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Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes

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Summary

Recent disclosures concerning the size and scope of the National Security Agency's (NSA) surveillance activities both in the United States and abroad have prompted a flurry of congressional activity aimed at reforming the foreign intelligence gathering process. While some measures would overhaul the substantive legal rules of the USA PATRIOT Act or other provisions of the Foreign Intelligence Surveillance Act (FISA), there are a host of bills designed to make procedural and operational changes to the Foreign Intelligence Surveillance Court (FISC), a specialized Article III court that hears applications and grants orders approving of certain foreign intelligence gathering activities, and the Foreign Intelligence Surveillance Court of Review, a court that reviews rulings of the FISC. This report will explore a selection of these proposals and address potential legal questions such proposals may raise.

Due to the sensitive nature of the subject matters it adjudicates, the FISC operates largely in secret and in a non-adversarial manner with the government as the only party. Some have argued that this non-adversarial process prevents the court from hearing opposing viewpoints on difficult legal issues facing the court. To address these concerns, some have suggested either permitting or mandating that the FISC hear from "friends of the court" or *amici curiae*, who would brief the court on potential privacy and civil liberty interests implicated by a government application. While formally codifying the FISA courts' authority in statute could arguably clarify the scope of the court's authority with respect to *amici* and encourage the courts to exercise that authority more frequently, it is unclear what legal difference a codification of the *amicus* authority ultimately makes, as the statutory authority is largely duplicative of the authority the FISA courts already possess as a matter of their inherent power. Proposals to mandate, rather than permit, that the FISC hear from an *amicus* might also fall within Congress's considerable power to regulate the practices and procedures of federal courts. Nonetheless, such mandatory *amicus* proposals are uncommon and could potentially raise constitutional issues concerning the independence of the FISC to control its internal processes. Such proposals may also prompt questions to the extent that they conflict with constitutional rules about who can appear before federal courts and what powers those individuals may wield when there.

In another attempt to promote greater judicial scrutiny of FISA applications, some have suggested that Congress mandate that the FISC sit *en banc*—that is, conduct review by all 11 judges of the court—when making "significant" interpretations of foreign intelligence statutes. Under current law, the FISC is permitted in certain instances to hold a hearing or rehearing *en banc*, mainly to ensure uniformity of FISC decisions and when addressing legal questions of exceptional importance. Requiring that the FISC sit *en banc* does not appear to raise major constitutional questions as such a proposal would likely not hinder the FISC from performing its core constitutional functions, which primarily includes independently adjudicating matters before it with finality.

There have also been calls to alter the voting rules of either the FISC, when sitting *en banc*, or the Foreign Intelligence Surveillance Court of Review apparently in an effort to create a higher threshold for government surveillance. While Congress has significant constitutional power to govern the practice and procedure of the federal courts, including the two foreign intelligence courts, it is unclear whether setting these voting rules falls within that power or, conversely, whether it may intrude upon the core judicial function of these federal tribunals.

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Introduction

The Foreign Intelligence Surveillance Act (FISA) of 1978 was the product of sweeping congressional investigation and deliberation prompted by perceived electronic surveillance abuses by the executive branch.[1] Among other things, FISA established the Foreign Intelligence Surveillance Court (FISC) to review government applications to conduct electronic surveillance for foreign intelligence purposes and the Foreign Intelligence Surveillance Court of Review (FISA Court of Review) to review the decisions of the FISC.[2] In the wake of revelations in June 2013 concerning the scope of orders issued by the FISC, many have questioned the efficacy of the current mechanisms for reviewing the executive branch's intelligence gathering practices. While some have proposed altering the underlying substantive law that regulates such surveillance, other proposals address the practice and procedures of authorizing such surveillance activities.[3]

This report begins with an overview of both the FISC and the FISA Court of Review, including the jurisdiction of these courts, how the judges are appointed, and the FISC's practices and procedures for reviewing and issuing surveillance orders. The report then discusses the scope and underlying legal principles behind congressional regulation of the procedures of the federal courts, and applies those principles with respect to the various proposals to reform the FISA judicial review process. These reforms include requiring the FISC to hear arguments from "friends of the court" or *amici curiae*, who would brief the court on the privacy or civil liberty interests implicated by a government application;[4] mandating that in certain instances the FISC sit *en banc*—that is, with all 11 FISC judges;[5] and altering the voting rules of the FISC and FISA Court of Review.[6]

Overview of the FISA Courts

The creation of the foreign intelligence surveillance courts came about from the confluence of two major legal and political developments in the 1970s. First, in 1972, the Supreme Court suggested in the *Keith* case that while domestic security surveillance must be handled through traditional legal processes, Congress could establish a special legal framework for reviewing requests for foreign intelligence surveillance.[7] Second, in 1975, Congress created the Senate

[1] *See* Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783; *see generally Foreign Intelligence Surveillance Act of 1977, Hearings on S. 1566 Before the Subcomm. on Criminal Law and Procedures of the S. Comm. on the Judiciary*, 95th Cong. (1977); *Foreign Intelligence Surveillance Act of 1978: Hearings on S.1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. (1978); S. Rpt. 94-1035 (1976); H. Rpt. 95-1283 (1978).

[2] *See* 50 U.S.C. §§ 1801-1181g.

[3] For a background on the substantive law that regulates U.S. foreign surveillance practices, see CRS Report R43134, *NSA Surveillance Leaks: Background and Issues for Congress*, by (name redacted) and (name redacted). For a discussion on recent proposals to introduce a public advocate into the FISA courts' adjudicatory process, see CRS Report R43260, *Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate*, by (name r edacted), (name redacted), and (name redacted).

[4] *See infra* notes 122-23, 136-37 and accompanying text.

[5] *See infra* note 180 and accompanying text.

[6] *See infra* note 208 and accompanying text.

[7] United States v. United States District Court (Keith Case), 407 U.S. 297, 323 (1972).

Select Committee to Study Governmental Operations With Respect to Intelligence Activities, commonly known as the "Church Committee," to review the executive branch's intelligence gathering activities.[8] The Church Committee unearthed widespread surveillance of American citizens and recommended tighter controls on intelligence activities.[9] Deliberating in the context of both the *Keith* case and the Church Committee Report, Congress enacted FISA in 1978.[10]

At the heart of FISA is the FISC, a specialized Article III court[11] that is empowered to "hear applications for and grant orders approving" of certain foreign intelligence gathering efforts.[12] The FISC is wholly unique among federal courts in that its jurisdiction is narrowly tailored; the selection of its judges deviates from traditional constitutional appointments process; and its day-to-day operations are conducted almost entirely in secret. Before addressing some of the proposals to alter the current practices and procedures of the FISC and FISA Court of Review, this section will take a closer look at the current structure and operational processes of these foreign intelligence courts.

Jurisdiction of the FISA Courts

The jurisdiction of the FISC is narrow in scope in that it solely "relates to the collection of foreign intelligence by the federal government."[13] As originally enacted, the FISC's authority was limited to hearing government applications for electronic surveillance.[14] The court's jurisdiction was later expanded, however, to hear applications for and grant orders approving of four types of investigative methods: (1) electronic surveillance;[15] (2) physical searches;[16] (3) pen register/trap and trace surveillance;[17] and (4) the use of orders compelling the production of tangible things.[18] The FISA Court of Review has jurisdiction to "review the denial of any application" for electronic surveillance and or physical searches.[19] Additionally, the Court of Review has

[8] S. Res. 21, 121 CONG. REC. 1432 (Jan. 27, 1975).

[9] *II Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, *Intelligence Activities and the Rights of Americans* 1 (1976).

[10] *See* Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783.

[11] *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.").

[12] 50 U.S.C. § 1803(a)(1).

[13] *In re* Release of Court Records, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).

[14] 92 Stat. 1788.

[15] 50 U.S.C. § 1803(a).

[16] *Id.* § 1822(c).

[17] *Id.* § 1842(a)(1).

[18] *Id.* § 1861(b)(1).

[19] *Id.* § 1803(b). The FISA Court of Review does not have jurisdiction to review pen register/trap and trace orders. *See* DAVID KRIS & DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 5.1 (2012).

jurisdiction to review "tangible things" orders appealed by either the government or a person receiving such a production order.[20]

Under the FISA Amendments Act of 2008 (FAA), the FISC is authorized to review the government's certifications, minimization and targeting procedures concerning the targeting of non-U.S. persons reasonably believed to be abroad,[21] and applications regarding the targeting of U.S. persons reasonably believed to be located abroad.[22] The FISC has jurisdiction to review petitions by electronic communication service providers to modify or set aside directives issued under the FAA.[23] The FISC can also review requests by the Attorney General to compel an electronic communication service provider to comply with a directive.[24] The FISA Court of Review has jurisdiction to review FISC decisions to modify or set aside a directive and decisions to compel compliance with a directive.[25]

Judges and Staff of the FISA Courts

The FISC is composed of 11 district court judges selected by the Chief Justice from at least seven of the regional judicial circuits.[26] Of these 11, at least 3 must reside within 20 miles of the District of Columbia.[27] Unlike judges appointed to traditional Article III courts, FISA judges are not selected via presidential appointment and Senate confirmation, but are instead "designated" to those positions by the Chief Justice of the Supreme Court.[28] Pursuant to the FISC's rules, the presiding judge of the FISC is selected by the Chief Justice.[29] The FISA Court of Review is composed of three district court or court of appeals judges also designated by the Chief Justice.[30] The Chief Justice also selects the presiding judge of the Court of Review.[31] Judges of both courts serve one term of seven years and are not eligible for a second term.[32] In addition to the judges, the FISC has a staff of five full-time legal advisors with expertise in foreign intelligence issues.[33] These legal advisors are said to conduct a thorough "vetting" of all applications before the government presents them formally to the FISC judges.[34]

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[20] 50 U.S.C. § 1861(f)(3).

[21] *Id.* § 1881a.

[22] *Id.* §§ 1881b(a), 1881c(a)

[23] *Id.* §§ 1881a(h)(4)(A).

[24] *Id.* § 1881a(h)(5)(A).

[25] *Id.* § 1881a(h)(6)(A).

[26] *Id.* § 1803(a)(1).

