an injury as a question regarding the merits of the (continued...)

standing requirements by statutorily authorizing the advocate to, for example, appeal a FISC ruling.²⁰⁰ While there is some case law that would allow the advocate to intervene in an Article III

(...continued)

underlying Fourth Amendment claim and as irrelevant to standing. *See ACLU*, 2013 WL 6819708 at *9.

Nonetheless, these two cases may not be the end of the debate over whether any member of the general public can challenge the bulk metadata collection data program as it currently exists. The government, while acknowledging the existence of the expired order affecting one telephone carrier, has not officially acknowledged, let alone continued to acknowledge, the current identities of any specific providers from whom the government currently collects telephony metadata, *see, e.g.*, Robert S. Litt, ODNI General Counsel, *Privacy, Technology and National Security: An Overview of Intelligence Collection*, July 19, 2013, <http://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/896-privacy,-technology-and-national-security-an-overview-of-intelligence-collection>, arguably making the assertion that the government has collected one individual's metadata speculative. *See Clapper*, 133 S. Ct. at 1149, n.4 (noting that the burden is on plaintiffs to "prove their standing by pointing to specific facts."). Moreover, as one of the recent cases noted, the *merits* of a Fourth Amendment challenge to bulk collection of metadata is premised on a series of "inflections" that would require the government to not only collect the data, but to analyze it in some way. *ACLU*, 2013 WL 6819708 at *21; *see generally* *Horton v. California*, 496 U.S. 128, 142 n.11 (1990) (noting that government acquisition of an item without examining its contents "does not compromise the interest in preserving the privacy of its contents"). Having such a series of assumptions be the basis of a lawsuit to enjoin the government's collection of metadata could be equated to a similar series of assumptions that the Supreme Court in *Clapper* found to be fatal to a plaintiff's standing to seek injunctive relief to challenge section 702 of FISA. *See* 133 S. Ct. at 1148 ("[R] respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending."); *see generally* *Defenders of the Wildlife*, 504 U.S. at 560 (holding that to demonstrate standing, one must demonstrate the "invasion of a legally protected interest."). The arguably speculative nature of the injury suffered by a member of the general public may be especially pronounced after recent revelations that the metadata program does not successfully collect the call records of every American. *See* Ellen Nakashima, *NSA is collecting less than 30 percent of U.S. call data, officials say*, WASHINGTON POST, February 7, 2014, available at http://www.washingtonpost.com/world/national-security/nsa-is-collecting-less-than-30-percent-of-us-call-data-officials-say/2014/02/07/234a0e9e-8fad-11e3-b46a-5a3d0d2130da_story.html; *see also* Siobhan Gorman, *NSA Collects 20% or Less of U.S. Call Data*, WALL STREET JOURNAL, Feb. 7, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304680904579368831632834004>; *see generally* *In re: Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things*, No. BR 13-109, at *4 n.5 ("The production of all call detail records of all persons in the United States has never occurred under this program.") (FISC Aug. 29, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>. Additionally, while an injury to a constitutional right can potentially form the basis for standing, "there remains the question of what facts are sufficient to establish" that the plaintiff has suffered a concrete and particularized injury. *See* Erwin Chemerinsky, *FEDERAL JURISDICTION* 68 (6th ed. 2012). Given the existence of Supreme Court case law that requires "specific present objective harm" with respect to challenges to federal surveillance policies, *see Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' arising from plaintiffs' knowledge of the existence of "a governmental investigative and data-gathering activity," without "any specific action of the [Government] against them," were "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *see also* *Halkin v. Helms*, 690 F.2d 977, 999 (D.C. Cir. 1982) (applying *Laird's* "specific present objective harm" standard to find a plaintiff had no standing to launch a Fourth Amendment challenge to NSA surveillance activity), it remains an open question whether an ordinary plaintiff, such as the FISA advocate, who potentially was one of the millions subject to the government metadata collection program without having any distinct injury beyond the alleged violation of a legal right has standing to challenge the program. *See generally* CRS Report WSLG756, *Federal Court Ruling on the Bulk Metadata Collection Program: Standing-to-Sue*, by (name redacted) et al. More broadly, the two federal cases only relate to a specific program constituted under one part of FISA, and given *Clapper's* holding, it could be difficult for a public advocate to personally demonstrate an injury-in-fact necessary to challenge any other foreign surveillance programs or laws.

²⁰⁰ *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Article III of the Federal Constitution, thus permitting litigation by one who otherwise would be barred by the prudential standing rules; in no event, however, may Congress abrogate the Article III minima to the effect that a plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted."); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing.").

case without having to establish standing, the advocate would still need another party, such as a telecommunications provider, to already be engaged in the FISA proceeding in order to participate in such a proceeding.²⁰¹

Third-Party Standing Doctrine and a Public Advocate

Given the potential difficulties with the FISA advocate having standing in his own capacity to seek judicial relief from the FISC, it could be argued that the advocate should invoke the rights of absent third parties to obtain standing. Such an argument necessitates a discussion regarding the law of third-party standing and representational standing. Standing-to-sue “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”²⁰² One of the prudential principles that bears on the question of standing is that a party seeking judicial relief from a federal court cannot “rest his claim to relief on the legal rights or interests of third parties,” rather than his own.²⁰³ The Supreme Court has recognized a limited exception to this principle when the litigant has a “close relation to the third party,” and “some hindrance” exists “to the third party’s ability to protect his or her own interests.”²⁰⁴ Prudential standing requirements, unlike their Article III counterparts, can, however, be “modified or abrogated by Congress.”²⁰⁵ Nonetheless, it is assumed that “Congress legislates against the background of [the Court’s] prudential standing doctrine,” and, accordingly, the prudential standing rules—including the rule against third-party standing—apply unless “expressly negated” in statute.²⁰⁶ Accordingly, legislation providing the public advocate the right to litigate on behalf of third parties will need to explicitly say so in the text of such a proposal.²⁰⁷ More importantly, even if Congress explicitly abrogates the prudential standing requirements, Congress cannot “abrogate the [Article] III minima” requiring a party seeking judicial relief to have suffered an

²⁰¹ *Diamond*, 476 U.S. at 62; see also *McConnell*, 540 U.S. at 233. For a discussion of when a telecommunications firm can challenge a FISA request, see CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted), at pp. 2-6.

²⁰² *Warth*, 422 U.S. at 498.

²⁰³ *Id.* at 499.

²⁰⁴ See *Powers v. Ohio*, 499 U.S. 400, 425 (1991).

²⁰⁵ See *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

²⁰⁶ *Id.* at 163.

²⁰⁷ In case law predating *Bennett*, the Supreme Court held that Congress abrogated the prudential standing requirements in sections 810 and 812 of the Fair Housing Act of 1968. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). A leading secondary source suggests that “[m]any other Acts of Congress appear on their face to contain very broad grants of standing,” eliminating prudential standing requirements for such claims. See WRIGHT AND KANE, *LAW OF FEDERAL COURTS* § 13 n.87 (7th Ed. 2011). Other authority suggests that the standard for Congress to lawfully abrogate prudential standing requirements is much higher. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1162 (10th Cir. 2013) (Bacharach, J., concurring) (arguing that Congress must either “mention[] prudential restrictions” or say “that the standing rules under Article III [are] exclusive” to abrogate prudential standing requirements). In the absence of such a waiver of the prudential standing requirements, it is doubtful that a public advocate would have the right to seek judicial relief based on the legal rights of third parties under the exception to the traditional third-party standing rule as enunciated in *Powers*. First, the public advocate may have difficulty in arguing that he personally has suffered an injury in fact, see *supra* note 199 and accompanying text. *Powers*, 499 U.S. at 425. Second, it is unlikely that the public advocate has a sufficiently close relationship with the public-at-large or those whose privacy rights are threatened by government foreign surveillance efforts, as the advocate would be representing “unknown” and “unascertained” clients. See *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (“The attorneys before us do not have a ‘close relationship’ with their alleged clients; indeed they have no relationship at all.”); cf. *infra* “Next Friend Standing and the Public Advocate.”

injury-in-fact that is likely to be redressed if the requested relief is granted.²⁰⁸ In other words, in order for a public advocate to seek judicial relief on behalf of third parties not before the FISA courts, the advocate himself would likely need to satisfy Article III's standing requirements.

Representational Standing and a Public Advocate

Notwithstanding the tenets of the third-party standing doctrine, there is another aspect of standing law that does allow an individual or group to assert the rights of an absent third party without having to demonstrate that the litigant himself has suffered an injury-in-fact. Specifically, under the doctrine of “representational standing” in “certain circumstances, particular relationships ... are sufficient to rebut the background presumption that litigants may not assert the rights of absent third parties.”²⁰⁹ There are several strands of the doctrine of representational standing. For example, through “associational standing,” a legal theory often relied on in environmental lawsuits,²¹⁰ an association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested “requires the participation of the individual members in the lawsuit.”²¹¹ Likewise, the Court has extended the representational standing doctrine such that states have standing to litigate as *parens patriae* to protect certain quasi-sovereign interests²¹² and an “assignee of a claim has standing to assert the injury in fact suffered by the assignor.”²¹³ Notwithstanding these various branches of the doctrine, with respect to the specific issue of allowing a FISA public advocate to seek judicial relief on behalf of a third party, two strands of representational standing are of particular relevance: “next friend” standing and the “agency theory” of standing.

Next Friend Standing and a Public Advocate

“Next friend” standing—the concept that under certain circumstances a qualifying party may be able to bring claims as a “next friend” on behalf of the party with proper standing²¹⁴—is potentially relevant to the question of whether a public advocate can seek judicial relief from the FISA courts on behalf of those whose privacy interests are implicated by government foreign surveillance efforts. The Court enunciated the limits of next friend standing in *Whitmore v. Arkansas*.²¹⁵ In *Whitmore*, after rejecting that the petitioner had standing in his individual capacity

²⁰⁸ *Gladstone, Realtors*, 441 U.S. at 100.

²⁰⁹ *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 557 (1996).

²¹⁰ *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

²¹¹ *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

²¹² *Massachusetts v. EPA*, 549 U.S. 497, 519-520 & n.17 (2007).

²¹³ *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

²¹⁴ *See* Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 79 n.22 (Fall 2002). “Next Friend” standing has several corollaries, such as when a litigant proceeds as a guardian *ad litem* for a minor, and as a consequence, the doctrine would govern with respect to questions about whether labeling the advocate as a guardian satisfies Article III concerns. *See Morgan v. Potter*, 157 U.S. 195, 198 (1895) (explaining that a “Next Friend” is “neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem*, by whom a suit is brought or defended in behalf of another”); *see also* 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1548 (“A guardian *ad litem* or next friend, on the other hand, always has been deemed a nominal party only; the ward is the real party in interest ...”).

²¹⁵ 495 U.S. 149 (1990).

to “press an Eighth Amendment objection” to a fellow death row inmate’s conviction and sentence, the Court evaluated whether Jonas Whitmore could proceed as “next friend of Ronald Gene Simmons.”²¹⁶ As the *Whitmore* Court explained, a “‘next friend’ does not himself become a party to” a case, “but simply pursues the cause on behalf of [another], who remains the real party in interest.”²¹⁷ Although “no federal statute authoriz[ed] the participation of ‘next friends’” with respect to Whitmore’s claim, the Court held that even with a federal statute granting such authority, the “scope of any federal doctrine of ‘next friend’ standing is no broader than what is permitted under the *habeas corpus* statute,”²¹⁸ which placed “at least two firmly rooted prerequisites for ‘next friend’ standing.”²¹⁹ First, a “‘next friend’ must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.”²²⁰ Second, the “‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate,” which may require that the “friend” have “some significant relationship with the real party in interest.”²²¹ The Supreme Court recognized that these two limitations on the doctrine “are driven by the recognition” that “if there were no restriction on ‘next friend’ standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of [Article] III simply by assuming the mantle of ‘next

²¹⁶ *Id.* at 161-62.