[27] *Id.*

[28] *Id.*

[29] UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, RULES OF PROCEDURE 4 [hereinafter FISC RULES OF PROCEDURE].

[30] 50 U.S.C. § 1803(b).

[31] *Id.* § 1803(d).

[32] *Id.* § 1803(d).

[33] *See* LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGY 201 (2013) [hereinafter REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE].

[34] *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) [hereinafter FISA Hearing] (answers of Sr. U.S. Dist. Judge James G. Carr), *available at* http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/
(continued...)

Operations of the FISA Courts

In light of the sensitive nature of its docket, the FISA courts operate largely in secret and in a non-adversarial fashion.[35] Court sessions are held behind closed doors, are generally held *ex parte* with the government as the only party presenting arguments to the court, and rarely are its opinions released.[36] As noted by the FISC, whereas "[o]ther courts operate primarily in public, with secrecy the exception[,] the FISC operates primarily in secret, with public access the exception."[37] That being said, there are several instances where non-governmental parties have appeared before the FISC.[38]

Generally, each of the 11 FISC judges sits for a one week period in a secure courtroom in a federal courthouse in Washington, DC on a rotating basis.[39] The judge on duty each week is aptly referred to as the "duty judge."[40] Additionally, the three FISC judges who reside in the District of Columbia, or if they are unavailable, other FISC judges as may be designated by the Chief Judge of the FISC, comprise a pool which has jurisdiction to review petitions filed under § 215 of the USA PATRIOT Act and § 702 of FISA.[41] Applications submitted to the FISC are heard by a single judge, and if denied, cannot be heard by another judge of the FISC, except when sitting *en banc*.[42]

The application process generally begins when the government submits a "read copy" of its proposed application to the FISC, which, pursuant to FISC rules, must be submitted seven days before the government files a formal application.[43] In many instances, the legal advisors or the FISC judges will have questions about these read copies,[44] and will often have conversations with the government's attorneys—generally, attorneys from the Office of Intelligence of the National Security Division of the Department of Justice—to seek additional information or raise concerns about the application.[45] The legal advisors will then prepare a written memorandum for the duty judge, identifying any weaknesses or flaws in the government's submissions.[46] The duty judge will review the memorandum and make an initial determination of how he is inclined to resolve the application. This may include a determination that the application will be approved without a

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[35] *See* 50 U.S.C. § 1805(a) (mandating that FISC orders are issued *ex parte*).

[36] *In re* Release of Court Records, 526 F. Supp. 2d 484, 488 (FISA Ct. 2007).

[37] *Id.*

[38] In 2002, the FISA Court of Review accepted *amicus curiae* briefs from the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers. *See In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002).

[39] KRIS & WILSON, *supra* note 19, at § 5.3; Letter from Reggie B. Walton, Presiding Judge, United States Foreign Intelligence Surveillance Court, to Senator Patrick J. Leahy, Chairman, Senate Committee on the Judiciary 1 (July 29, 2013) [hereinafter Walton Letter], *available at* http://www.uscourts.gov/uscourts/courts/fisc/chairman-leahy-letter-131011.pdf.

[40] Walton Letter, *supra* note 39, at 1.

[41] 50 U.S.C. § 1803(e).

[42] *Id.* § 1803(a)(1).

[43] FISA Hearing, *supra* note 34, at 4 (answers of Sr. U.S. Dist. Judge James G. Carr); FISC RULE OF PROCEDURE 9(a).

[44] FISA Hearing, *supra* note 34, at 4 (answers of Sr. U.S. Dist. Judge James G. Carr).

[45] Walton Letter, *supra* note 39, at 2 & n.3.

[46] *Id.* at 2.

hearing, that additional information is required from the government, that conditions may be placed on the application, or that a hearing is required.[47] Based on the judge's response, the government then decides whether to submit a formal application. In some instances, the questions raised by the judges or legal advisors may result in the withdrawal or non-submission of the final application.[48] If the judge denies a formal application, he must prepare a statement of reasons of his decision.[49]

A hearing regarding an application can occur in several situations.[50] The FISC judge may determine that a hearing is needed before deciding to issue an application. Alternatively, the government may request a hearing to challenge conditions that the judge has stated he would place on the approval of the application. Additionally, the FISC may, on its own initiative, or upon the request of the government in any proceeding, or a party in any proceeding under § 215 or § 702, hold a hearing or rehearing *en banc*.[51] An *en banc* panel consists of all the judges that constitute the FISC.[52] An *en banc* panel will be convened when ordered by a majority of the FISC judges upon a determination that "(i) the en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (ii) the proceeding involves a question of exceptional importance."[53] An initial hearing, as opposed to a rehearing, will be heard *en banc* only if the matter "is of such immediate and extraordinary importance that initial consideration" is necessary and feasible "in light of applicable time constraints."[54]

Upon the denial of any application for electronic surveillance or physical searches, the government may request review from the FISA Court of Review.[55] If the court determines that the application was properly denied, it "shall immediately provide for the record a written statement of each reason for its decision."[56] The government may then file for a writ of *certiorari* to have such a denial reviewed by the Supreme Court.[57] The Court of Review also has jurisdiction to review a petition by either the government or anyone receiving an order for the production of "tangible things" to affirm, modify, or set aside a FISC order.[58] The Court of Review must provide a written opinion of the reasons for its decision, and upon petition by the government or the entity receiving the production order transmit the record to the Supreme Court, which has jurisdiction to review such decision.[59]

[47] *Id.* at 2-3.

[48] FISA Hearing, *supra* note 34, at 4 (answers of Sr. U.S. Dist. Judge James G. Carr).

[49] 50 U.S.C. § 1803(a)(1).

[50] *See* Walton Letter, *supra* note 39, at 3.

[51] *Id.* § 1803(a)(2)(A).

[52] *Id.* § 1803(a)(2)(C).

[53] *Id.* § 1803(a)(2)(A).

[54] FISC RULE OF PROCEDURE 46.

[55] *Id.* §§ 1803(b), 1822(d).

[56] *Id.* § 1803(b).

[57] *Id.*

[58] *Id.* § 1861(f)(3).

[59] *Id.*

Congress's Power to Regulate the Practice and Procedures of Federal Courts

Several congressional proposals attempting to reform United States foreign intelligence gathering efforts are aimed at changing the underlying practices of the FISC and FISA Court of Review. For example, some have suggested either explicitly permitting or mandating that the FISC hear from an *amicus curiae* or "friend of the court."[60] Others have proposed mandating *en banc* panels of the FISC.[61] Still others have suggested altering the voting rules of the FISC in an apparent attempt to create a higher threshold for government surveillance.[62] Before delving into the specific legal questions prompted by such proposals, however, it is important to first explore the underlying legal principles animating the extent to which Congress can regulate an Article III court's practices and procedures.[63] The starting point for that discussion is the nature of a federal court's power, which stems from the Constitution, statutory law, and federal common law.

A federal court's power emanates first and foremost from the Constitution. Specifically, Article III of the Constitution vests the "judicial power" of the United States in the Supreme Court and any inferior courts established by Congress.[64] Supreme Court case law has interpreted the judiciary's authority to consist of three primary elements. First, the judicial power encompasses the power to interpret laws. As stated in *Federalist No. 78* and later echoed in *Marbury v. Madison*: "The interpretation of the law is the proper and peculiar province of the courts."[65] Nonetheless, as the Supreme Court had noted, the judicial branch is not the only branch that interprets the law, as President must necessarily interpret laws in executing them, and Congress must necessarily engage in legal interpretation when enacting legislation.[66] Accordingly, there is a second aspect of Article III judicial power, and it centers on *when* a court exercises the power to say what the law means. Specifically, a federal court exercises its authority in the context of certain "cases" or "controversies."[67] The "cases" or "controversies" language of Article III connotes a source of authority for federal courts such that Article III courts are empowered to not "merely ... rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy ... ."[68] Put another way, the "judicial power" of Article III entails a power to render final, "dispositive judgments" in particular cases and controversies.[69] Third, the structural

[60] *See infra* notes 122-23, 136-37 and accompanying text.

[61] *See infra* note 180 and accompanying text.

[62] *See infra* note 208 and accompanying text.

[63] The term "procedure" differs from a substantive change in law in that the former is in no way "determinative" as to the ultimate "outcome" of a proceeding at the beginning of litigation. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[64] *See* U.S. CONST. art. III, § 1.

[65] *See* THE FEDERALIST NO. 78 (Alexander Hamilton). In *Marbury*, Chief Justice John Marshal famously declared: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803).

[66] *See* United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution.").

[67] U.S. CONST. art. III, § 2, cl. 1.

[68] *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 219 (1995). The "case-or-controversy" language is most commonly cited not as a source of judicial authority, but as a "fundamental limit[]" on the jurisdiction of federal courts such that a federal court cannot exercise its power unless it is founded upon the facts of a controversy between truly adverse parties. *See* Allen v. Wright, 468 U.S. 737, 750 (1984).

[69] *See Plaut*, 514 U.S. at 219 (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (continued...)

protections the Constitution provides to courts suggest another distinct aspect regarding the federal judicial power. Section one of Article III stipulates that all federal judges in "good behaviour" shall have lifetime tenure and that their salary cannot be diminished within their term of office.[70] The purpose of these provisions is to ensure that federal courts operate free from interference from the political branches in order to, in the words of Alexander Hamilton, "secure a steady, upright, and impartial administration of the laws."[71]

While the Constitution provides federal courts the "capacity" to exercise their power in certain cases, an act of Congress is "require[d] ... to confer" authority to a given Article III court, meaning that statutory law is another source of a federal court's power.[72] Article I of the Constitution provides Congress with the discretion to create inferior tribunals to the Supreme Court.[73] As a "necessary and proper" function of carrying into execution that power and the "[p]owers vested by [the] Constitution" in the judiciary, Congress can authorize the courts to "carry[] into execution all the judgments which the judicial department has the power to pronounce."[74] In this vein, provisions codified in Title 28 of the United States Code empower the federal courts to do a host of activities, such as being able to hear disputes based on "federal questions"[75] or assess certain fees to litigants.[76]

In addition to the powers bestowed on federal courts through Article III and certain statutory provisions, the Supreme Court has long recognized that the federal judiciary retains certain "inherent powers" or "implied powers" that are "necessary to the exercise of all others."[77] A federal court's inherent powers are not governed by "rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of case."[78] In some sense, a federal court's inherent power can be conceptualized as a type of federal common law where a judge adopts practices and procedures as a gap-filling measure because the existing statutes and rules are insufficient.[79] Nonetheless, the Supreme Court has recognized that a court's inherent powers are not exclusively exercised due to oversights by

(...continued)

(1990)).