²¹⁷ *Id.* at 163.

²¹⁸ Next friend standing is generally used in the context of *habeas corpus* proceedings. *United States v. Ken Int’l Co.*, 897 F. Supp. 462, 464 (D. Nev. 1995). Nonetheless, as *Whitmore* suggests, there are other contexts where next friend standing can be relevant. 495 U.S. at 162 n.4 (noting that some courts have “permitted ‘next friends’ to prosecute actions outside the *habeas corpus* context on behalf of infants, other minors, and adult mental incompetents.”).

²¹⁹ *Id.* at 163-165.

²²⁰ *Id.* at 163.

²²¹ *Id.* at 163-64; *see also* *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159-60 (9th Cir. 2002) (“We have subsequently described the two-pronged *Whitmore* inquiry as follows: ‘In order to establish next-friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner.’”) (*quoting* *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001)). While at least one federal appellate court continues to hold that a “significant relationship” between the real party-in-interest and their representative is not absolutely needed for next-friend standing, *see* *Sam M. v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010) (“While the Supreme Court recognized that some courts have ‘suggested’ that a Next Friend must also have a significant relationship with the real party in interest, the Court did not hold that a significant relationship is a necessary prerequisite for Next Friend status.”); *Coalition of Clergy*, 310 F.3d at 1165 (Berzon, J., concurring) (“I write separately because I do not believe that we need to address whether next friend standing always requires a significant relationship. If we did need to address that question, I would be inclined to hold that a significant relationship is not always necessary.”), the overwhelming majority of federal appellate courts have concluded otherwise. *See* *In re Moser*, 69 F.3d 691, 693 (3^d Cir. 1995) (affirming a plaintiff had standing as next friend because he “clearly is dedicated to the best interests of Leon Moser and has a significant relationship with him”); *see also* *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 (4th Cir. 2002) (“We conclude that the significant-relationship inquiry is in fact an important requirement for next friend standing”); *Lucarelli v. United States*, 65 Fed. Appx. 926, 927 (6th Cir. 2003) (describing a three part test for next friend standing); *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) (“He must have some significant relationship with the real party in interest”); *Amerson v. Iowa*, 59 F.3d 92, 93 n.3 (8th Cir. 1995) (“[N]ext friend has burden to establish ... that she has some significant relationship with real party in interest”); *Coalition of Clergy*, 310 F.3d at 1159-60; *Centobie v. Campbell*, 407 F.3d 1149, 1151 (11th Cir. 2005) (concluding plaintiff lacked next friend standing because, in part, because she did “not have ‘some significant relationship with the party in interest.’”). However, even in the First Circuit, which disclaims the absolute necessity of a “significant relationship” test, the appellate court limited its holding to situations where the real party in interest had “no significant relationships” with any other individual and the assertion of the rights of others is not a “mere pretext” for advancing ulterior political or economic aims.” *See Sam M.*, 608 F.3d at 91 (internal citations omitted) (holding that certain foster care children lacked “significant ties with their parents” to allow for a third party to assert their interests as next friends).

friend.”²²² Ultimately, the Court in *Whitmore* concluded that the petitioner had failed to demonstrate that Simmons was “unable to proceed on his own behalf” and dismissed Whitmore’s next friend claim for want of standing.²²³

Assuming the doctrine applies outside of the context of a criminal proceeding,²²⁴ next friend standing is likely a difficult theory on which to base standing for a public advocate to seek judicial relief on behalf of the public-at-large or unnamed members of the public whose privacy has been allegedly threatened. First, next friend standing still requires that the real party in interest suffer an injury-in-fact,²²⁵ and it remains unclear whether certain foreign surveillance conduct results in a concrete and particularized and actual or imminent injury to any member of the general public for whom the advocate could serve as the “next friend.”²²⁶ Second, an argument can be made that the real parties in interest that the FISA advocate represents are capable of protecting their own rights and prosecuting an action on their own. Unlike the typical next friend, the FISA advocate would not be representing someone who is suffering from a “mental or physical disability precluding their representation.”²²⁷ Arguably, a target of government foreign surveillance does not have “access” to the FISA courts because of a lack of knowledge about the surveillance activity and because of the lack of a statutory mechanism for a member of the public to be heard before the FISC. Nonetheless, the type of inaccessibility to a court in the “next friend” standing context typically concerns a party who is “held incommunicado” and subject to “severe restrict[ions]” on their liberty,²²⁸ as opposed to a party who cannot access a particular forum for statutory reasons or a party who is simply unaware that their rights are being violated.²²⁹ Moreover, as two recent cases illustrate, members of the general public may have access to the courts to assert their privacy concerns regarding government

²²² *Whitmore*, 495 U.S. at 164. Some have argued that the restriction on next friend standing in *Whitmore* “did not turn on Article III” because the rule derived from “decisions applying the *habeas corpus* statute.” Caroline Nasrallah Belk, *Next Friend Standing and the War on Terror*, 53 DUKE L.J. 1747, 1758 (April 2004). However, such a view appears to be in conflict with language in *Whitmore* stating that the restrictions based on the next friend doctrine are necessary to preserve the “jurisdictional limits of Article III.” 495 U.S. at 164. Moreover, the *Whitmore* Court was clear that even assuming that there was congressional authorization for next friend standing akin to the *habeas* statute, the doctrine was “no broader than what is permitted by that” law. *Id.* at 164-65. It should be noted that in *Elk Grove United School District v. Newdow*, the Court concluded that because California law deprived the respondent of the right to sue as next friend that he lacked “prudential standing to bring this suit in federal court.” 542 U.S. 1, 17 (2004). Notwithstanding this language, the Court’s reference to prudential standing in *Newdow* appears to be centered on the fact that the standing inquiry turned on “hard questions of domestic relations” which made it “prudent” for “the federal court to stay its hand....” *Id.* Nothing in *Newdow* indicates that the next friend standing inquiry is *per se* prudential as opposed to constitutional in nature, and *Whitmore*’s holding appears to confirm that conclusion. *See* 495 U.S. at 164-65. In other words, it appears unlikely that Congress could circumvent the limitations imposed by *Whitmore*, as that could provide a means by which the legislature could override core Article III limits on the judicial power. *Id.*

²²³ 495 U.S. at 166.

²²⁴ *See supra* note 218.

²²⁵ *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 24 (D.D.C. 2010).

²²⁶ *See supra* note 199 and accompanying text; *but see Clapper*, 133 S. Ct. at 1154 (rejecting argument by respondents that “they should be held to have standing because otherwise the constitutionality of [section 702 of FISA] could not be challenged.”).

²²⁷ *See Coalition of Clergy*, 310 F.3d at 1160.

²²⁸ *See id.* at 1160-61.

²²⁹ In contrast, the context of third-party standing, where the litigant can personally satisfy Article III’s standing requirements, a third party’s inability to sue because of a lack of statutory redress or awareness of the injury can suffice such that the litigant can assert the legal rights of the absent third party. *See generally* ERWIN CHERMERINKSY, FEDERAL JURISDICTION 85-86 (6th ed. 2012).

surveillance activity.²³⁰ As the *Clapper* court noted, judicial review in the context of challenges to foreign surveillance efforts by the public is “not farfetched” and “by no means” are FISA proceedings “insulate[d]” from judicial review, arguably making it difficult for a public advocate to contend that the real party in interest cannot access a federal court to raise his own interests.²³¹

Third, the public advocate may have difficulty demonstrating that he has a “significant relationship” between himself and the absent real parties in interest.²³² It is unclear whether any of the FISA advocate proposals envision the advocate seeking relief on behalf of a specific individual or specific group of people,²³³ and federal courts have been loath to grant “next friend” standing to persons who cannot identify a real party in interest and can only state they are acting on behalf of a large group of unidentified individuals.²³⁴ As one federal court noted, one cannot identify “any case in any context in which [a litigant] has been allowed to pursue *habeas* (or other) relief on behalf of a non-class of unidentified [persons] where [the persons’] identity is unknown by counsel representing” them.²³⁵ Moreover, the advocate very likely will not have any sort of prior relationship with the vast majority of the real parties in interest—indeed, he is a “stranger” to those that he represents—indicating that there is an insufficient relationship.²³⁶ And, given the secrecy that surrounds the FISA judicial review process and the confidentiality obligations likely to be imposed on a FISA advocate,²³⁷ any proceedings involving the FISA advocate likely would be “devoid of any effort [by the advocate] to even communicate” with the real parties in interest²³⁸ and likely lack any sort of consent from the real party in interest to pursue his judicial relief,²³⁹ indicating that the advocate lacks the necessary relationship that may be needed to be a “next friend.” Even amongst the courts that have embraced the most “elastic construction of the significant relationship requirement”²⁴⁰ for “next friend” standing have only done so in cases where each real party in interest had absolutely “no significant relationships” and where the assertion of the rights of the real party in interest was not a pretext for advancing

²³⁰ See *supra* note 199 and accompanying text.

²³¹ 133 S. Ct. at 1154, n.8.

²³² *Whitmore*, 495 U.S. at 163-165.

²³³ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (stating that the advocate “represent[s] the privacy and civil liberties interests of the people of the United States ...”); see also *Bates*, *supra* note 19, at 4 (“Advocates of the type put forward in various proposals to change FISA would not actually represent a proposed target of surveillance or any other particular client.”).

²³⁴ See, e.g., *Coalition of Clergy*, 310 F.3d at 1162 (rejecting that a coalition of “clergy, lawyers, and law professors” could assert the rights of Guantanamo “detainees *en masse*.”); *Bell v. United States*, No. 07-2594, 2008 WL 4630328 at *1 (E.D. Cal. Oct. 17, 2008) (“Nowhere in his petition does he state that the real party in interest cannot appear on his own behalf, nor does he state he has any kind of significant relationship with the real party in interest. In fact, he does not even identify an individual on whose behalf he is acting. Stating he is acting on behalf of all the other federal prisoners is not sufficient.”); *Does v. Bush*, No. 05-313, 2006 WL 3096685 at *5 (D.D.C. Oct. 31, 2006) (“Counsel cannot demonstrate that Counsel is dedicated to the best interests of unspecified individuals based only on speculation as to unidentified detainees’ intentions or wishes to litigate in United States courts.”).

²³⁵ See *Does*, 2006 WL 3096685 at *7.

²³⁶ See *T.W. by Enk*, 124 F.3d at 897 (“To entitle a stranger to bring suit on behalf of children or other legal incompetents on the basis of blunderbuss allegations in a complaint is too facile a circumvention of the ordinary limitations on standing.”).

²³⁷ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(a)(1) (1st Sess. 2013).

²³⁸ See *Coalition of Clergy*, 310 F.3d at 1162.

²³⁹ See *Sanchez-Velasco v. Sec’y of the Dep’t of Corr.*, 287 F.3d 1015, 1027 (11th Cir. 2002) (“We have concluded that ‘some significant relationship’ does exist when the would-be next friend has served in a prior proceeding as counsel for the real party in interest and did so with his consent.”).