[70] U.S. CONST. art. III, § 1.

[71] THE FEDERALIST No. 78; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) ("[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.").

[72] *See* Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

[73] U.S. CONST. art. I, § 8, cl. 9.

[74] *See* Wayman v. Southard, 10 Wheat. 1, 22 (1825).

[75] 28 U.S.C. § 1331.

[76] *See, e.g.,* 28 U.S.C. § 1923.

[77] United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

[78] Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962). For example, courts have power over admission to the bar, *see Ex Parte Burr*, 22 U.S. 529 (1829), the ability to vacate a judgment when a fraud is perpetrated on the court, *see Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), the ability to control their own dockets, *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936), the ability to dismiss cases for a failure to prosecute, *Link*, 370 U.S. at 629-30, and the power to impose sanctions on an attorney. *See Eash v. Riggins Trucking*, 757 F.2d 557, 559 (1985).

[79] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) ("At the very least, the inherent power must continue to exist to fill in the interstices.").

Congress or the rulemaking bodies, but instead inhere to broadly allow a federal court to properly function as an institution.[80]

Given the three central sources of power for the federal judiciary—the Constitution, statutory law, and federal common law—the issue that remains is to what extent can Congress restrict or regulate a court's power by prescribing rules of practice and procedure. As a starting point, the Supreme Court has recognized that Congress has "undoubted power to regulate the practice and procedure of federal courts."[81] As Chief Justice Warren noted in *Hanna v. Plumer,* the "constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts."[82] And, indeed, Title 28 includes numerous provisions through which Congress mandates how the federal judiciary conducts its business—from how many Justices sit on the Supreme Court,[83] to what constitutes a quorum on the Court,[84] to what types of evidence can be admitted into a federal court proceeding,[85] to rules of precedence among federal district court judges.[86] Accordingly, the Court has interpreted Congress to have the power to promulgate mandatory rules of procedure that Article III courts have "no more discretion to disregard ... than they do to disregard constitutional provisions."[87] And Congress' power even extends to regulate the inherent powers of a court.[88]

Nonetheless, although some have described Congress's power over the federal judiciary's practices to be "plenary" in nature,[89] the Supreme Court has recognized that Congress's authority to prescribe procedural rules for federal courts is not absolute.[90] Specifically, Congress's power

[80] *See Ex parte* Peterson, 253 U.S. 300, 312 (1920) (holding that courts possess "inherent powers to provide themselves with appropriate instruments required for the performance of their duties."); *see also Hudson*, 11 U.S. at 34 ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."); Young v. United States *ex rel.* Vuiton et Fils S.A., 481 U.S. 787, 821 (1987) (Scalia, J., concurring) (recognizing that "the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes.").

[81] Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941).

[82] 380 U.S. 460, 472 (1965).

[83] 28 U.S.C. § 1.

[84] *Id.*

[85] *See, e.g.,* 28 U.S.C. § 1731 (allowing admitted or proved handwriting of a person to be admissible for purposes of comparison and determination of the genuineness of other handwriting).

[86] 28 U.S.C. § 136.

[87] *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). Under current law, general procedural rulemaking authority has been largely delegated to the Supreme Court in the Rules Enabling Act. *See* 28 U.S.C. § 2072.

[88] *See* Degen v. United States, 517 U.S. 820, 823 (1996) ("In many instances the inherent powers of the courts may be controlled or overridden by statute or rule."); *Chambers,* 501 U.S. at 47 ("It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule.... ").

[89] *See, e.g.,* G. Germain, *Due Process in Bankruptcy: Are the New Automatic Dismissal Rules Constitutional?* 13 U. PA. J. BUS. L. 547, 591 (Spring 2011) ("*Wayman* and *Sibbach* show that the Court has consistently recognized that the Congress has plenary power over federal court procedure, and the courts have only secondary power to regulate when that authority is either expressly delegated by Congress, or possibly when Congress is silent."). In sharp contrast, others have argued that matters of procedure are exclusively part of the judicial function. *See, e.g.,* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993).

[90] *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 218 (1995) (identifying "two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids"); *see generally* F. Frankfurter & J.M. Landis, *Power of Congress over Procedure in Criminal Contempt in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017 (1924).

over procedure cannot extend so far as to erode functions of the federal judiciary that are at the heart of the Article III judicial power—namely the ability to independently and impartially resolve a case-or-controversy with finality.[91] In other words, Congress cannot erode the "essential attributes of the judicial power" in the Article III courts.[92] As a consequence, Congress cannot require a court to issue advisory opinions on matters of legal concern, as such a rule would require the judiciary to say what the law is outside of a case-or-controversy.[93] Moreover, the legislature cannot subject a federal judicial opinion to review by a non-Article III body[94] or retroactively command federal courts to reopen their final judgments, as such procedures would prevent an Article III court from ruling with finality and issuing dispositive judgments.[95] Likewise, Congress cannot enact laws that erode the decisional or analytical independence of a federal court. In this regard, the Court has struck down congressional enactments that interfere with the judicial decision-making process as to effectively decide the outcome of a given case[96] or essentially plunge the federal judiciary into a political role.[97] In short, Article III places some limits on Congress's relatively broad authority to regulate the practice and procedures of federal courts. With these principles in mind, this report turns to several proposals attempting to regulate the practice of the FISA courts.[98]

FISA Reform and *Amicus Curiae*

FISA proceedings primarily involve only one party, as the FISC is authorized to issue orders approving of electronic surveillance,[99] certain physical searches,[100] the use of a pen register or a trap and trace device,[101] or the access to certain business records for foreign intelligence and international terrorism investigations[102] upon a proper showing made in an application by a federal officer. Recent controversies over the nature of the government's foreign surveillance activity have prompted the argument that the *ex parte* nature of the judiciary's review of government surveillance requests under FISA deprives the court from hearing a "researched and

[91] *See Plaut*, 514 U.S. at 218; *see generally* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742 (2001) (contending that Congress cannot legislate in a way that destroys powers "indispensable to the integrity and independent functioning of the judiciary."); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 782-98 (1997) (arguing that courts' power trumps Congress's only where Congress has attempted to interfere unduly with courts' inherent power to render decisions in contested cases).

[92] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 n.29 (1982).

[93] *See* United States v. Johnson, 319 U.S. 302, 305 (1943) (dismissing as nonjusticiable a suit brought at the request of, and directed and financed by, the defendant because "it [was] not in any real sense adversary").

[94] *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[95] *See Plaut*, 514 U.S. at 219.

[96] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

[97] *See N. Pipeline Constr. Co.*, 458 U.S. at 60; *see also* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 715 (1995) (noting that *Klein* stands for the principle that Congress cannot "interfer[e] wih the proper performance of the judicial function by effectively conscripting the judiciary as an unwilling coconspirator in what amounts to the imposition of a legal fraud on the public.").

[98] The federal courts have consistently considered the FISC an Article III court. *See* cases cited at *supra* note 11.

[99] *See* 50 U.S.C. § 1804.

[100] *See id.* § 1824.

[101] *See id.* § 1843.

[102] *See id.* § 1861.

informed presentation of an opposing view."[103] In this vein, while some have suggested formally establishing an office for a permanent public interest advocate to represent "the interests of those whose rights of privacy or civil liberties might be at stake,"[104] others have proposed allowing or even requiring the FISC to, on a temporary or *ad hoc* basis, hear from certain individuals or interests groups who, as "friends of the court" or *amici curiae*, would brief the court on the privacy or civil liberty interests implicated by a government application.[105] Proposals purporting to regulate the process by which the FISC hears from *amici* potentially raise several questions about their legal necessity and the extent to which Congress can mandate that a federal court hear from a particular party.

Background on the *Amicus Curiae*

Before delving into these issues, it is first important to note the historical origins of the *amicus* and the unique role that *amicus curiae* play in the federal courts. *Amicus curiae*, a Latin term literally meaning "friend of the court," has its roots in Roman law, where an *amicus* entailed a judicially appointed attorney who served to advise or assist a court in the disposition of cases by providing non-binding opinions on points of law with which the court was unfamiliar.[106] The Roman *amicus curiae* became a forerunner for the Anglo-American *amicus* device.[107] According to English common law pre-dating the American Revolution, a trial or appellate court could request or permit in its "uncontrolled discretion" an *amicus* to inform the court about various aspects of the law.[108] In particular, an *amicus* functioned as an "impartial assistant to the judiciary,"[109] as an *amicus*'s "principal role" under the English common law was to "assist judges in avoiding error."[110] With the continuation of English judicial traditions in the United States,[111] American courts began embracing the use of *amici* in the early nineteenth century.[112]

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[103] REPORT OF PRESIDENT'S REVIEW GROUP ON INTELLIGENCE, *supra* note 33, at 203-04; *see also* ACLU v. Clapper, 959 F. Supp. 2d 724, 756 (S.D.N.Y. 2013) ("[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.").

[104] REPORT OF PRESIDENT'S REVIEW GROUP, *supra* note 33, at 204; *see also* U.S.A. FREEDOM Act, H.R. 3361, 113th Cong. § 401 (1st Sess. 2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(a). (1st Sess. 2013). For a discussion regarding the legal issues associated with appointing a permanent public interest advocate for FISC proceedings, *see* Nolan, et al., *supra* note 3.

[105] *See* FISA Improvements Act of 2013, S. 1631, 113th Cong. § 4 (1st Sess. 2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(5) (1st Sess. 2013); USA FREEDOM Act, S. 2685, 113th Cong. § 401 (2d Sess. 2014).