²⁴⁰ *Coalition of Clergy*, 310 F.3d at 1162.

ulterior political aims.²⁴¹ Given that the burden “is on the ‘next friend’ clearly to establish the propriety of his status, and thereby justify the jurisdiction of the court” over the next friend’s claims,²⁴² it may be difficult for the FISA advocate, whose general mission may have nothing to do with a specific individual, to demonstrate that he can proceed as the next friend of certain unidentified members of the public.²⁴³

It should be noted that the types of litigants who the Supreme Court, pursuant to various corollaries²⁴⁴ of the doctrine of next friend standing, has determined can seek judicial relief on behalf of absent third parties seem distinguishable from the role of the FISA advocate.²⁴⁵ A litigant that operates even pursuant to a statute as a guardian ad litem or a trustee does so pursuant to a host of long-established legal obligations²⁴⁶ owed to that absent party, a breach of which would expose the litigant to civil liability.²⁴⁷ With respect to the FISA advocate, while several proposals have suggested that the advocate has a general and broadly defined mission to protect the civil liberty interests of the real parties in interest he represents,²⁴⁸ no proposal appears to create any sort of “obligation” whereby the advocate is discharging a “legal obligation [that] is an independent, personal benefit that supports” the advocate’s standing in federal court.²⁴⁹ Relatedly, in contrast to the concept of a trustee or a guardian ad litem, a FISA public interest advocate is a wholly novel concept in American law²⁵⁰ and the Supreme Court has interpreted the judicial power to be limited to “cases and controversies of the sort *traditionally* amenable to and resolved by the judicial process,”²⁵¹ which arguably would exclude the power to adjudicate the advocate’s prayers for relief on behalf of an absent third party.²⁵²

²⁴¹ See *Sam M.*, 608 F.3d at 91-92.

²⁴² *Whitmore*, 495 U.S. at 164.

²⁴³ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (providing that the FISA advocate’s mission is to “represent the privacy and civil liberties interests of the people of the United States in the matter before the court.”).

²⁴⁴ See *supra* note 214 (noting that the doctrines of standing for guardians ad litem and trustees fall under the broader doctrine of next friend standing).

²⁴⁵ See *Spring Communs. Co.*, 554 U.S. at 288.

²⁴⁶ See, e.g., *Jones v. Brennan*, 465 F.3d 304, 308 (7th Cir. 2006) (collecting cases holding that a guardian ad-litem, when not acting as an agent of a court, can be liable if they “step outside the scope of their agency and engage in self-dealing.”); see also *Gibbs v. Gibbs*, 210 F.3d 491, 510 (5th Cir. 2000) (noting that a guardian ad litem can be liable in a civil action for damages resulting from a breach of his duties as a personal representative for the minor.). For similar authority respecting a trustee’s legal obligations, see *generally* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007) (establishing that a trustee owes the beneficiary of a trust a duty of loyalty).

²⁴⁷ See, e.g., *Sprint Communs. Co.*, 554 U.S. at 288 (“And if the aggregators somehow violate that contractual obligation ... each payphone operator would be able to bring suit for breach of contract.”).

²⁴⁸ See, e.g., U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 (1st Sess. 2013) (providing that the FISA Special Advocate “must vigorously advocate before the {FISC} or the Foreign Surveillance Court of Review ... in support of legal interpretations that protect individual privacy and civil liberties.”).

²⁴⁹ Cf. *Spring Communs. Co.*, 554 U.S. 269, 304 n.2 (Roberts, C.J., dissenting); see also *id.* at 288 (agreeing with dissenting opinion that entities like “trustees” and “guardians ad litem” must have “some sort of ‘obligation’ to the parties whose interests they vindicate through litigation” to have standing to seek judicial relief from a federal court).

²⁵⁰ See *supra* note 3.

²⁵¹ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998); see also *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2665 (2013) (noting that *qui tam* assignments and the “next friend” doctrine do not violate Article III because of tradition of such actions dating back to 13th and 17th Centuries, respectively); but see *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation.”).

²⁵² Indeed, circuit courts have rejected the argument that all a litigant needs to have standing is the “legal authority to (continued...) ”

Perhaps the best argument proponents of establishing an office of the FISA advocate can make with respect to next friend standing is that *Whitmore* and its progeny are simply distinguishable based on the fact that a FISA advocate would be acting pursuant to some sort of statutory authorization. Specifically, an argument can be made that unlike the situation in *Whitmore*, where a prisoner was attempting to proceed on behalf of a fellow inmate without the aid of any statute granting such authority,²⁵³ the FISA advocate would be embedded with a legal obligation to represent the privacy rights of the general public or those that are the targets of government surveillance, and such an “obligation” allows the advocate to vindicate the rights of third parties through litigation.²⁵⁴ As a corollary to that argument, one could conceivably contend that, given the needed qualifications to be a FISA advocate²⁵⁵ and the statutory mission of the office in protecting the constitutional rights of the public,²⁵⁶ the advocate must necessarily as a matter of law be “truly dedicated to the best interests” of the real parties in interest that he represents.²⁵⁷

Nonetheless, formally empowering the advocate to be the “next friend” of the general public or those who are the target of government surveillance in a federal statute may not alleviate the general Article III concerns in allowing an individual to assert the interests of amorphous, absent third parties with whom he has no relationship. First, the holding of *Whitmore* did not turn on the fact that the petitioner lacked the statutory authority to proceed as a “next friend,”²⁵⁸ and federal courts that have followed *Whitmore*’s limits on “next friend” standing have often done so in the context where Congress has affirmatively allowed third parties to assert the rights of friends under the federal *habeas* statute.²⁵⁹ In fact, the *Whitmore* Court noted that the “scope of any federal doctrine of ‘next friend’ standing is no broader than what is permitted by the *habeas corpus* statute,” indicating that there are indeed limits as to what “friends” Congress can statutorily employ to represent absent third parties in federal court.²⁶⁰

Second, an act of Congress that allows a public advocate to seek judicial relief because of a generalized interest in representing the public’s privacy interests would appear to violate core Article III concerns animating the *Whitmore* decision. Specifically, the Supreme Court in *Whitmore* held that the restrictions on “next friend” standing were necessary to prevent a “litigant asserting only a generalized interest in constitutional governance [from] circumvent[ing] the

(...continued)

bring [a] claim on behalf of” a party that has been injured. *See, e.g.,* David v. Alphin, 704 F.3d 327, 336 (4th Cir. 2013).²⁵³ 495 U.S. at 164 (noting that *Whitmore*’s purported authority to proceed on behalf of fellow prisoner Simmons was a product of Arkansas common law).

²⁵⁴ *Cf. Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008) (noting that entities like “trustees guardians ad litem, and the like” can assert the interests of third parties because of the “obligation” they have to those parties).

²⁵⁵ *See, e.g.,* U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 -§ 902(b)(2)(B) (1st Sess. 2013) (providing that candidates for the FISA advocate position should be considered based on their “litigation and other professional experience,” “the experience ... in areas of law that the ... Advocate is likely to encounter ... , and the demonstrated commitment ... to civil liberties.”).

²⁵⁶ *See, e.g.,* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (providing that the FISA advocate’s mission is to “represent the privacy and civil liberties interests of the people of the United States in the matter before the court.”).

²⁵⁷ *Whitmore*, 495 U.S. at 163.

²⁵⁸ *Id.* at 166 (“We therefore hold that *Whitmore*, having failed to establish that Simmons is unable to proceed on his own behalf, does not have standign to proceed as ‘next friend’ of Ronald Gene Simmons.”).

²⁵⁹ *See, e.g., Coalition of Clergy*, 310 F.3d at 1157-58.

²⁶⁰ 495 U.S. at 164-65.

jurisdictional limits of [Article] III by simply assuming the mantle of ‘next friend.’²⁶¹ The Court’s reference to a litigant who asserts a “generalized interest in constitutional governance” is strikingly similar to proposals for a FISA advocate charging the office with the generalized duties to “protect individual rights,”²⁶² “represent the privacy and civil liberties interests of the people of the United States,”²⁶³ or “vigorously advocate ... in support of legal interpretations that protect individual privacy and civil liberties.”²⁶⁴ Given that Congress may not “abrogate” “Article III minima,” it is unclear how statutorily labeling a public advocate as, for example, a “next friend” of the general public would not merely be a unconstitutional attempt to expand the judicial power such that a federal court could grant judicial relief to someone with only a generalized interest in the litigation.²⁶⁵ Moreover, if Congress can grant a public advocate standing as a next friend, it is difficult to understand what principle would limit Congress from overriding the federal judiciary’s closely guarded limits on its jurisdiction by statutorily allowing “anyone in [a] universe of interested persons” to “seek in federal court what [that person] could not otherwise obtain—namely, the vindication of objectives better suited to political as opposed to judicial resolution.”²⁶⁶ As a consequence, the statutory authorization of a public advocate as a “next friend” may very well not alleviate any Article III concerns created by such a proposal.

Agency and a Public Advocate

Nonetheless, even if a public advocate cannot, in his or her individual capacity or as “next friend” of the real party in interest, satisfy the requirements of Article III standing, there is some authority suggesting that the advocate could still seek judicial relief in a FISA proceeding if he or she is authorized to appear and assert the interests of a party who does have standing as that real party in interest’s agent.²⁶⁷ The “agency theory” of standing is a distinct thread of the broader representational standing doctrine²⁶⁸ and contrasts with “next friend” standing in that agency theory is not centrally dependent on the real party in interest’s inability to directly assert his legal rights or a “significant relationship” between the litigant and the party whose rights are asserted.²⁶⁹ Instead, to seek judicial relief as an agent of another in an Article III court, a litigant must be authorized by that third party to do so such that the litigant’s interest is generally not divorced from the interests of the principal.²⁷⁰

²⁶¹ 495 U.S. at 164.

²⁶² FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(d)(2) (1st Sess. 2013).

²⁶³ Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013).

²⁶⁴ U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 (1st Sess. 2013).

²⁶⁵ *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979); *see also* footnote 196.

²⁶⁶ *Hamdi*, 294 F.3d at 606.

²⁶⁷ *See Karcher v. May*, 484 U.S. 72, 84 (1987) (White, J., concurring) (noting that an authorized representative has the authority to participate as a party in an Article III court) (citing *INS v. Chadha*, 462 U.S. 919, 940 (1983)); *see also Hollingsworth v. Perry*, 133 S.Ct. 2652, 2665 (2013) (noting that *Karcher* stands for the proposition that authorized official acting in an official capacity can act as a party in an Article III proceeding).

²⁶⁸ *See Myriam E. Gilles, Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 348 (2001).

²⁶⁹ *See Whitmore*, 495 U.S. at 164.

²⁷⁰ *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (“It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States ... This analysis is precluded, however, by the fact that the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery.”) (emphasis in original).