[106] *See* Comment, *The Amicus Curiae,* 55 NW. U. L. REV. 469, 469 n.3 (1960) ("Under Roman law, a judge could appoint an attorney to act as *consilium* and advise and assist in the disposition of the case. His opinion was not binding, but rather served to enlighten the court on points of law with which it was not familiar.").

[107] *See* Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?,* 41 AM. U. L. REV. 1243, 1244 n.4 (1992).

[108] *See* Comment, *supra* note 106, at 469-70.

[109] *See* Lowman, *supra* note 107, at 1244.

[110] Reagan Wm. Simpson & Mary R. Vasaly, THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT (2d Ed.) 1 (2004 2d ed) (citing The Protector v. Geering, Hardres 85, 145 Eng. Rep. 394 (1656)).

[111] *See* MARY K. BONSETTEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 77 (1978) ("The most distinctive aspect of [early federal court] procedures was their rigorous adherence to the antiquated technicalities of English law."). Moreover, Article III of the U.S. Constitution allots the "judicial power" to the Supreme Court and any inferior courts Congress may create, aligning the federal judicial power with that of the "English legal tradition." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011).

[112] It should be noted, however, an *amicus* did "not make [an] appearance in the Supreme Court (or federal courts (continued...)

Over time, federal courts have accepted an increasingly broad and flexible role for *amici*.[113] For example, the Supreme Court has generally recognized the power of Article III courts to appoint an *amicus curiae* "to represent the public interest in the administration of justice."[114] Some federal courts have allowed *amici* to participate in an overtly partisan or adversarial nature.[115] Other courts have limited when an *amicus* can proceed to instances where the *amicus* would be offering (1) a different perspective than the named parties;[116] (2) impartial information on matters of public interest;[117] or (3) observations on legal questions, as opposed to "highly partisan ... account[s] of the facts."[118] Nonetheless, the "classic role of *amicus* curiae" involves "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."[119] Regardless of what type of party constitutes a proper *amicus*, participation remains a privilege generally governed by the inherent authority of a court.[120] Put another way, absent a statute or rule, under federal common law there is typically "no right to compel [a] court to permit one to appear as *amicus curiae*."[121]

Allowing the FISC to Hear from an *Amicus Curiae*

Several have suggested that Congress should establish a formal mechanism whereby the FISC, in its discretion, could solicit the independent views of an *amicus curiae* in appropriate cases.[122] For example, the FISA Improvements Act, which was approved by the Senate Select Committee on Intelligence (SSCI) in October of 2013, if enacted would authorize the FISC and the FISA Court

(...continued)

generally) until after 1820." *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Adovcacy,* 72 YALE L.J. 694, 699 (1963) (noting that federal courts' initial use of *amicus curiae* occurred in the 1820s with the appearance of Henry Clay on behalf of the state of Kentucky in the case of *Green v. Biddle*).

[113] *See id.* at 702-204 (describing the shift whereby the *amicus* no longer was reserved to impartial advocacy before federal courts).

[114] *See* Universal Oil Products Co. v. Root Rfg. Co., 328 U.S. 575, 581 (1946) (Frankfurter, J.).

[115] *See* United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991) ("Over the years, however, some courts have departed from the orthodoxy of amicus curiae as an impartial friend of the court and have recognized a *very limited* adversary support of given issues through brief and/or oral argument.") (emphasis in original).

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

[117] *See Michigan*, 940 F.2d at 164; *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).

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

[119] *See* Miller-Wohl Co. v. Comm'r of Labor & Indus., 694 F2d 203, 204 (9th Cir. 1982).

[120] *See* Martinez v. Capital Cities/ABC-WPVI, 909 F. Supp 283, 286 (E.D. Pa. 1995); *see also* Community Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) ("Proceeding *amicus* is a 'privilege' that 'rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise.'") (internal citations omitted).

[121] *See* 3B C.J.S. Amicus Curiae § 3.

[122] *See, e.g., Continued Oversight of the Foreign Intelligence Surveillance Act*, *Before the S. Comm. on the Judiciary,* 113th Cong. 9 (October 2, 2013) (joint statement of James R. Clapper, Director of Nat'l Intelligence, and General Keith B. Alexander, Director of Nat'l Security Agency) ("Therefore, we would be open to discussing legislation authorizing the FISC to appoint an *amicus*, at its discretion, in appropriate cases ... "); Peter P. Swire, *The System of Foreign Intelligence Surveillance Law,* 72 GEO. WASH. L. REV. 1306, 1365 (2004) (arguing that the lack of a "statutory mechanism ... permitt[ing] *amici*" to participate in the FISA appellate process demonstrated a "clear gap in existing procedures.").

of Review to designate, when needed, one or more individuals to serve as *amicus curiae* "to assist the court in the consideration of" certain government applications made under FISA, such as those that present a "novel or significant interpretation of the law."[123] The SSCI bill provides examples of the needed expertise to be an *amicus curiae*, such as being an "expert on privacy and civil liberties," and outlines the duties for a FISA *amicus*, in that the FISC's "friend" may assist the court in reviewing "any application, certification, petition, motion, or other submission that the court determines is relevant to the duties assigned by the court."[124]

Congressional regulation of how the FISA courts hear from *amici* generally does not appear to raise serious constitutional questions. As noted earlier, the Supreme Court has stated that "Congress has undoubted power to regulate the practice and procedure of federal courts,"[125] which would presumably include the power to prescribe regulations with respect to *amici* that appear before a federal court. Indeed, Congress has in the past enacted several laws that allow courts to hear from a particular *amici*.[126] Proposals like the FISA Improvements Act, which simply *authorizes* a court to appoint from a broad range of qualified individuals an *amicus* to assist in the proceedings, impose no firm mandates on the FISC that would threaten the "essential attributes of the judicial power,"[127] the constitutional limit to Congress's broad power to regulate federal practice and procedure.[128] Instead of allowing "encroachment or aggrandizement of one branch at the expense of the other," the hallmark of a separation of powers violation,[129] proposals that provide the FISA courts with formal statutory authority to appoint *amici* arguably *enhance* the power of the federal courts without simultaneously detracting from the power of the political branches.[130]

While providing broad statutory authority to the FISA courts allowing them to appoint *amici* likely does not raise serious constitutional issues, a question remains as to whether such a statute is needed as a legal matter. As noted above, the ability of a court to appoint an *amicus curiae* to assist in the judicial proceedings has a long history that predates the Constitution,[131] and federal courts have held that they possess inherent authority to appoint *amici* and permit the filing of briefs by them.[132] In this vein, both the FISC[133] and the FISA Court of Review[134] have accepted

[123] *See* FISA Improvements Act of 2013, S. 1631, 113th Cong. § 4 (1st Sess. 2013).

[124] *Id.*

[125] *See Sibbach*, 312 U.S. at 9-10.

[126] *See, e.g.,* 5 U.S.C. § 612(b) ("The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as an amicus curiae any action brought in a court of the United States to review a rule."); 15 U.S.C. § 3207 ("The Secretary [of Energy] may participate as an *amicus curiae* in any judicial review of an action arising under [the National Energy Conservation and Production Act's provisions on natural gas]."); 16 U.S.C. § 2633 ("[T]he Secretary [of Energy] may also participate as an *amicus curiae* in any review by any court of an action arising under [the Public Utility Regulatory Policies Act of 1978]."); 29 U.S.C. § 792(e)(2)(B) ("The executive director [of Architectural and Transportation Barriers Compliance Board] is authorized ... to appear as *amicus curiae* in any court of the United States or in any court of a State in civil actions that relate to this section or to the Architectural Barriers Act of 1968.").

[127] *See Northern Pipeline*, 458 U.S. at 77 n.29 (*quoting* Crowell v. Benson, 285 U.S. 22, 51 (1932)).

[128] *See supra* "Congress's Power to Regulate the Practice and Procedures of Federal Courts," at pp. 6-9.

[129] *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (*per curiam*).

[130] *But see infra* p.13 (noting that the statutory authority provided to the court may be merely duplicative of the court's inherent authority).

[131] *See supra* "Background on the *Amicus Curiae*," pp. 10-11.

[132] *See* United States v. Providence Journal Co., 485 U.S. 693, 704 (1988) ("[I]t is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment."); *see also* Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991) ("The district court has the inherent authority to appoint amici curiae, or 'friends of the court,' to assist it in a proceeding."); James Square Nursing Home, (continued...)

amicus briefs during their proceedings. While formally codifying the FISA courts' authority in statute could arguably clarify the scope of the courts' authority with respect to *amici* and encourage the courts to exercise that authority more frequently,[135] it is unclear what legal difference a codification of the *amicus* authority ultimately makes, as the statutory authority is largely duplicative of the authority the FISA courts already possess as a matter of their inherent power.

Requiring the FISC to Hear from an *Amicus Curiae*

Not all of the proposals attempting to regulate the FISA's courts' *amicus* authority leave the decision to appoint a friend of the court up to the discretion of the FISC or the FISA Court of Review.[136] Instead, several proposals contemplate *requiring* the FISA courts to hear from *amici*.[137]

Before discussing the legal issues raised by requiring the FISC to hear from an *amicus*, it is important to note that the nature of a "mandate" may ultimately depend on a matter of judicial interpretation. For example, the most recent version of the USA FREEDOM Act requires the FISC to hear the views of an *amicus* when considering an application for an order that "presents a novel or significant interpretation of the law."[138] Under that bill, an application is considered to raise a novel or significant interpretation of law when "such application involves settled law to novel technologies or circumstances, or any other novel or significant construction or interpretation of any provision of law or of the Constitution of the United States, including any novel or significant interpretation of the term 'specific selection term.'"[139]

On the one hand, this language may be viewed as placing significant discretion with the court as to whether a particular case truly is "novel" or "significant" in nature. In other words, while this language may facially "require" the court to appoint an *amicus* in a particular case, if the determination of whether a case fits within this mandatory category depends on a discretionary decision of the court, the congressional provision may function much like the proposals that *allow* the FISC to appoint *amici*. On the other hand, defining "novel or significant interpretation of law" to include the application of settled law to new technologies or circumstances might limit the

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Inc. v. Wing, 897 F. Supp. 682, 683 n.2 (N.D.N.Y. 1995) ("The district court has broad inherent authority to permit or deny an appearance as amicus curiae in a case.").