The most recent Supreme Court case to enunciate the limits of agency theory and Article III standing was *Hollingsworth v. Perry*, where the Court considered an Equal Protection challenge to Proposition 8.²⁷¹ That California law amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.²⁷² Because the state officials had declined to appeal an adverse district court ruling, however, the Supreme Court requested briefing on the question of whether the official “proponents”²⁷³ of the proposition had standing under Article III to appeal the district court’s decision.²⁷⁴ After rejecting the argument that the proponents of Proposition 8 had a particularized injury,²⁷⁵ the Court considered the argument that the plaintiffs were formally authorized to litigate on behalf of the State of California.²⁷⁶

Hollingsworth ultimately rejected this proposition, noting that while a third party can be authorized to represent the interests of a state when that party is an officer of the state, acting in an official capacity,²⁷⁷ California law, as interpreted by the California Supreme Court, did not “describe[the] petitioners” as being “authorized to act” as “agents of the people.”²⁷⁸ Instead, the Supreme Court found that the California High Court had merely allowed the “petitioners [to] argue in defense of Proposition 8,” which did not mean that the proponents were “*de facto* public

²⁷¹ 133 S. Ct. 2652 (2013). It should be noted, however, that the agency theory of standing typically arises in the context of public law litigation, such as in *Vermont Agency*, where a private actor sued under the False Claims Act purportedly as the agent of the federal government, 529 U.S. at 772, or in *Hollingsworth*, where private parties argued that they were seeking judicial relief through an appeal as the agents of the State of California. 133 S. Ct. at 2666. Notwithstanding agency theory’s roots in public law litigation, the logic of *Vermont Agency* and *Hollingsworth* would seem to indicate a litigant who has a true agency relationship with a private party may litigate on behalf of that private party. Nonetheless, it should be noted that some courts, perhaps conflating the requirements of having standing as an assignee with the requirements of having standing as an agent, *cf. Vt. Agency*, 529 U.S. at 772, have held that a litigant who is the “agent” of a private client does not have standing to seek judicial relief for his client unless the litigant also has “an ownership stake in any claims its clients might pursue against defendants.” *W. R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109 (2d Cir. 2008) (citing *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)). However, *Vermont Agency* indicates that agency theory is distinct from having standing as an assignee, *see Vt. Agency*, 529 U.S. at 772-73, signaling that the different branches of representational standing should be treated differently. Cases suggesting that an agent does not have standing to seek judicial relief on behalf of a non-governmental principal may logically be viewed as cases in which there simply was no statutory right for the agent to pursue the suit in the agent’s name. *See Advanced Magnetics, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) (affirming a district court’s ruling that the litigant had no standing to proceed on behalf of his clients, because under New York law having the power of attorney did not enable the agent to bring suit in his own name). Relatedly, most federal civil actions prosecuted on behalf of an agent for a principal are done under the name of the real party in interest pursuant to Federal Rule of Civil Procedure 17. *See Fed. R. Civ. P. 17(a)* (stating that subject to several exceptions an “action must be prosecuted in the name of the real party in interest.”). Hence, there are few examples in the context of private law where an agent seeks judicial relief in his name as opposed to the name of the principal he represents.

²⁷² *Hollingsworth*, 133 S. Ct. at 2659.

²⁷³ Under Cal. Elec. Code Ann. §342, “[p]roponents of an initiative or referendum measure’ means ... the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General ... ; or ... the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body.”

²⁷⁴ *Hollingsworth*, 133 S. Ct. at 2661.

²⁷⁵ *Id.* at 2663 (holding that the official petitioners “have no ‘personal stake’ in defending its enforcement that is distinguishable from the general interest of every citizen of California.”).

²⁷⁶ *Id.* at 2664.

²⁷⁷ *Id.* at 2665 (citing *Karcher*, 484 U.S. at 84). The Court did note that there are historical exceptions to the rule that a third party typically does not have standing to assert the interests of another. *Hollingsworth*, 133 S. Ct. at 2665 (noting the historical anomalies of the *qui tam* action, “next friend” standing, and shareholder-derivative suits).

²⁷⁸ *Id.* at 2666.

officials.”²⁷⁹ The Supreme Court went further to dispute the contention made by the petitioners that they were the “agents of” California²⁸⁰ because, among other things, there existed no principal controlling the agent’s actions,²⁸¹ and the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal.²⁸² In short, *Hollingsworth* held that to have standing to seek judicial relief on behalf of an absent third party a litigant must be officially authorized by that third party to do so and may need to have a relationship with that third party that exhibits some of the “most basic features of an agency relationship.”²⁸³

With respect to the FISA privacy advocate and the agency theory of standing, the critical question is who is the real party in interest on whose behalf the advocate would be seeking some form of judicial relief—such as a motion for reconsideration or an reversal of a lower court decision. Assuming the advocate, in asking, for example, to appeal the decisions of the FISC, is purporting to represent the views of and act as the agent of the “public-at-large” or of those who are targeted by the government’s surveillance efforts, the logic of *Hollingsworth* would lead to the conclusion that the advocate cannot constitutionally do so. First, to the extent the advocate is representing the views of the public-at-large, the advocate would not be representing the views of a particular party who does have standing, but instead would be representing the views of a very “generalized” interest.²⁸⁴ Moreover, to the extent the advocate purports only to be the agent of those who are harmed in a way by government surveillance that amounts to an injury for constitutional standing purposes,²⁸⁵ the privacy advocate would very likely not be authorized in any sort of official capacity by those targeted by the government.²⁸⁶ After all, those targeted by the government under FISA are generally unaware of any specific government surveillance conduct.²⁸⁷ Additionally, there does not appear to be any of the elements of an agency relationship

²⁷⁹ *Id.*

²⁸⁰ *Id.* (“And petitioners are plainly not agents of the State....”).

²⁸¹ *Id.* at 2666-67 (noting that the proponents “decided what arguments to make and how to make them.”).

²⁸² *Id.*

²⁸³ *Id.* at 2666. The dissent in *Hollingsworth* accused the majority of “demand[ing] that [a] state follow the Restatement of Agency.” 133 S. Ct. 2652, 2671 (2013) (Kennedy, J., dissenting). Nonetheless, nothing in the majority opinion makes such a stark requirement on Article III standing. The majority’s approval of New Jersey’s scheme as litigated in *Karcher* whereby the litigating authority of the state could be exercised by the Speaker of the General Assembly and the President of the Senate, would seem to indicate that an agency relationship, while relevant to the standing inquiry, is not absolutely controlling. 133 S. Ct. at 2664-65. Instead of noting the legitimacy of New Jersey’s law because of the formal agency relationship that the legislators had with state, the *Hollingsworth* Court relied on the fact that the New Jersey law authorized certain official offices to proceed on behalf of the state, distinguishing the New Jersey law from the California law at issue in the Proposition 8 case. *Id.* at 2665 (“The point of *Karcher* is ... [that] *Karcher* and *Orechio* were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing.”). This view has been followed by the early court opinions interpreting *Hollingsworth*. See, e.g., *In re Auerhahn*, 724 F.3d 103, 117 (1st Cir. 2013) (“The Court based its decision [in *Hollingsworth*] partly on the petitioners’ lack of an agency relationship with the State.”) (emphasis added).

²⁸⁴ *Id.* at 2667 (“And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”).

²⁸⁵ Outside of a telecommunications provider or a criminal defendant challenging the use of FISA authorized evidence, it remains unclear as to what party from the general public would have standing to challenge government foreign intelligence surveillance efforts. See *supra* note 199.

²⁸⁶ Cf. *Hollingsworth*, 133 S. Ct. at 2665 (noting to have standing to represent the interests of another, the actor must be an “officer, acting in an official capacity.”).

²⁸⁷ See, e.g., *Amnesty Int’l USA*, 133 S. Ct. at 1148 (noting that plaintiffs challenging section 702 of the FISA have “no actual knowledge of the Government’s ... targeting practices.”).

between the injured party and the privacy advocate, such as the injured party having the ability to control the litigation or potentially remove the advocate, factors that the *Hollingsworth* Court deemed important to determining whether one could seek judicial relief on behalf of a third party.²⁸⁸

It should be noted, however, that *Hollingsworth* on its face is a case about the standing of a *private* party defending the constitutionality of the law of a government.²⁸⁹ Employing a public advocate for FISA proceedings could arguably be distinguished from *Hollingsworth* on the grounds that the advocate can be viewed, as discussed earlier in this report, as an agent of the *government*,²⁹⁰ in that the advocate would be an officer of a government agency and, thus, an agent of a party who does have standing.²⁹¹ And the government’s “[s]tanding to pursue the general interests of the public” has been “easily recognized” when federal officials seek relief pursuant to a statute.²⁹² As a consequence, a FISA advocate could arguably have standing to seek judicial relief before the FISC if the position is viewed, in line with *Hollingsworth*, as one where a government officer, acting in an official capacity was authorized to proceed on behalf of the government in litigation.²⁹³

Still, there may be problems with the view that the advocate is an agent of the government. First, such an argument is based on the premise that the advocate would be a permanent and continuing government official.²⁹⁴ This line of reasoning would be significantly undermined if, pursuant to several recent proposals,²⁹⁵ the advocate was a private attorney who was appointed by the FISC on an *ad hoc* basis.²⁹⁶ Second, arguably there is a distinction between an entity that functions as an arm of the government and the ability of that “governmental” entity to seek judicial relief from an Article III court based on the *personal* rights of someone outside the government.²⁹⁷ Third, arguing that the advocate is an agent for the government belies a basic assumption that seems to underlie many, if not all, of the public advocate proposals. Specifically, many of the proposals for a FISA advocate envision such a position as being wholly independent from the government and representing the public’s privacy rights as an adversary to the government’s official position.²⁹⁸ In other words, far from being *controlled* by the government, the “essential element of agency” according to the *Hollingsworth* Court,²⁹⁹ the public advocate, as envisioned by many proponents

²⁸⁸ Cf. *Hollingsworth*, 133 S. Ct. at 2666-67.

²⁸⁹ *Id.* at 2668 (“We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”).

²⁹⁰ See *supra* “The Role of a Public Advocate,” at pp. 8-9.

²⁹¹ See *Karcher*, 484 U.S. at 84.

²⁹² 13B WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 3531.11.

²⁹³ *Hollingsworth*, 133 S. Ct. at 2665.

²⁹⁴ See *supra* “The Role of a ‘Public Advocate’” at pp. 8-9.

²⁹⁵ See, e.g., REPORT OF PRESIDENT’S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204.

²⁹⁶ See *supra* “The Role of a ‘Public Advocate’” at p. 9.

²⁹⁷ See *United States v. Hickey*, 185 F.3d 1064, 1066 (9th Cir. 1999) (discussing the limits of the ability of the government to assert the rights of members of the public in litigation); see also *United States v. Carrigan*, 804 F.2d 599, 601 n.1 (10th Cir. 1986) (noting that the government cannot assert the rights of a third party unless the third party faces an impediment to asserting her own rights). This line of argumentation may be particularly apt with respect to the specific role of the FISA advocate who would likely be asserting that government surveillance efforts violate rights that are exclusively personal in nature, like Fourth Amendment rights. See *Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (“Fourth Amendment rights are personal rights that may not be asserted vicariously.”).

²⁹⁸ See *supra* “Background on the Concept of a ‘Public Advocate,’” at pp. 5-7.

²⁹⁹ See *Hollingsworth*, 133 S. Ct. at 2666 (explaining *Karcher*) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt (continued...))

of the concept, would be independent from the government and would be arguing against the government's position. While *Hollingsworth* likely should not be read so broadly as to require that the government's agent be controlled by the executive branch,³⁰⁰ a reading that could potentially call into question the litigating status of independent agencies, given how the FISA advocate has been envisioned by many proponents, it does appear anomalous to describe the advocate as being an agent of the government.

Intra- or Inter-branch Litigation

Nonetheless, assuming that the FISA advocate can feasibly be viewed as authorized by the government to seek judicial relief before the FISC, such a position may not resolve the constitutionality of allowing the FISA advocate to do more than serve as an *amicus curiae*. Allowing the FISA advocate to seek judicial relief against another government agent in the same proceeding in a federal court, may raise questions as to whether the proceeding is in line with the underlying principles of separation of powers.³⁰¹ Specifically, the Constitution's "case-or-controversy" requirement gives rise to the "long-recognized general principle that no person may sue himself," as federal courts "do not engage in the academic pastime of rendering judgments in favor of persons against themselves."³⁰² Applying this general principle to the federal government, the Supreme Court has noted that it is "startling" to even propose that there can be "more than one 'United States' that may appear" before a federal court.³⁰³ While the government suffers an injury for constitutional standing purposes when its sovereign interests, as expressed through federal law, are threatened,³⁰⁴ there is only one sovereign entity that is the United States. And it is questionable whether two agents of the government can litigate against each other in an Article III court with each asserting an injury stemming from a threat to the general sovereign interests of the United States.³⁰⁵ Indeed, if two agencies of the federal government, with

(...continued)

f (2005)).