[133] *See, e.g., In re* Orders of this Court Interpreting Section 215 of the Patriot Act, No. 13-02, (FISA Ct. Dec. 5, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-02-08-09-order-131205.pdf (granting motion of the Reporters Committee for Freedom of the Press a group of 25 media organizations to file a brief as *amici curiae*).

[134] *See, e.g., In re* Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) ("Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL) as *amici curiae*.").

[135] Codifying a court's inherent authority into a rule or statute is not uncommon. For example, while "commentators and decisional authority generally agree that courts have inherent authority to appoint expert witnesses," Federal Rule of Evidence 706 formally codifies this authority and prescribes "in detail the procedure to be followed." *See* 3 CHRISTOPHER MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 367 (2d ed. 1994).

[136] *See, e.g.,* FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 5(a)(5)(A) (requiring the FISA Court of Review to "accept *amicus curiae* briefs from interested parties in all mandatory reviews.").

[137] *Id.*; *see also* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b) (1st Sess. 2013) (requiring the FISC to hear the views of a public advocate in certain proceedings).

[138] USA FREEDOM Act, S. 2685, 113th Cong. § 401 (2d Sess. 2014).

[139] *Id.*

judge's discretion whether to appoint an *amicus*. Because of the uniqueness and ever-shifting nature of surveillance techniques and investigations, it could be argued that almost every surveillance application will involve the application of settled law to new circumstances. Indeed, arguably nearly every act of any court requires applying settled law to a new circumstance. Under this reasoning, the FISC would have to appoint an *amicus* when considering almost every application.[140]

In any event, legal questions could potentially arise from congressional attempts to *mandate*—as opposed to *permit*—an Article III court to hear from an *amicus*. First, it can be argued that a "mandatory *amicus*" proposal potentially conflicts with the constitutional norm that Article III courts, like the FISC, must have some degree of autonomy or independence in controlling their internal processes. A mandate that a federal court hear the views of an *amicus* in certain cases, contrasts with the historic *amicus* tradition which "hinge[d]" on the principle of providing the court with considerable flexibility and discretion as to when and how it may rely on a third party friend.[141] If an *amicus* is viewed in the Anglo-American common law tradition as being an extension of the court itself,[142] one could liken a congressional mandate as to who and when a federal court must hear from an *amicus* to a similar mandate as to who a court must hire as a member of the court's own staff.[143] Such a restriction on an inherent judicial power could

[140] Beyond the question of judicial discretion, the language concerning the *amicus* in the USA FREEDOM Act presents some ambiguity concerning when the FISC must actually appoint an *amicus*. For instance, § 401 provides that "a court established under subsection (a) or (b)" (that is, the FISC and FISA Court of Review) "shall designate a special advocate to serve as amicus curiae to assist such court in the consideration of any certification pursuant to subsection (j)." Subsection (j) provides that "after issuing an order, the [FISC] shall certify for review to the [FISA Court of Review] any question of law that the court determines warrants such review because of a need for uniformity or because consideration by the [FISA Court of Review] would serve interests of justice." Based on this language, it is unclear whether the FISC must appoint an *amicus* (1) when considering whether to certify a question of law to the FISA Court of Review; (2) when a question has already been certified to the FISA Court of Review; or (3) in both instances. If either (1) or (3) are correct, it would appear that the FISC would be required to appoint an *amicus* for arguably every order issued by the court.

[141] *See* Lowman, *supra* note 107, at 1247; *see also* Krislov, *supra* note 112, at 695 ("[T]he courts have from the beginning avoided precise definition of the perimeters and attendant circumstance involving possible utilization of [*amicus*]. This, of course, increases judicial discretion, while it concomitantly maximizes the flexibility of the device.").

[142] *See* Lowman, *supra* note 107, at 1244.

[143] One commentator uses the example of congressional regulation of the hiring of the number of secretaries and law clerks for federal judges as an example of clear overreach by Congress. *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 972 (1996) ("To take other far-fetched examples, the Supreme Court ought not and would not submit if Congress directed that the number of secretaries and law clerks assigned to individual judges shall vary according to a legislated formula linking support staff to the number of dispositions each judge achieves."). Of course, members of a federal court's staff, unlike the typical *amicus*, serve for extended terms and participate in confidential discussions with the court. Nonetheless, congressional regulation of a federal court's staff is, in the words of Professor Carrington, "ludicrous," and illustrates that there is a "core of control vested in the [a federal court] that is beyond the constitutional reach of Congress." *Id.*at 972-73. In other words, while the degree of intrusion may admittedly be less, if a concern is raised by Congress regulating a court's staff, a similar concern can stem from congressional regulation of the court's "friends." Such a concern may be more pronounced when a party, while provided the label of *amicus curiae*, possesses far broader duties than the typical *amicus* and functions as an additional staff attorney to the FISC or FISA Court of Review. *See, e.g.,* USA FREEDOM Act, H.R. 3361, § 401 (2d Sess. 2014) (requiring the FISC and FISA Court of Review to appoint five individuals "to assist" the court by "carry[ing] out the duties assigned by the appointing court," such as reviewing FISA applications). In this sense, for those who disclaim Congress's role in overseeing the judiciary's internal affairs, *see* Carrington, *supra* note 144, at 972, congressional regulation of who the court chooses as an "*amicus"*/staff attorney could raise a separation of powers question. Nonetheless, this is *not* to say that the appointment of an *amicus* or staff attorney raises *any* serious questions with respect to the Appointments Clause of Article II, as no traditional *amicus* or staff attorney can plausibly be deemed to exercise "significant authority" on behalf of the United States. *See* Buckley v. Valeo, 424 U.S. 1, 140 (1976); *see also* (continued...)

arguably limit the ability of a federal court to maintain its independence from the political branches, implicating a core Article III norm.

Second, mandating that the FISC hear from a particular *amicus* may raise constitutional questions about the nature of the *amicus*. The mandatory *amicus* proposal would functionally transform the role of an *amicus* from an individual whose views are heard based on the "sound discretion of the court[]"[144] to a party who has the unfettered right to be heard from in the course of litigation. It could be argued that such a transformation of the *amicus* process nearly elevates an *amicus* to having the "full litigating status of a named party or a real party in interest."[145] It is generally recognized that "[o]nly a named party or an intervening real party in interest is *entitled* to litigate on the merits."[146] To the extent that the mandatory *amicus* proposal could be characterized as providing an *amicus* with some of the rights that are traditionally exclusive to that of a party, one could potentially argue that a mandatory *amicus* proposal violates Article III. The proposal does this, according to this line of argumentation, by statutorily empowering an individual who lacks Article III standing with the right to be heard by a federal court, forcing the judiciary to say what the law is outside of a case or controversy between two parties with a genuine stake in the matter.[147] This concern may be particularly pronounced if the *amicus*'s role functions in a way typically assigned only to parties to the case, such as having the guaranteed right to ask for an appeal of a decision.[148] Indeed, a recent FISC opinion deciding whether to allow for *amicus*

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Nolan, et al., *supra* note 3, at p. 12 n.90 ("[W]hile the *Buckley* Court would not allow Congress to appoint individuals to conduct litigation on behalf of the United States . . . 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*.") (emphasis added).

[144] *See Michigan*, 940 F.2d at 165.

[145] *Id.* at 165-66.

[146] *Id.* at165-66 (emphasis added). While the original debate over the FISA court centered on whether that court was operating in line with the mandates of Article III, even if one assumes that the FISA court must comply with Article III's mandate, *see* Nolan, et al., *supra* note 3, at pp. 17-20, it is unclear how merely adding a party to an existing case-or-controversy absolves that new party from meeting Article III's prerequisites for having standing to pursue judicial relief from a federal court. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 352 (2006) (rejecting that a federal court could exercise supplemental jurisdiction over a party's claim that does not itself "satisfy [the] elements of the Article III inquiry ... "); *see generally* Flast v. Cohen, 393 U.S. 83, 99 (1968) (noting that standing "focuses on the party" and not on the surrounding issues of the litigation); Nolan, et al., *supra* note 3, at pp. 23-24. After all, the Supreme Court, under the *Bowsher-Diamond* doctrine has limited when a "standingless" party can intervene to seek relief from a court to those moments in which *another* party is seeking the identical relief that the new party is seeking. *See id.*

[147] *See* Lowman, *supra* note 107, at 1288-89; *see also* Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 539 (D.C. Cir. 1999) (noting that an *amicus* who cannot satisfy the basic elements of Article III standing can do no more than seek to contribute its views to the court and participate in oral argument if a party espousing the same views cedes its oral argument time).

[148] *See supra* note 140 (discussing the potential scope of the *amicus* provisions in the USA FREEDOM Act of 2014, S. 2685, § 401 (2d Sess. 2014)). Whether a law that guarantees the right of an *amicus* to be heard with respect to whether a lower court should "certify" an appeal to a higher court is viewed as one that functionally gives an *amicus* the right to appeal may turn on the question of the interpretation of such a certification procedure. One could view certification as a unique procedural mechanism that is simply divorced from any Article III rules because of the existence of adversity in the initial court. *See, e.g.,* Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A Response to Orin Kerr*, (July 31, 2014), http://www.lawfareblog.com/2014/07/article-iii-appellate-review-and-the-leahy-bill-a-response-to-orin-kerr/ ("In both sets of cases, there is necessarily a case-or-controversy in the certifying court at the time of certification . . . and the existence of such a case-or-controversy presumably follows the certificate to the appellate court."). In this sense, certification is a mechanism exercised—in theory—independent of the *amicus*'s role. However, one can also argue that an appellate court in taking any action, including answering a certificate regarding a specific question of law, must act in the context of a case that *continues* to be genuinely adverse, including having someone who has been injured by the lower court seeking resolution of that question. *See, e.g.,* Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?* (July 30, 2014), http://www.lawfareblog.com/2014/07/article-iii-problems-(continued...)

briefing in a case noted that "most courts have recognized that the role of an *amicus curiae* is limited, and does not rise to the level of a party to the litigation,"[149] perhaps signaling a reluctance by the FISA courts to affording an *amicus* rights equivalent to those of a named party.[150]