³⁰⁰ See *supra* note 283 (discussing the different ways *Hollingsworth* can be read).

³⁰¹ See, e.g., *Valley Forge Christian College*, 454 U.S. at 472 (noting that Article III requires "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

³⁰² See *United States v. ICC*, 337 U.S. 426, 430 (1949); see generally *Cleveland v. Chamberlain*, 66 U.S. 419, 426 (1862) (rejecting justiciability of a case where a single person is the "sole party in interest on both sides"); *Wood-Paper Co. v. Heft*, 75 U.S. 333, 336 (1869) (same); *Lord v. Veazie*, 49 U.S. 251, 255 (1850) (holding a dispute with persons having the "same interest" is not justiciable); *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774, 777 (2d Cir. 1921) ("[T]he same person cannot be both plaintiff and defendant at the same time in the same action."); *Glass v. United States*, 258 F.3d 1349, 1356 (Fed. Cir. 2001) ("The FDIC has not demonstrated how the transfer of money from one government fund to another creates a justiciable controversy."); *Anderson v. United States*, 344 F.3d 1343, 1350 (Fed. Cir. 2003) (finding non-justiciable a case where "the government would essentially take money from one pocket and place it in the next pocket ...").

³⁰³ See *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988).

³⁰⁴ See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (holding that the Government suffers injury from the "violation of its laws"); see also *United States v. City of Pittsburgh*, 757 F.2d 43, 45 (3d Cir. 1985) ("[T]he United States may bring suit to protect its sovereign interests notwithstanding the lack of any immediate pecuniary interest.").

³⁰⁵ Cf. *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 n.3 (1995) (explaining in the context of the Administrative Procedure Act that agencies asserting an injury against the government apart from the agency's role as a market participant are not "adversely affected or aggrieved."); see generally Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1263-64 (Summer 2013) ("[T]he United States has no sovereign interest in proceeding against itself, like it does against another, to ensure its vision of the public interest or interpretation of the law is realized. It has no interest in reversing itself.").

competing views about the sovereign interests of the United States, can have their dispute resolved before a federal court, the fear is that “[s]uch a state of affairs would transform the courts into ombudsmen of the administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory.”³⁰⁶

Nonetheless, the “mere assertion” that a legal action “is an ‘intra-branch dispute, without more,’” does not operate to defeat federal jurisdiction.³⁰⁷ Instead the Supreme Court has cautioned that “courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.”³⁰⁸ In this vein, the High Court has found cases to be justiciable that on the surface appear to be intra-branch conflicts. For example, in *United States v. ICC*, the Supreme Court held that the United States had standing to sue the Interstate Commerce Commission (ICC) in federal court to overturn a Commission order that denied the government recovery of damages for an allegedly unlawful railroad rate, as the dispute, at bottom, would settle who was “legally entitled to sums of money, the Government or the railroads.”³⁰⁹ In other words, instead of being a dispute between two government agents, the dispute involved the government’s interests conflicting with those of private entities—the railroads—which were the real parties in interest and actively participating in the case.³¹⁰ The Court, in *Newport News Shipbuilding*, explained *ICC*’s holding in a slightly different sense, emphasizing that the *ICC* case was justiciable despite being between the various agents of the government because one agency was participating as a “statutory beneficiary” or “market participant” by being subject to the railroad rates set by the ICC.³¹¹ In *United States v. Nixon*, a “unique[]” conflict between the Watergate special prosecutor and the Chief Executive over the release of subpoenaed tapes, the Court held that the setting of an evidentiary dispute arising from a criminal prosecution assured that the matter was “within the traditional scope of Article III power.”³¹² Other settings have yielded justiciable intra-branch disputes, including when one agency, acting as an employer, is sued by another agency as enforcer of federal labor laws.³¹³ Nonetheless, despite these varied exceptions to the rule that the government cannot sue itself,³¹⁴ the Supreme Court has not enunciated any formal test for resolving when an Article III court can adjudicate a dispute between two government agencies.³¹⁵

³⁰⁶ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (April 1993).

³⁰⁷ See *United States v. Nixon*, 418 U.S. 683, 693 (1974).

³⁰⁸ See *ICC*, 337 U.S. at 430.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 429, 432; see also *Dean v. Herrington*, 668 F. Supp. 646, 651 (E.D. Tenn. 1987) (“[T]he exact holding of the *ICC* case appears to be that the railroads, rather than the ICC, were the real parties.”).

³¹¹ 514 U.S. at 128 (“But the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator.”).

³¹² 418 U.S. at 695-97.

³¹³ See *Mead*, *supra* note 305 at 1239-1249 (providing an overview the various instances of intra-branch litigation).

³¹⁴ See *ICC*, 337 U.S. at 430.

³¹⁵ See *Mead*, *supra* note 305 at 1249 (“Courts and commentators have proposed several theories for squaring these cases with the general proposition that no entity can sue itself.”). Some lower courts have attempted to articulate a limiting principle for when the government can litigate against itself in a federal court. For example, the Eleventh Circuit, relying on *United States v. Nixon*, held that intra-branch litigation can occur when the underlying issue is “traditionally justiciable” and there is “true adversity between the parties.” See, *TVA v. EPA*, 278 F.3d 1184, 1197 (11th Cir. 2002). Determining whether an intra-branch dispute is properly before an Article III court based on whether a matter is “traditionally justiciable” appears to be circular in its logic and, as a consequence, the Eleventh Circuit’s test has been criticized by various academic sources. See *Mead*, *supra* note 305 at 1252 (“But this test is based on a misreading of *Nixon* and cannot be squared with basic principles of justiciability.”); Herz, *United States v. United* (continued...)

Assuming an office of a public advocate is viewed as a governmental entity, with respect to a proposal allowing the FISA courts to resolve disputes between a public advocate and the DOJ's National Security Division, such proposals may raise Article III justiciability concerns. One can argue, relying on *ICC*, that the “case” is justiciable because there are “real [private] parties in interest” underlying the dispute. Specifically, the “case” is arguably between the general public (or those members of the public whose privacy rights are threatened) and the government over the latter’s foreign surveillance efforts.³¹⁶ However, this reading of *ICC* may conflict with the Supreme Court’s more recent interpretations of that case that cast *ICC* as a dispute where the government agent was operating as a market participant,³¹⁷ and only a very broad reading of that reasoning could conclude that the executive branch is “participating in the market” regulated by the FISA advocate. More importantly, the *ICC* case appears to be legally distinguishable from a dispute over the legal relief being sought by a public advocate. In *ICC* the dispute was recast as a case over whether railroads had “exacted sums of money from the United States,”³¹⁸ a clear legal conflict between identifiable parties respecting a concrete monetary injury.³¹⁹ Assuming away that the general public as an indistinguishable mass has standing to challenge a given foreign surveillance practice³²⁰ and assuming away that the government can represent a real party in interest in the absence of any form of a legally recognized relationship with that real party,³²¹ the underlying dispute between the “general public” and the executive branch over foreign surveillance sounds far more like an argument that is generally settled amongst the elected branches and far less like the “justiciable controversy” found in *ICC*, a “proceeding[] to settle

(...continued)

States: When Can the Federal Government Sue Itself, 32 WM. & MARY L. REV 893, 969 (Summer 1991) (“The test was in part inadequate and in part misapplied.”). Judge Brett Kavanaugh of the D.C. Circuit, in a concurring opinion, wrote that intra-branch litigation can create a justiciable case-or-controversy under Article III when the matter is a dispute between an “independent agency and a traditional executive agency” or “between two independent agencies.” See *SEC v. FLRA*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring); see also Louis L. Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 299–300 (December 1961). While Judge Kavanaugh’s concurrence could provide a simple overarching theory for when intra-branch litigation is allowed, it is unclear whether the theory has a basis in law. See, e.g., *Menasha Corp. v. United States DOJ*, 707 F.3d 846, 852 (7th Cir. 2013) (Posner, J.) (noting that justiciable intra-branch disputes “mainly though not only involv[e] independent federal agencies). It can be argued that relying on the “independent agency” label to determine whether an intra-branch dispute is justiciable conflicts with the far less formalistic discussion outlined in *ICC*. See 337 U.S. at 430 (instructing courts to “look behind names” to determine whether a case is justiciable). Moreover, Judge Kavanaugh’s concurrence is hard to square with the *Nixon* Court’s holding on intra-branch litigation which involved a dispute lacking any agency or entity that possessed “for cause” removal restrictions. See 38 Fed. Reg. 14688; 38 Fed. Reg. 30738 (establishing the Watergate special prosecutor pursuant to the general authority provided to the Attorney General in 28 U.S.C. §§ 509-510). Finally, as Judge Kavanaugh’s concurrence notes, independent agencies can only be legally constituted in “certain circumstances.” 568 F.3d at 997 (Kavanaugh, J., concurring) (citing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)). Relying on Judge Kavanaugh’s theory for when intra-branch litigation can occur as a means to allow a FISA advocate to have standing to seek judicial relief in an Article III court could potentially raise serious constitutional questions under Article II. See *infra* notes 327-35 and accompanying text.

³¹⁶ Cf. 337 U.S. at 432. 337 U.S. at 428.

³¹⁷ *Newport News Shipbuilding*, 514 U.S. at 128.

³¹⁸ 337 U.S. at 430.

³¹⁹ Monetary harm generally qualifies as an injury-in-fact necessary for a party to seek relief from an Article III court. See *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (“Monetary harm is a classic form of injury-in-fact. Indeed, it is often assumed without discussion.”).

³²⁰ See *supra* note 199 and accompanying text.

³²¹ See generally *supra* “Third-Party Standing and a Public Advocate” and “Representational Standing and a Public Advocate.”

who [was] legally entitled to sums of money,” the government or certain railroads.³²² Congress assigning to a government agent the right to assert in federal court a generalized legal right against another governmental entity could potentially thrust federal courts in a role as a “referee of political disputes,”³²³ a role that could be seen as conflicting with the underlying command of Article III.³²⁴

The remaining types of cases where a federal court can adjudicate an intra-branch dispute appear to be distinguishable from a dispute between the FISA advocate and the Justice Department, as a case with a public advocate does not, for example, arise out of a criminal prosecution³²⁵ or an intra-branch labor dispute.³²⁶ Instead, an intra-branch dispute involving a public advocate appears to be centered on a dispute with respect to the relative importance of two conflicting sovereign interests—the need to engage in foreign surveillance to protect national security versus the need to protect the privacy rights of the public. Having a federal court be the arbiter of such a dispute may ultimately run afoul of the principle that an Article III court does not adjudicate a dispute between a solitary legal entity.³²⁷

Moreover, there may be other constitutional issues raised by intra-branch litigation respecting the propriety of foreign surveillance efforts. One could argue that having two entities within the executive branch coming to different conclusions on how the law should be executed violates Article II’s provision vesting the executive power of the United States in the President of the United States.³²⁸ After *Humphrey’s Executor v. United States*, however, Congress can indeed create certain independent agencies run by principal officers appointed by the President, whom the President has limited control over because of “for cause” removal protections, undermining the general argument that having two different voices executing the laws violates Article II.³²⁹ At the same time, however, it should be noted that *Humphrey’s Executor* and its progeny, at bottom, are cases about when Congress could allow “quasi-legislative and quasi-judicial” bodies, as opposed to “purely executive” agencies, “to act.... independently of executive control.”³³⁰ Given that the dispute over foreign surveillance arises in the context of national security, it could be argued that the Executive’s unique role in protecting national security is a “purely executive” function and cannot be challenged by another government agent.³³¹ Indeed, the Court has

³²² 337 U.S. at 430. Moreover, in contrast to *ICC*, a public advocate is functionally seeking judicial relief in the form of an order that would deny the government the ability to conduct certain foreign surveillance. Such relief if sought by a real party in interest would require a showing of a likelihood of substantial and immediate irreparable injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Given the Court’s recent holding in *Amnesty Int’l*, it may be difficult for many real parties in interest to be injured by the government’s foreign surveillance efforts in such a way that an Article III court could adjudicate their claim for injunctive relief. *See supra* note 199.