Nonetheless, such criticisms may very well be a result of the uncommon nature of a mandatory *amicus* proposal as opposed to any inherent constitutional infirmity in the proposal. One may question whether eliminating the court's discretionary power to hear from an *amicus*, while a historic power, truly erodes one of the "essential attributes of the judicial power" as encompassed by Article III.[151] While having the discretionary power to appoint *amici* in a federal case is an ancient power for a court, it may be difficult to argue that such a power is "essential" to having the FISC function in line with the Constitution's envisioned scheme for federal courts. For example, even if the FISA courts were required to *hear* from a particular *amicus*, the court would not be obligated to adopt the views of the *amicus* or otherwise be unable to independently say what the law means.[152] Indeed, requiring the court to hear from different perspectives on an issue arguably may ensure that the court's judgment remains independent and impartial, aligning with core Article III values.[153] Moreover, while a mandatory *amicus* law would establish for the *amicus* a guaranteed right to be heard by the court, such a proposal does not go so far as to embed an *amicus* with the right to seek any sort of judicial relief from a federal court, such as having a

(...continued)

with-appellate-review-in-the-leahy-bill/ ("Federal courts lack the power to decide cases unless the justiciability requirements of Article III have been met. Using a certification procedure doesn't change that requirement."). Likewise, whether the FISA Court of Review in answering a certified question that has already resulted in an order from the FISC continues to be a case or controversy for purposes of Article III has prompted debate amongst academics and policy advocates. *Compare* Orin Kerr, *More on Article III and Appellate Review in the Leahy Bill,* (Aug. 5, 2014), http://www.lawfareblog.com/2014/08/more-on-article-iii-and-appellate-review-in-the-leahy-bill/, and Orin Kerr, *A Concluding Thought on Justiciability and Appellate Review in the Leahy Bill*, (Aug. 5, 2014) http://www.lawfareblog.com/2014/08/a-concluding-thought-on-justiciability-and-appellate-review-in-the-leahy-bill/, *with* Steve Vladeck, *The FISA Court and Article III: A Surreply to Orin,* (Aug. 5, 2014), http://www.lawfareblog.com/2014/08/the-fisa-court-and-article-iii/. Certification and the constitutional issues associated with the unusual procedural mechanism are beyond the scope of this report. Nonetheless, for those who view Article III as providing stricter limitations on when a federal court can act, certification coupled with a guaranteed right of an *amicus* to be heard on the question of whether an appeal can occur could potentially be seen as an end run around Article III's case or controversy limitations. *See, e.g.,* Kerr (July 30, 2014 post), note 148 ("It's an attempt to overcome the lack of an adversarial process by giving lower courts a way to bring the case upstairs. It's well-meaning, but I'm not sure Article III allows it.").

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

[150] Courts have generally recognized that the "granting of near-party status to government *amici* is proper ... [and] consistent with established legal principles," *see* Michael J. Harris, *Amicus Curiae: Friend or Foe?* 5 SUFFOLK J. TRIAL & APP. ADV. 1, 8-11 (2000), and so a mandate to allow a government *amicus* the right to appear before a federal court may raise less serious legal questions than a mandate that allows private party *amici* an unfettered right to be heard. Harris argues that affording a government *amicus* the rights normally provided to a real party in interest is consistent with the underlying purposes of allowing friends to assist the court, in that the judiciary is apprised of the impartial views of the law by an agent of the government representing the public interest. *Id.* at 7-8. It is unclear whether the legal principles justifying a broader role for government *amici* apply with respect to a public advocate tasked with providing a partisan view of the law that contrasts with the view of the executive branch. *See* Nolan, et al., *supra* note 3, at pp. 6-8, 22-24.

[151] *See Northern Pipeline Construction Co.*, 458 U.S. at 77 n.29.

[152] *Cf. Klein*, 80 U.S. at 146.

[153] *See* "Congress's Power to Regulate the Practice and Procedures of Federal Courts," *supra* pp. 6-9.

right to appeal or the right to seek discovery, which would likely raise more serious concerns with respect to Article III standing.[154]

It should be noted that there have been few laws and rules that have attempted to curb the federal judiciary's discretionary power over the use of *amici*. The Federal Rules of Civil Procedure, for example, are silent on the topic of *amici curiae*, leaving appointment of an *amicus* to be a product of a district court's inherent power.[155] In contrast, both the Federal Rules of Appellate Procedure and Rules of the Supreme Court of the United States do not require an *amicus* to obtain leave from a court to file an *amicus* brief if the brief is filed on behalf of the United States, its officer or agency, or a state.[156] While such rules functionally limit the discretion of a federal court in allowing the appearance of an *amicus*, each rule is a product of a decision of the Supreme Court of the United States, which, through the Rules Enabling Act, has the power to "prescribe general rules of practice and procedure" in federal courts.[157] The federal appellate and Supreme Court rules' waiver of the need for government *amici* to obtain leave of court before appearing is both a provision that enhances the rights of a type of *amicus* traditionally provided with broader rights[158]—government *amici*—and is a restriction imposed by the judiciary on itself. In other words, such rules may not raise the same constitutional concerns as a congressional command to a court to appoint a private party as an *amicus*.

Very few *statutory provisions* relating to *amicus curiae* go so far as to mandate that a federal court hear from a particular *amicus*. For example, several statutes *permit* certain executive branch officials to appear as *amici* in certain proceedings.[159] Other statutes are phrased such that they impose a mandate on the government official in question to appear as an *amicus* without imposing a similar mandate on the court.[160] However, the Commodity Exchange Act provides the Commodities Futures Trading Commission (CFTC) the "right to appear as an amicus in any proceeding brought by a state government in federal court under that Act."[161] Another provision in Title 5 of the U.S. Code authorizes the head of the Office of Special Counsel to appear as an *amicus* in certain cases and requires a "court of the United States [to] grant the application of the Special Counsel to appear in any such action.... "[162] While the plain language of these two laws appear to provide a mandate on the court to hear from certain government *amici,* no court has

[154] *See* Lowman, *supra* note 107, at 1280-82; *see also* Nolan, et al., *supra* note 3, at 20-24.

[155] *See Martinez*, 909 F. Supp. at 286.

[156] *See* FED. R. APP. P. 29(a) ("The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."); S. CT. R. 37(4) ("No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.").

[157] 28 U.S.C. § 2072(a).

[158] *See* Harris, *supra* note 151, at 8-11; *see also* Lowman, *supra* note 107, at 1261 ("Compared to their private counterparts, federal or state governmental units have traditionally enjoyed greater leeway in their participation as *amicus curiae* before federal courts.").

[159] *See supra* note 126.

[160] *See, e.g*,. 2 U.S.C. § 288e(a) ("[T]he [Senate Legal] Counsel shall ... appear as *amicus curiae* in the name of the Senate ... in any legal action or proceeding pending in any court of the United States ... in which the powers and responsibilities of Congress under the Constitution of the United States are placed at issue.").

[161] *See* 7 U.S.C. § 13a-2(8)(B).

[162] 5 U.S.C. § 1212(h)(1) ("The Special Counsel is authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9).").

assessed the constitutionality of such a provision, leaving the constitutional status of a mandatory *amicus* statute judicially unresolved.

In addition to the question whether Congress can mandate that the FISA courts hear from an *amicus*, proposals to install an *amicus* in FISA proceedings raise two other interrelated questions: first, what is the appropriate nature and scope of the *amicus's* briefings to the FISA courts, and, second, whether it is within Congress's authority to define this scope. As described above, the nature and scope of the authority of the *amicus* has shifted over the years from an "impartial assistant to the judiciary"[163] to one who plays a more adversarial role in defending the legal interests of existing or absent parties to the litigation. Even judges who have been skeptical of this modern role of *amici* have accepted a limited adversarial role in certain instances. Judge Richard Posner of the Seventh Circuit Court of Appeals, for example, has explained that an *amicus* brief should be allowed only when: (1) "a party is not represented competently or is not represented at all"; (2) "when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case); or (3) "when the amicus has unique information or perspective that can help the court beyond help that the lawyers for the parties are able to provide."[164]

There do not appear to be any serious *constitutional* constraints to having a defined role for an *amicus* when that individual is briefing the FISA court; instead, at best, defining what an *amicus* can say to a court raises prudential questions about whether such an *amicus*'s role is appropriate. *Amicus* provisions like those proposed in legislation like the USA FREEDOM Act that require the *amicus* to "advocate as appropriate, in support of legal interpretations that advance individual privacy and civil liberties"[165] would appear to align with even the most restricted views on the appropriate scope of what an *amicus* can discuss in briefing to a court. While the USA FREEDOM Act's language contemplates that the advocate would participate in FISA proceedings in an adversarial manner, the adversarial nature of such briefing, in and of itself, does not appear to breach the various prudential constraints limiting an *amicus*'s role when briefing a court. First, a FISA *amicus* would be utilized to represent an interest that is arguably not fully represented in current FISA proceedings. Second, because a FISA *amicus* must have expertise in "privacy and civil liberties, intelligence collection, telecommunications, or any other relevant area of expertise,"[166] the *amicus* will presumably be able to provide the court a unique perspective on the legal issues raised by the government's surveillance applications. Lastly, although a FISA *amicus* under the USA FREEDOM Act would be tasked with promoting legal interpretations that advance individual privacy and civil liberties, such a responsibility has to be done "as appropriate," a standard that is not very different from the current obligation of government attorneys to ensure that surveillance applications do not violate constitutional safeguards[167] and a provision that may help ensure that the FISA *amicus*'s briefings do not become "highly partisan."[168] Whether Congress, as opposed to the FISA courts, can define the role of an *amicus* during briefing raises similar questions as to whether Congress can mandate that the FISA courts

[163] Lowman, *supra* note 107, at 1244.

[164] Ryan v. Commodity Futures Trading Commission, 125 F.35 1062, 1063 (7th Cir. 1997).

[165] USA FREEDOM Act, S. 2685, 113th Cong. § 401 (2d Sess. 2014).

[166] *Id.*

[167] *See, e.g.*, 50 U.S.C. § 1881a (requiring that government certification submitted to the FISC attest that targeting and minimization procedures "are consistent with the requirements of the fourth amendment to the Constitution of the United States.").