³²³ *Public Citizen v. NHTSA*, 847 F.2d 843, 883 (D.C. Cir. 1988) (Silberman, J., dissenting), *vacated by*, 856 F.2d 1557 (D.C. Cir. 1988) (*en banc*).

³²⁴ *See Roberts, supra* note 306.

³²⁵ *See Nixon*, 418 U.S. at 694.

³²⁶ *See, e.g., IRS v. FLRA*, 494 U.S. 922 (1990). This is particularly true because unlike in an intra-branch labor dispute where one government agency is functionally representing the views of an individual, with a FISA public advocate the advocate is representing the broad interests of the public-at-large.

³²⁷ *See ICC*, 337 U.S. at 430.

³²⁸ *See U.S. CONST.* Art. II, § 1, Cl. 1.

³²⁹ 295 U.S. 602, 620 (1935).

³³⁰ *Id.* at 627-29; *see also Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3152 (2010).

³³¹ *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (noting that the field of national security and foreign affairs presents “important, complicated, delicate and manifold problems” and “the President alone (continued...)”).

recognized with respect to issues regarding the President's "Commander-in-Chief" powers and foreign concerns, "[i]nstead of acting independently of executive control," Congress has in practice "subordinated" independent agencies to such control.³³² In this sense, it could be argued that a wholly independent FISA advocate with the power to seek judicial relief that may interfere with the President's power to conduct foreign surveillance could raise significant separation of power issues.³³³ This, of course, is not meant to suggest that Congress does not have power to regulate foreign affairs or more specifically foreign intelligence gathering practices;³³⁴ rather, a regulation that empowers an *independent agency* to seek judicial relief that would functionally override or prevent a particular foreign intelligence operation sought by the President could be viewed as an impermissible interference with how the law respecting an area of core executive powers is to be executed.³³⁵ Nonetheless, as one thoughtful commentator has noted, ultimately,

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has the power to speak or listen as a representative of the nation."); *see also* *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (discussing the President's "authority to classify and control access to information bearing on national security...."); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring)); *see generally* *Hearing on Examining Recommendations to Reform FISA Authorities before House Committee on the Judiciary*, 113th Cong., 2d Sess. 19-20 (2014) (statement of Steven G. Bradbury, former Asst. Att'y Gen., Office of Legal Counsel), available at http://judiciary.house.gov/_cache/files/c6304551-0e02-46e4-881a-1ece957c908f/bradbury-testimony-final-.pdf.

³³² *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (Jackson, J.).

³³³ *Id.*; *see also* *Myers v. United States*, 272 U.S. 52, 117 (1926) (noting the "Decision of 1789" to empower the President to remove at will executive officers such as the Secretary of Foreign Affairs evidenced the limited independence that any agency can have with respect to foreign affairs); *see also* *Humphrey's Ex'r*, 295 U.S. at 630-631 (reaffirming *Myers*' discussion of the necessity of empowering the President with the power to remove offices that were "purely of an executive nature," such as the Secretary of Foreign Affairs); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (noting that the Decision of 1789 with respect to the removal powers provided to the President "provides 'contemporary and weighty evidence' of the Constitution's meaning") (internal citations omitted); *see generally* (name redacted), *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 696 (January 1989) (arguing that while many executive officials could be subject to a for-cause removal limitation, "[t]he textual commitment of foreign affairs and national defense responsibilities to the President effectively prevents insulation of the secretaries of State and Defense from presidential supervision and control. Similarly, Congress undoubtedly would be precluded from isolating from executive control a particular diplomatic or defense task...."); *but see* *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (suggesting that, under majority's analysis, an Assistant Secretary of State with responsibility for one narrow area of foreign policy could be insulated from direct presidential control); *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 774-76 (3d Cir. 1979) (suggesting that the Nuclear Regulatory Commission had independent authority with respect to a decision to suspend nuclear fuel recycling that touched upon the President's foreign policy efforts to prevent international proliferation of nuclear weapons).

³³⁴ *See* *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 n.23 (2006) (noting that regardless of whether the President has "independent power, absent congressional authorization ... he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."). For an extended discussion on Congress's power to regulate foreign intelligence gathering, *see* CRS Report R43404, *Reform of the Foreign Intelligence Surveillance Courts: Disclosure of FISA Opinions*, by (name redacted), at pp. 5-7.

³³⁵ *See* Peter M. Swire, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 696 (January 1989) ("[N]o one thinks Congress may set up an independent agency to negotiate treaties, direct troops in battle, or make pardon decisions."); *see also* A. Michael Froomkin, *In Defense of Administrative Agency Autonomy*, 96 Yale L.J. 787, 793 n.31 (March 1987) ("[T]here are indeed some functions that can properly be conducted by only one branch. *E.g.* military operations can only be conducted by persons in the executive branch (a category that includes the President).") It should be noted that so-called independent agencies tend to regulate and adjudicate with regard to areas that are primarily of domestic concern. *See, e.g.*, 12 U.S.C. § 242 (Federal Reserve Board); 15 U.S.C. § 41 (Federal Trade Commission); 29 U.S.C. § 661(b) (Occupation Safety and Health Review Commission); *see generally* Elizabeth A. Snodgrass, *Foreign Affairs in the Twilight Zone: The Foreign Affairs Power of the Federal Communications Commission*, 83 VA. L. REV. 207, 209 (February 1997) (exploring the "murky" areas of (continued...))

the role that independent agencies can play with respect to “foreign affairs activities” pursuant to Article II “may fall into [a] constitutional lacuna,” with “[p]olitics, rather than law, adjudicat[ing]” this constitutional question.³³⁶

Constitutional Issues Raised by Housing the Advocate in the Judicial Branch

Because the *ICC* line of cases primarily pertains to *intra-* as opposed to *inter-*branch litigation and because courts have found that Article III permits a federal court to adjudicate a dispute between two branches in certain circumstances,³³⁷ some proposals have suggested creating an office of a public advocate for the FISA courts in the judicial branch.³³⁸ While housing a public advocate’s office in the judicial branch would likely not alleviate concerns over whether the advocate has standing to proceed before a FISA court,³³⁹ such a proposal may also raise important separation of powers concerns with respect to creating an independent agency within the judicial branch.³⁴⁰ In *Mistretta*, the Court, in upholding the constitutionality of establishing the Sentencing Commission as an independent agency within the judicial branch, found that separation of powers concerns would counsel against creating an independent agency within the judiciary if one of two conditions existed.³⁴¹ Specifically, locating an agency within the judicial branch would violate the doctrine of separation of powers if the agency would either “expand the powers of the Judiciary beyond constitutional bounds by uniting the Branch with” a political power or by “undermining the integrity of the Judicial Branch.”³⁴²

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law implicating the role for independent administrative agencies and foreign policy).

³³⁶ See Snodgrass, *supra* note 335, at 244 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

³³⁷ See, e.g., *United States v. AT&T*, 551 F.2d 384, 390 (D.C. Cir. 1976) (“[T]he mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict ... [*Nixon*] resolved an analogous conflict between the executive and judicial branches and stands for the judiciability of such a case.”).

³³⁸ See, e.g., Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(a) (1st Sess. 2013).

³³⁹ See *Raines*, 521 U.S. at 819 (applying the traditional three part standing inquiry to an inter-branch dispute); see also *Moore v. United States House of Representatives*, 733 F.2d 946, 960-61 (D.C. Cir. 1984) (Scalia, J., concurring) (“The Supreme Court itself, of course, has never found standing to resolve, or reached the merits of, an intra- or inter-branch dispute presented by a federal officer whose only asserted injury was the impairment of his governmental powers.”).

³⁴⁰ See generally *Bradbury*, *supra* note 20, at 16 (“If intended to act as an “independent” officer within the Judicial Branch, not simply an adviser to the judges but empowered to appeal rulings of the FISA court and granted the mandate to appear in court as an adversary to the executive branch, the Public Advocate would fall outside the three-branch framework established in the Constitution.”); see also REPORT OF PRESIDENT’S REVIEW GROUP ON INTELLIGENCE, *supra* note 16, at 204-205 (“One difficult issue is where the Advocate should be housed.”); *Bates*, *supra* note 19, at 6 (At an institutional level, there are difficult policy, and potentially constitutional questions regarding how an advocate would fit within existing governmental structures ... Some proposals for an advocate may compromise judicial independence.”); see also *The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court before the Senate Judiciary Committee*, 113th Cong., 2d Sess. (2014) (statement of David Medine, Chairman of the PCLOB) (“We thought long and hard about where to put the special advocate ... We were concerned that it’s the executive branch that’s approaching the FISA Court for authority, and so it didn’t make sense to have the executive branch arguing against itself. We then thought of a judiciary, and again, the judiciary is supposed to be an independent arbiter, and it didn’t make sense to have them be the house of the special advocate.”).

³⁴¹ 488 U.S. at 393.

³⁴² *Id.*

An argument can be made that locating a public advocate in the judicial branch would violate either of these principles. It should be noted that much like the Sentencing Commission in *Mistretta*, a public advocate housed in the judicial branch would be an auxiliary body whose power was “not united with the powers of the Judiciary,”³⁴³ as Article III judges are generally not envisioned as overseeing or monitoring the daily work of a public advocate. Nonetheless, a public advocate, by seeking relief in aid of the legal interests of the United States through litigation before the FISA courts, arguably is functioning much like his counterparts in the DOJ in executing the laws of the United States, a power that is generally reserved to the executive branch.³⁴⁴ Moreover, in contrast to *Mistretta*, where the Court found that the Sentencing Commission merely formalized the “everyday business of judges” in carrying out sentencing decisions, with respect to the public advocate proposals that go beyond formalizing the role that the FISC court’s legal advisors currently play,³⁴⁵ allowing members of the judicial branch to actively seek judicial relief in aid of the general public would appear to enhance the current role that the third branch has in enforcing the law. However, it should be noted that courts embracing a more functionalist approach to separation of powers questions³⁴⁶ may not be as concerned with allowing the judicial branch to litigate on behalf of the United States when the underlying purpose of the litigation is to protect civil liberties and ensure that all views are considered by the court.³⁴⁷

Likewise, locating a public advocate within the judicial branch could be seen as being inconsistent with the role of federal courts to impartially resolve certain cases and controversies.³⁴⁸ The Supreme Court has recognized that Congress can assign the “courts or auxiliary bodies within the Judicial Branch” certain “extrajudicial activities” that have a “close relation to the central mission of the Judicial Branch.”³⁴⁹ A public advocate tasked with a duty to represent a distinct viewpoint that opposes the government’s foreign surveillance efforts³⁵⁰ may be casting the judicial branch into the role of advocate, as opposed to neutral arbiter.³⁵¹ Moreover, unlike the housing of the Sentencing Commission in the judicial branch, which was in line with the “Judiciary’s special knowledge and expertise” about criminal sentencing, locating an advocate who argues against government foreign surveillance efforts in the judicial branch would be giving the branch power in an area in which the judiciary generally has no special expertise,³⁵² a concern of the *Morrison* and *Mistretta* courts.³⁵³ Nonetheless, because of the novelty of housing an agency

³⁴³ *Id.*

³⁴⁴ See *Buckley*, 424 U.S. at 138 (holding that the “discretionary power to seek judicial relief, is authority” for the President who the “Constitution entrusts the responsibility to ‘take care that the Laws be faithfully executed’”); *Bowsher*, 478 U.S. at 733 (noting that the “very essence” of “‘execution’ of the law” entails interpreting a law enacted by Congress to implement the legislative mandate).