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

hear from an *amicus* in the first place. While Congress has considerable power to regulate the procedures of the judiciary,[169] a question could be raised as to whether Congress regulating an ancient power of a federal court, like its historically unfettered power regarding the *amici* that appear before the court,[170] usurps the court's constitutional powers. As Congress has rarely attempted to regulate the *amici* process in federal courts, let alone regulate what an *amicus* can say before a court, there is simply no legal precedent available by which to assess whether a law defining the *amicus*'s role in briefing before a court is legally appropriate.[171]

Mandating an *En Banc* Panel of the FISC

In 2008, FISA was amended to explicitly permit the FISC, on its own initiative, or upon the request of the government in any proceeding, or a party in a proceeding under § 215 or § 702, to hold a hearing or rehearing *en banc*.[172] An *en banc* panel consists of all the judges that constitute the FISC.[173] During debate of the FISA Amendments Act of 2008, lawmakers proposed *mandating* that the FISC sit *en banc* to make legal immunity determinations regarding telecommunication service providers who allegedly aided the federal government in surveillance gathering activities.[174] In the wake of recent revelations about the NSA's foreign surveillance practices, at least one commentator has revived the mandatory *en banc* proposal for certain proceedings before the FISC.[175] Congressionally mandating that the FISC sit *en banc* prompts questions regarding the constitutionality of such proposals. Before delving into those questions, it is first worth noting the background of *en banc* proceedings in federal courts.

History of *En Banc* Proceedings

En banc review—that is, review by all judges of a court—has its origins in the 1930s. In the wake of the Evarts Act of 1891,[176] in which Congress created the three-tiered federal court system, growing caseloads in the appellate courts, coupled with the rise of *certiorari* review at the Supreme Court, led to an increasing number of inconsistent panel decisions within a given circuit.[177] In 1938, the Ninth Circuit, faced with two conflicting panel rulings of that circuit, held that no mechanism existed in law to resolve the conflict and opted to certify the question to the Supreme Court.[178] Two years later, the Third Circuit rejected the Ninth Circuit's reasoning and sat

[169] *See* "Congress's Power to Regulate the Practice and Procedures of Federal Courts," supra pp. 6-9.

[170] *See* "Background on the *Amicus Curiae,*" *supra* pp. 10-11.

[171] It should be noted that any constitutional infirmities with a FISA *amicus curiae* law could potentially be cured through a limited savings construction that eliminates the potential reach of the statute so to avoid serious constitutional questions. *See, e. g.,* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979).

[172] FISA Amendments Act of 2008, P.L. 110-261, § 109, 122 Stat. 2436, 2464 (codified at 50 U.S.C. § 1803(a)(2)(A)).

[173] 50 U.S.C. § 1803(a)(2)(C).

[174] *See* S.Amdt. 3919, S. 2248, 110th Cong. (2d. Sess. 2008).

[175] Bruce Ackerman, *Surveillance and the FISA Court*, LOS ANGELES TIMES, (Sept. 24, 2013), http://articles.latimes.com/2013/sep/24/opinion/la-oe-ackerman-fisa-reform-20130924.

[176] Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826 (1891).

[177] *See* Sarah J. Berkus, *Survey: A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits and United States v. Nacchio*, 86 DENV. U.L. REV. 1069, 1071 (2009).

[178] Lang's Estate v. Commissioner, 97 F.2d 867, 869 (9th Cir. 1938).

en banc to resolve the panel split.[179] The Supreme Court granted certiorari to the Third Circuit's ruling and unanimously affirmed in *Textile Mills Security Corp. v. Commissioner* that the courts of appeals had the discretion to decide cases *en banc*.[180] In doing so, the Supreme Court attached special importance to the capacity of the *en banc* hearing to promote the finality of decisions and to resolve internal circuit splits, as the courts of appeals "are the courts of last resort in the run of ordinary cases."[181]

Seven years later, Congress codified the result of *Textile Mills* in Section 46(c) of the Judicial Code of 1948.[182] The provision, as amended, states that cases in the courts of appeals shall be heard and decided by a three-judge panel, unless a majority of the judges in regular active service order a rehearing by the circuit sitting *en banc*.[183] The Supreme Court subsequently interpreted Section 46(c) to be permissive in nature, such that the courts of appeals were empowered, but not required to sit *en banc*.[184] In turn, the Court allowed each of the courts of appeals to "devise its own administrative machinery to provide the means whereby a majority may order [an *en banc*] hearing."[185] The framework for determining when an *en banc* hearing is appropriate is established in Federal Rule of Appellate Procedure 35, which states that an *en banc* hearing is "not favored and ordinarily will not be ordered" unless consideration is necessary to "secure or maintain" the uniformity of a court's decisions or the proceeding involves a question of "exceptional importance."[186] In this vein, *en banc* rulings in the United States Courts of Appeals are a relatively rare phenomenon.[187]

En banc hearings outside of the context of a federal appellate court are even more unusual, as there is no general statutory authority for federal trial judges to reach decisions as panels and apply those decisions as precedent for all judges in the district.[188] In the late 1980s, some district courts proceeded *en banc* in evaluating the constitutionality of the federal sentencing guidelines.[189] Other examples exist of district courts sitting *en banc* in complex criminal

[179] Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62, 70-71 (3d Cir. 1940) (*en banc*), *aff'd,* 314 U.S. 326 (1941).

[180] Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326, 333-35 (1941) ("We cannot conclude, however, that the word 'court' as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges against the clear intendment of § 118.").

[181] *Id.*at 335.

[182] Judicial Code and Judiciary Act, Pub. L. No. 80-773, § 46(c), 62 Stat. 869, 871-72 (1948) (codified at 28 U.S.C. § 46(c)).

[183] 28 U.S.C. § 46(c).

[184] Western P. R. Corp. v. Western P. R. Co., 345 U.S. 247, 259 (1953) ("A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case. On the other hand, there is nothing in § 46 (c) which requires the full bench to adhere to a rule which delegates that responsibility to the division.").

[185] *Id.* at 261.

[186] Fed. R. App. P. 35(a).

[187] As an example of the rarity of *en banc* hearings, in FY2011, only 59 out 37,806 appeals terminated on the merits after oral hearings or submission on the briefs were reviewed *en banc*. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR, Table S-1 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S01Sep12.pdf.

[188] *See* Gregory C. Sisk, et al., *Charting the Influences on the Judicial Mind*, 73 N.Y.U.L. REV. 1377, 1500 n.172 (1998).

[189] *See* United States v. Allen, 685 F. Supp. 827 (N.D. Ala. 1988); United States v. Bogle, 689 F. Supp. 1121 (S.D. Fla. 1988); United States v. Bolding, 683 F. Supp. 1003 (D. Md. 1988); United States v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988); United States v. Christman, Cr. 88-4-2 (D. Vt. Nov. 19, 1988); United States v. Gentry, Criminal No. 87-
(continued...)

actions.[190] Nonetheless, it remains anomalous for a court of first impression to review a matter by all of the judges on that court.[191]

Legal Issues with Requiring an *En Banc* Panel for "Significant Interpretations" of FISA

There does not appear to be a major constitutional question raised by legislation requiring, as opposed to allowing, a federal court to sit *en banc* in certain circumstances.[192] Requiring a federal court to sit *en banc* does not limit the ability of the court to independently adjudicate a matter to finality.[193] Instead, a provision mandating more frequent use of the *en banc* process would merely require certain decisions to be made by a majority of the FISC instead of a single judge. Given this, it would appear that Congress can constitutionally require the FISC to sit *en banc*, because *en banc* decision-making does not, in and of itself, limit core Article III powers.[194] After all, in *Western P.R.,* the case in which the Supreme Court held that the *en banc* provisions of Section 46 of the Judicial Code were permissive in nature, the Courts' interpretation was not compelled by constitutional reasons.[195] Instead, the Court reasoned that practical considerations, such as a contrary reading imposing "unwarranted extra burdens on the court," drove the Court's interpretation of Congress's intent in enacting the statute, implicitly conceding that Congress *could* impose mandatory *en banc* proceedings if it had had such an intent.[196]

Indeed, in a related context, Congress has mandated the use of three-judge panels to adjudicate various categories of cases in the federal courts. For instance, in 1903, Congress established three-judge panels of the circuit courts to adjudicate antitrust suits brought by the federal government.[197] That statute provided that when the Attorney General attested that the case involved questions of "general public importance," that case "be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not

(...continued)

50062-01 (W.D. La. June 22, 1988); United States v. Harris, No. 88-CR-6-B (N.D. Okl. Apr. 28, 1988); United States v. Johnson, 68 F. Supp. 1033 (W.D. Mo. 1988); United States v. Macias-Pedroza, 694 F. Supp. 1406 (D. Ariz. 1988); United States v. Ortega Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988); United States v. Serpa, 688 F. Supp. 1398 (D. Neb. 1988); United States v. Stokley, Criminal Action No. 2:87-00206 (S.D. W. Va. July 8, 1988); United States v. Swapp, 695 F. Supp. 1140 (D. Utah 1988); United States v. Williams, 691 F. Supp. 36 (M.D. Tenn. 1988).

[190] *See, e.g.,* United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980), *aff'd*, 685 F.2d 1272 (11th Cir. 1982) (dismissing 84 indictments lodged against 336 Cuban defendants).

[191] "Although [the FISC] is not a district court, it possesses similar inherent authority, except to the extent that it is limited by FISA." *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158 (FISA Ct. Dec. 18, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf.

[192] Similar to the discussion above on mandating the FISC to hear from an *amicus*, *see* "Requiring the FISC to Hear from an Amicus Curiae," *supra* pp. 13-14, a determination of which applications require a hearing *en banc* could entail an act of judicial discretion on the part of the FISC.

[193] *See* United States v. Klein, 80 U.S. 128, 146 (1872).

[194] *See* "Congress's Power to Regulate the Practice and Procedures of Federal Courts," *supra* pp. 6-9.

[195] 345 U.S. at 258-59.

[196] *Id.* at 259; *but see* Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been decided as to constitute precedents.").

[197] Act of Feb. 11, 1903, ch. 544, 32 Stat. 823.

less than three of the circuit judges" of that circuit.[198] Similarly, in 1910, Congress required that any suit seeking to enjoin a state officer from enforcing an allegedly unconstitutional law had to be submitted to a three-judge panel consisting of at least one justice of the Supreme Court or any circuit judge, and the other two either district court or circuit court judges.[199] Although Congress has since narrowed the use of these panels,[200] they are still employed in a limited category of cases, such as certain claims under the Civil Rights Act of 1964.[201] In this sense, requiring the use of *en banc* panels in certain FISA cases appears to be a neutral regulation of the courts "procedures" that aligns with a long historic precedent and does not appear to offend core Article III norms.

Altering Voting Rules of the FISC and the FISA Court of Review

Another suggested procedural change to the FISA judicial review process is to alter the voting rules of the FISC and the FISA Court of Review. A judicial voting rule is simply the number of votes required for a court to decide and give precedential effect to a case.[202] The FISA Court Accountability Act (H.R. 2586) would require that before an *en banc* panel of the FISC could act, it must have the concurrence of 60% of the sitting judges.[203] H.R. 2586 would also require that any decision in favor of the government by the three-judge FISA Court of Review must be made unanimously.[204]

This proposal to statutorily regulate the voting rules of federal courts is not unique. While it has never directly set the voting rules of the federal courts, Congress has established the number of Justices that sit on the Supreme Court and the number that constitute a quorum.[205] Likewise, Congress has exercised considerable control over the lower federal courts, such as setting the number of judges that sit on each court of appeals[206] and the number of appeals court judges needed to constitute a quorum.[207] While Congress has made efforts to directly alter the voting rules of the Supreme Court and the courts of appeals, usually during periods of strong disagreement with the Court's rulings,[208] none have been successful.[209] Without congressional

[198] *Id.*

[199] Act of June 18, 1910, ch. 309, 36 Stat. 539, 557.

[200] P.L. 94-381, 90 Stat. 1119 (1976).

[201] *See* 42 U.S.C. § 2000a-5(b); 42 U.S.C. § 2000e-6(b).

[202] *See* Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L. J. 831, 837 (2009).

[203] FISA Court Accountability Act, H.R. 2586, 113th Cong. (1st Sess. 2013).

[204] *Id.*

[205] 28 U.S.C. § 1; S. CT. RULE 4.2.

[206] 28 U.S.C. § 44.

[207] 28 U.S.C. § 46 ("A majority of the number of judges authorized to constitute a court or panel thereof ... shall constitute a quorum.").

[208] See the appendix in Evan H. Caminker, *Thayerian Defense to Congress and the Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L. J. 73, 177 (2003), for a list of past congressional supermajority voting proposals.

[209] There have also been proposals to alter the voting rules of the inferior federal courts, including the courts of appeals sitting *en banc*, *see, e.g.*, Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 866 (1989); Note, *En Banc Review in Federal Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1655 (1974), and courts of appeals sitting in (continued...)

regulation, the federal courts have fallen back on the common law simple majority rule.[210] While Congress has significant authority to regulate the practice and procedure of the federal courts,[211] it is unclear whether directly setting the voting rules of a federal court falls within that power.

Because Congress has never enacted a voting rule for federal courts, neither the Supreme Court nor the lower federal courts have had the opportunity to address the propriety of such a law. Nonetheless, various arguments have been made that Congress lacks the authority to set the voting rules of the Supreme Court. For instance, one theory holds that once Congress vests the courts with the "judicial power," sets the number of judges on that court, and sets the quorum, Congress's authority to regulate the Court's procedure terminates, and the Court can exercise the power of all similar deliberative bodies to decide cases by a simple majority.[212] A similar argument has been made that the structure of the Constitution itself mandates the common law rule of a bare majority. One observer contends that Congress is powerless to alter the default majority rule that applies in all deliberative bodies in the absence of a specific constitutional provision providing for an alteration of this rule.[213] For instance, the Constitution provides each House of Congress the authority to "determine the Rules of its proceedings,"[214] but does not expressly provide that Congress may alter the voting rules of the federal courts. However, there are several current voting practices that deviate from the bare-majority rule that would undercut this argument. For instance, Congress currently sets the quorum of the Supreme Court at six,[215] which is greater than the common law rule of a simple majority. Likewise, the Court's own implementation of sub-majority rules including the Rule of Four,[216] which requires only four justices to grant *certiorari* review, and the "hold rule," which requires only three justices to hold a case,[217] may weaken the argument that the use of simple majorities is constitutionally compelled.

Instead of an absolute bar on congressional regulation of the courts' voting rules, a more likely resolution of their constitutionality will turn on the degree of interference they might have on the FISA courts' exercise of the judicial function. As described above, while Congress has considerable authority to regulate the practice and procedure of the federal courts, it may not use

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traditional three-judge panels. Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L. J. 676, 709 (2007).

[210] *See* FTC v. Flotill Prods., 389 U.S. 179, 183 (1967) ("The almost universally accepted common-law rule is [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."); Saul Levmore, *More Than Mere Majorities*, 2000 UTAH L. REV. 759, 765 (2009) ([T]here is almost universal convergence on the requirement of an absolute majority coalition for ... 'disposition,' or the immediate, enforceable result affecting the litigants.").

[211] Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941).

[212] CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 215 (1925).

[213] Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L. J. 1535, 1591 (2000).

[214] U.S. CONST. art. I, § 5, cl. 2.

[215] 28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.")

[216] *See* Bailey v. Central Vt. Ry., 319 U.S. 350, 358-59 (1943) (Stone, C.J., concurring) (noting that the Court has adhered to the "long standing practice of granting certiorari upon the affirmative vote of four Justices"); Harris v. Pennsylvania R.R. Co., 361 U.S. 15, 18 (1959) (Douglas, J., concurring) ("[T]he practice of the Court in allowing four out of nine votes to control the certiorari docket is well established and of long duration.").

[217] Watson v. Butler, 483 U.S. 1037, 1038 (1987) ("Three votes suffice to hold a case[.]").

this power to erode the core functions of the judiciary.[218] Of particular concern with respect to altering the voting rules is the proposition enunciated in *United States v. Klein*, in which the Supreme Court refused to give effect to a statute that was said to "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]"[219] Although the precise contours of *Klein*'s holding are subject to debate, one generally accepted interpretation is that Congress cannot regulate the jurisdiction of the federal courts in an attempt to dictate substantive outcomes.[220]

Requiring a 60%, rather than majority, concurrence in the *en banc* proceeding would not appear to unduly interfere with the essential functions of these courts. Under this proposed rule, if the 60% threshold is not met, the decision below would be affirmed. With respect to proceedings under Section 215 and Section 702, which have recently caused the most concern for Congress,[221] this proposal would tilt the scales in favor of affirming the one-judge FISC decision, but on its face would not primarily favor one result over another.[222] The judges would still be permitted to interpret the law and decide the matter before them free from interference. And because this rule would primarily have a neutral effect on the FISC's rulings, it may not violate the principles established in *Klein*. Some may argue that this proposal interferes with the FISC's prerogative to set its own rules and adjudicate cases free from congressional interference, but as discussed, Congress has wide latitude to set the rules of the federal courts, and this proposed rule appears to fall within that authority.[223]

The requirement of a unanimous vote in the FISA Court of Review for any decision in favor of the government poses a more serious risk of interfering with the independence of these courts. The proposal would not apply across the board to all decisions of the Court of Review, but instead singles out decisions in favor of the government.[224] As a matter of course, this rule would prevent the court from entering an order in favor of one side even when two thirds of the court agrees with that decision. If viewed in that light, it could be interpreted as Congress seeking to dictate a substantive outcome in violation of *Klein*.[225] Additionally, a broader argument could be made that

[218] *See* "Congress's Power to Regulate the Practice and Procedures of Federal Courts," pp. 6-9.

[219] United States v. Klein, 80 U.S. 128, 146 (1872).

[220] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (4th ed. 2003); *see also* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 985 (2003) ("Congress should not be able to tell the Court exactly how to rule and for whom, because that infringes on the judicial power.").

[221] *See* CRS Report R43134, *NSA Surveillance Leaks: Background and Issues for Congress*, by (name redacted) and (name redacted).

[222] In all other FISA proceedings, this rule may tilt the scales against the government as it is the sole entity with the authority to request a hearing or rehearing *en banc*. Although still not dictating a substantive outcome, this scenario could raise more serious constitutional concerns. *See* Shugerman, *supra* note 208, at 985-86 ("If Congress imposed a supermajority rule only for certain kinds of constitutional challenges, e.g., federalism or substantive due process, such a substantive direction would create a Klein problem.").

[223] Although Congress has considerable authority to establish procedures in the federal courts, this power is not limitless. While requiring a 60% concurrence of an *en banc* FISC panel may fall within that power, mandating a higher threshold, such as unanimity, may unduly hinder the FISC from acting at all and might constitute an unreasonable interference into that court's judicial function. *See* Shugerman, *supra* note 208, at 984-85 ("However, what if Congress required a unanimous vote, or no more than one dissent, for striking down federal laws? In terms of 'essential functions,' this difference in degree becomes a difference in kind with such a burdensome rule. Judicial review would remain a power only in theory but not in practice, except in only the clearest cases of legislative intrusions. An overly burdensome degree of consensus effectively would be a checkmate against the essential power.").

[224] FISA Court Accountability Act, H.R. 2586, 113th Cong. (1st Sess. 2013).

[225] *Cf.* United States v. Klein, 80 U.S. 128, 146 (1872).

by preventing the Court of Review from acting or issuing binding rulings with respect to certain cases, Congress is preventing it from acting as a duly constituted court. While the creation of the Court of Review was in Congress's sole discretion, it could be argued that once it was created, Congress cannot deprive it of the core functions of a federal court, including the ability to render final, "dispositive judgments" in cases before it.[226] However, one may argue that while this rule may make it harder for the government to win on appeal, the proposal does not mandate a particular result and leaves the ultimate decision-making authority with the judges. Ultimately, like the other proposals altering the procedures and operations of the FISA courts, there is little judicial precedent to evaluate measures that would alter the courts' voting rules.

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[226] *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 219 (1995) (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).