³⁴⁵ See Kris, *supra* note 34, at 38-39.

³⁴⁶ See *Mistretta*, 488 U.S. at 393 (“Rather, our inquiry is focused on the ‘unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.’”) (internal citations omitted).

³⁴⁷ Cf. THE FEDERALIST No. 47 (Madison) (“Were [the judicial power] joined to the executive power, the judge might behave with all the violence of an oppressor.”) (quoting Montesquieu).

³⁴⁸ See *Mistretta*, 488 U.S. at 394 n.20.

³⁴⁹ *Id.* at 389.

³⁵⁰ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013).

³⁵¹ Such a concern may be especially troubling if a law were to allow the judiciary to appoint a public advocate, remove a public advocate from office, and adjudicate over a public advocate’s legal claims.

³⁵² See *Humanitarian Law Project*, 130 S. Ct. at 2727.

³⁵³ See *Mistretta*, 488 U.S. at 389 (citing *Morrison*, 487 U.S. at 676 n.13).

with independent litigating authority within the judiciary, there is a lack of precedent to confirm how exactly a court would approach the relevant separation of powers issues.

Public Advocate and the Appeals Process

Given the constitutional concerns raised by vesting a public advocate with the power to seek relief from a federal court, some have suggested that instead of solely relying on an advocate to appeal a decision by the FISC, that the FISC's decisions or parts of their decisions be automatically reviewed by the Foreign Intelligence Surveillance Court of Review or the Supreme Court.³⁵⁴ There is a dearth of federal law allowing for an automatic appeal that is not initiated by a party. While Congress generally has broad authority to regulate the practices of federal courts,³⁵⁵ it appears at the very least questionable that a federal appellate court could hear an appeal in which no party to the case in the lower court wishes for an appeal to proceed, raising the specter of the court ruling outside of a case or controversy.³⁵⁶ In state courts that adhere to similar rules regarding standing as the federal judiciary, courts have not allowed a case to proceed on an automatic appeal when only an *amicus* wishes the case to continue.³⁵⁷

Moreover, if the result of an automatic appeal procedure would be to automatically stay the FISC's ruling or part of its ruling until affirmed by a higher court,³⁵⁸ such a proposal may raise other constitutional concerns. Article III “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a ‘judicial Power’ is one to render dispositive judgments.”³⁵⁹ While Congress may constitutionally “intervene and guide or control the exercise of the courts’ discretion,”³⁶⁰ including by “amend[ing] applicable law,”³⁶¹ the legislature cannot “prescribe rules of decision to the Judicial Department of the government in cases pending before it.”³⁶² More broadly, “no decision of any court of the United States can, under any circumstances, ... be liable to ... suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested.”³⁶³ In other words, congressional enactments that would automatically suspend the legal effect of an Article III court's order may be seen as threatening the underlying “power and duty of

³⁵⁴ Cf. ACLU “In First-Ever Ruling, Secret Appeals Court Allows Expanded Government Spying on U.S. Citizens,” November 18, 2002, <https://www.aclu.org/technology-and-liberty/first-ever-ruling-secret-appeals-court-allows-expanded-government-spying-us-c> (noting lack of an automatic appeal procedure for the decisions of the FISA courts).

³⁵⁵ See generally CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted), at pp. 5-9 (discussing Congress's broad authority to regulate federal practice and procedure)

³⁵⁶ See *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

³⁵⁷ See, e.g., *Briggs v. United States*, 597 A.2d 370, 375 (D.C. 1991).

³⁵⁸ See, e.g., *Lederman and Vladeck*, *supra* note 90 (“Or perhaps the legislation might require FISA Court of Review confirmation of a FISC judge's ruling as a condition for the government to proceed with proposed surveillance or collection in certain cases....”).

³⁵⁹ See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219 (1995) (emphasis in original) (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)); cf. *United States v. Raddatz*, 447 U.S. 667, 683 (1980) (noting that the Article III power is reserved to district courts in making dispositive judgments).

³⁶⁰ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

³⁶¹ *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992).

³⁶² *United States v. Klein*, 80 U.S. 128, 146, 13 Wall. 128 (1872).

³⁶³ *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D. J.).

those courts to decide cases and controversies properly before them.”³⁶⁴ While the Supreme Court has upheld statutes authorizing a temporary suspension of an order by a federal court when premised on a change in the underlying substantive law,³⁶⁵ a provision that would automatically prevent the FISC’s orders from ever having legal effect until another court reviews that order may be seen as rendering an Article III court into a mere “adjunct” of the FISA Court of Review³⁶⁶ and, more generally, could be seen as a usurpation by Congress of the judicial function of deciding cases on the merits with finality.³⁶⁷

Other proposals are aimed at increasing appellate review of FISC decisions. For example, some have suggested allowing the FISC to certify, at the request of a public advocate, pure questions of law for review or an entire case by the Foreign Intelligence Surveillance Court of Review or the Supreme Court.³⁶⁸ Certifying pure questions of law to another court usually occurs in the context of a federal court seeking the opinion of a *state* court on a question of state law.³⁶⁹ When the “question is certified, the responding court does not assume jurisdiction over the parties or over the subject matter,”³⁷⁰ and, instead, the certifying court retains the “right to determine actual

³⁶⁴ *United States v. Raines*, 362 U.S. 17, 20 (1960). The Bankruptcy Code does provide for an automatic stay upon all “entities” the “commencement or continuation ... of a judicial ... action or proceedings against the debtor ...” 11 U.S.C. § 362. The provision, however, is aimed at facilitating the orderly distribution of the estate’s assets, *see* *SEC v. Brennan*, 230 F.3d 65, 82 (2d Cir. 2000), and in no way affects the ultimate ability of the federal court to adjudicate claims rightfully within its jurisdiction. *See Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011). Moreover, the automatic stay provision does not relieve parties of the obligation to comply with non-monetary orders of a federal court, but instead is aimed at facilitating the timing of monetary judgments. *See, e.g., Ohio v. Kovacs*, 469 U.S. 274, 283 n.11 (1985) (“The automatic stay provision does not apply to suits to enforce ... regulatory statutes ... , but the enforcement of such a judgment by seeking money from the bankrupt....”).

³⁶⁵ *Miller v. French*, 530 U.S. 327, 349 (2000) (finding that because a statutory provision mandating a temporary, but automatic stay “operate[d] in conjunction with” a set of “new standards for the continuation of prospective relief” the provision was not constitutionally infirm). To the extent that *Miller* can be read to broadly allow Congress to amend prospective relief like an injunction issued by a federal court, injunctive relief that is on-going in nature differs from the specific, temporary, and immediate relief provided by a criminal warrant, the traditional analog to a FISA warrant. *Cf. In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1132 (7th Cir. 1988) (Posner, J.) (noting that is “proper” to find a “sharp disjunction between an injunction” and “an honest-to-goodness criminal search warrant.”).

³⁶⁶ *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (distinguishing between the role of an adjunct and the “essential attributes” of Article III judicial power).

³⁶⁷ Traditionally, a stay can be issued by a federal court under Rule 62 of the Federal Rules of Civil Procedure, which do not automatically impose a stay of a judgment in certain circumstances, but instead empowers a court to issue a stay based on a subsequent determination by the court, such as an evaluation of the merits of the underlying claim or consideration of whether a supersedeas bond should be approved. *See Fed. R. Civ. P. 62.*

³⁶⁸ *See, e.g., Ensuring Adversarial Process in the FISA Court Act*, H.R. 3159, 113th Cong. § 2(b)(i)(4) (1st Sess. 2013); *see also* REPORT OF THE PCLOB, *supra* note 16, at 188. The PCLOB envisions the advocate filing a motion with the FISC “requesting the court to certify its decision to the FISC and, if it were denied by the FISC, to appeal that denial.” *Id.* As an aside, the PCLOB also recommends “a structure allowing the Special Advocate to file a petition with the FISC seeking review of a FISC order and giving the FISC discretionary review of the petition,” “similar to the process of seeking *certiorari* in the Supreme Court of the United States.” REPORT OF THE PCLOB, *supra* note 16, at 188. Assuming the advocate does not have standing to appeal an order, it is unclear why utilizing a writ of *certiorari* as the means by which the advocate would seek an appeal of an order would alleviate any constitutional concerns. Given the Supreme Court’s holding in *Diamond* with respect to the ability of a party without standing to appeal a case to the Supreme Court, which rests on core limits to Article III’s power, *see supra* notes 176–77 and accompanying text; *see also Arizona v. Official English v. Arizona*, 520 U.S. 43, 64 (1997) (“The standing Article III requires must be met by persons seeking appellate review ...”), it is unclear how the PCLOB’s proposal “avoids concerns ... that a Special Advocate lacks Article III standing to directly appeal a FISC decision.” REPORT OF THE PCLOB, *supra* note 16, at 188.

³⁶⁹ *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (holding that “where there is doubt as to the local law and where the certification procedure is available” it is within the “sound discretion of the federal court” to use the certification process).

³⁷⁰ The Honorable Bruce M. Selya, *Certified Madness: Ask a Silly Question ...* 29 SUFFOLK U. L. REV 677, 685–86 (Fall (continued...))

controversies arising between adverse litigants.³⁷¹ Such a procedure when utilized to seek answers pure questions of law posed by another federal court may raise constitutional problems. As one former member of the Foreign Intelligence Surveillance Court of Review has discussed, by allowing federal courts to respond to certified questions on a generalized issue of law, the responding federal court, in answering a general question of law, may be violating Article III's bar against federal courts issuing advisory opinions.³⁷² Of course, a reviewing court could review the entire record of a case at once with a certification, removing the specter of the reviewing court is only responding to abstract or hypothetical questions.³⁷³ Moreover, a persuasive argument could be made that a court accepting a question of law on certification in an on-going case-or-controversy is still exercising the judicial power in a manner that is consistent with the requirements of Article III.³⁷⁴

Regardless if the certification is for a pure question of law or for review of an entire case, a more fundamental concern with respect to certifying appeals is the means by which a certification occurs. If one assumes the FISA advocate does not have standing to seek judicial relief from a federal court,³⁷⁵ a proposal that provides a non-party relief through granting a motion to certify an appeal may run afoul of Article III's requirement that a federal court may only exercise its judicial power in favor of a party who has "shown an injury to himself that is likely to be redressed by [the] favorable decision."³⁷⁶ In other words, as discussed above, it is unclear how a federal court can constitutionally grant judicial relief to a standingless non-party. There are, of course, existing procedural mechanisms that allow an appeal to be certified from one court to a higher court, but such mechanisms typically function as a condition precedent or subsequent to an appeal by a

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1995).

³⁷¹ See *Muskrat*, 219 U.S. at 361.

³⁷² See Selya, *supra* note 368, at 685-86 ("The familiar illusion that the certification of a question in essence places the litigants before the responding court ... would not fare well before the Supreme Court's formalist insistence that the Article III power extends only to cases involving *actual* litigants who demonstrate *actual* injuries. Indeed, even from a less formalist perspective, the Court has made plain that it values cases and controversies because they provide "a clash of adversary argument exploring *every aspect of a multifaceted situation embracing conflicting and demanding interests.*" Almost by definition, certified questions do not permit a court to explore every aspect of multifaceted litigation.") (emphasis in original); see also WRIGHT AND KANE, LAW OF FEDERAL COURTS § 106 (7th Ed. 2011) ("Certificates bring to the Court abstract questions of law, divorced from a complete factual setting in which they may be explored more carefully."); see generally *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (noting that "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."); cf. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

³⁷³ See 17 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 4038 n.45 & 46 (discussing how certification can allow for review of the entire record in a case).

³⁷⁴ See Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 459-60 (Summer 1996) ("The traditional categories of Cases and Controversies jurisprudence, such as feigned cases and moot cases, may indeed provide grounds for the Court to exercise its discretion to dismiss a certificate, i.e., not to reply to the certified question. In the normal case, however, the state court will have before it a case involving proper parties with a legitimate dispute, in which one or the other party has invoked federal law. The Court, in responding to the question certified, will be exercising its Article III 'Power' in a 'Case[] ... arising under' federal law.").

³⁷⁵ See *supra* "The Traditional Argument and the Role of the Public Advocate."

³⁷⁶ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

party with standing.³⁷⁷ There does exist an “almost completely unused device” that allows a circuit court to certify “any question of law in any civil or criminal case” to the Supreme Court.³⁷⁸ Regardless of whether this mechanism can be used *sua sponte* by a lower court to functionally allow a non-party’s appeal to be heard,³⁷⁹ placing the discretion of when an appeal of a FISC order can occur in the hands of the court that just issued the opinion could arguably be seen as an ineffective way of garnering more appeals of the government’s requests for surveillance.³⁸⁰

Conclusion

In enacting FISA in 1978, Congress attempted to reconcile the inclusion of federal courts in the process of approving executive branch foreign surveillance requests with the demands of the Constitution and the secrecy required for foreign intelligence gathering.³⁸¹ A robust debate began during FISA’s enactment³⁸² and continued in its aftermath, with a host of different Article III

³⁷⁷ See, e.g., Fed. R. Civ. P. 54(b) (allowing for a district court to enter a certification providing for an interlocutory appeal of a claim); 28 U.S.C. § 2253(c) (conditioning the appeal of a denial of the issuance of a *habeas* writ under 28 U.S.C. § 2255 upon the issuance of a certificate of appealability); 2 U.S.C. § 437h (allowing the district court to immediately “certify all questions of constitutionality” of the Federal Election Campaign Act brought by the FEC, the national committee of any political party, or any individual eligible to vote in any election for the office of President to the “United States court of appeals for the circuit involved.”).

³⁷⁸ See 17 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 4038 (citing 28 U.S.C. § 1254(2) (noting that the Court has used the device in only three cases and a repeal of the appeal by certification would be “little more than an official obituary.”). Today, certification has melded with the *certiorari* process for appellate review, with the Supreme Court accepting certified questions “only in circumstances that would warrant *certiorari*” review. *Id.* While some has suggested reviving the certification process, see *United States v. Seale*, 558 U.S. 985, 986 (2009) (Stevens, J., dissenting from denial of certificate) (“Section 1254(2) and this Court’s Rule 19 remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case.”); see also Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319 (September 2010), certification of questions of law has largely met with hostility from the Supreme Court and may raise other legal issues. See WRIGHT AND KANE, LAW OF FEDERAL COURTS § 106 (7th Ed. 2011) (noting “two very strong arguments against certification” and concluding that “the power to certify cases to the Supreme Court seems an anachronism that the courts of appeals should not use, and that Congress should repeal.”).

³⁷⁹ In another context, the Supreme Court interpreted another “unusual” certification statute to prevent a district court from certifying a question to a higher court if the certification was invoked by a party lacking standing or involved interpretations of pure questions of law. *Cf.* *Cal. Medical Ass’n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (interpreting 2 U.S.C. § 437h). The certification procedure allowed under 28 U.S.C. § 1254(b) appears on its face to be limited to the situation where there is live “case” that is properly before a lower court, and the lower court certifies a question to a higher court. *Cella v. Brown*, 144 F. 742, 765 (8th Cir. 1906) (“Questions should not be certified after the case has been decided.”). It is unclear whether, after a final judgment has been rendered in a case and no party with standing wishes to appeal that final order, it would be constitutionally permissible for the lower court to *then* decide to certify a question to the appellate court as there arguably may no longer be a live case or controversy. See *supra* notes 353-55 and accompanying text (discussing the issue of an “automatic appeal” when no party wishes to appeal).

³⁸⁰ See, e.g., *The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court before the Senate Judiciary Committee*, 113th Cong., 2d Sess. (2014) (statement of Senator Richard Blumenthal) (“[T]he conclusion of the panel was that the advocate ... should be enlisted only when the court thought there was a novel or important issue. My view is that the constitutional advocate should make that decision and be involved wherever she thought an important or novel issue was raised by a warrant ... judges fail to see important or novel issues ...”). As a comparison, in the *habeas* context, “certificates of appealability” are generally rarely granted. See, e.g., Kristy L. Fields, *Toward a Bayesian Analysis of Recanted Eyewitness Identification Testimony*, 88 N.Y.U.L. REV. 1769, 1775 (November 2013).

³⁸¹ See *supra* “The Traditional Argument for the Constitutionality of FISA Proceedings.”

³⁸² Compare *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 26 (1978) (statement of John M. Harmon, Asst. Att’y Gen., Office of Legal Counsel), with *Foreign Intelligence Electronic* (continued...)

courts interpreting the legality of the 1978 law.³⁸³ While the Supreme Court has not opined specifically on many of the issues raised during the debates over FISA, in the decades following the passage of FISA, lower courts, after hearing several challenges to the law, have largely concurred on the legality of the original FISA judicial review process.³⁸⁴ In the wake of the June 2013 revelations about some of the specific tools used in federal foreign surveillance efforts, a wide range of public advocate measures have been proposed, aiming to reform the FISA judicial review process by adding a public advocate in FISA proceedings to ensure that differing points of view are presented to the FISA courts.³⁸⁵ Just as with the original debate over the 1978 law, the public advocate proposals have and will likely continue to generate a robust legal debate, and the legality of any public advocate proposal enacted into law may ultimately be a matter to be resolved by the courts. The Director of the Administrative Office of the United States Courts, in consultation with the current members of the FISA courts, has already expressed concerns with several advocate proposals and has described some proposals as potentially raising “substantial standing and other constitutional issues,” suggesting that an advocate proposal enacted into law may be scrutinized by the FISA courts themselves.³⁸⁶ As a result, any consideration of a proposal altering the process by which the FISA court reviews executive branch foreign intelligence surveillance requests may be informed by an understanding of the limits that the Constitution imposes.

Nonetheless, this is not to say that any hurdle imposed by the Constitution that is implicated by a public advocate proposal is insurmountable or even applicable with respect to every FISA advocate measure. At the same time, the Constitution does impose some limits that may be considered during the debates over whether to include an advocate in the FISA process. These constitutional limits if ignored or easily dismissed could render a law subject to judicial review.³⁸⁷ Ultimately, the proverbial “devil is in the details,”³⁸⁸ and the vast range of public advocate proposals cannot be understated. Some proposals envision a broad role for a permanent advocate

(...continued)

Surveillance: Hearings on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess. 221 (1978) (statement of Laurence H. Silberman).

³⁸³ See, e.g., *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y.1982); see also *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982); *In re Kevork*, 634 F. Supp. 1002, 1014 (S.D. Cal. 1985); See *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987).

³⁸⁴ *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002).

³⁸⁵ See *supra* “Background on the Concept of a “Public Advocate.”

³⁸⁶ See *Bates, supra* note 19, at 8. Indeed, as a recent FISC opinion on the scope of an *amicus curiae*’s role in a active case demonstrates, the FISC has demonstrated a willingness to ensure that novel legal procedures adhere to historical constitutional norms. See *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things*, No. BR 13-158 at *1-2 (FISA Ct. Dec. 18, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf>; see also *Bates, supra* note 19, at 14-15 (“Judicial involvement in the FISA process occurs within the context of Article III’s case or controversies requirement.”).

³⁸⁷ *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176-177 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written ... It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may later the constitution by an ordinary act.”).

³⁸⁸ See, e.g., *The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court before the Senate Judiciary Committee*, 113th Cong., 2d Sess. (2014) (statement of Senator Sheldon Whitehouse) (“So that takes me to the question of an independent advocate who could appear in the [FISC] representing a public interest. I think there’s pretty broad agreement that that’s a good idea. When you get into the details of how that individual gets managed and supervised, I get more anxious.”).

who reviews every FISA surveillance request, seeks discovery from the executive branch, asks the FISC to reconsider previous orders, or appeals orders of the FISA courts that are adverse to certain civil liberty interests. Other proposals are more restricted in nature, suggesting that the FISA court can at its own discretion and on an *ad hoc* basis, seek input from private party advocate *amici*. While there are no clear answers that exist to the novel questions raised by the establishment of an office for a FISA public advocate,³⁸⁹ generally the more modest and confined the role of the advocate in a given proposal is, the more likely that proposal, if made into law, would raise fewer constitutional issues. And, of course, there are means beyond formally adding another party into the FISA courts' judicial review process that could potentially help accomplish the overarching goal of ensuring that the government's surveillance applications are thoroughly scrutinized that do not raise similar constitutional concerns as some of the broadest public advocate proposals.³⁹⁰

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³⁸⁹ See, e.g., Professor Orin Kerr, Comments before the Privacy and Civil Liberties Oversight Board, 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, November 4, 2013, available at <http://www.pclob.gov/SiteAssets/PCLOB%20Hearing%20-%20Full%20Day%20transcript%20Nov%204%202013.pdf> (“We don't really know. So just thinking from a constitutional standpoint it's really difficult to know what the constitutional parameters are here in terms of what is permissible. There's just a tremendous gray area and I don't think there's going to be a lot of certainty one way or another.”).

³⁹⁰ While the efficacy of any proposal is beyond the scope of this report, it is worth mentioning that several means exist that could potentially help make the FISA application process more exacting. For example, Article III would not be implicated by statutory requirements that enhance the internal review process that occurs *before* the executive branch applies to the FISC for a FISA warrant. See generally *Continued Oversight of the Foreign Intelligence Surveillance Act before the Senate Judiciary Committee*, 113th Cong., 1st Sess. 9 (2013) (statement of Carrie F. Cordero, Director of National Security Studies and Adjunct Professor at Georgetown University Law Center), available at <http://www.judiciary.senate.gov/pdf/10-2-13CorderoTestimony.pdf> (describing general reforms to the internal Executive Branch FISA application review process). Once a FISA application is submitted to the FISC, multiple judges could simultaneously review a given application without raising serious constitutional issues. See CRS Report R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes*, by (name redacted) and (name redacted), at pp. 18-19 (discussing proposals to mandate the use of *en banc* panels on the FISC). Moreover, greater incentives could be provided to a party that does have standing to proceed before the FISA courts, such as a telecommunications provider, to appeal an adverse order more frequently. Cf. Bill Mears, *Uphill climb to appeal federal data mining*, CNN, June 7, 2013, available at <http://www.cnn.com/2013/06/07/politics/nsa-data-court/>. In addition, enhancing the resources, including supplying more staff attorneys to the FISA courts could arguably enhance the scrutiny provided to the government's FISA applications. See Kris, *supra* note 34, at 38-39.

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