

Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act

January 10, 2014

These comments on behalf of the Judiciary regarding proposals with respect to the Foreign Intelligence Surveillance Act of 1978 (FISA), codified as amended at 50 U.S.C. §§ 1801-1885c, were prepared by the Honorable John D. Bates, Director of the Administrative Office of the United States Courts, in consultation with the current Presiding Judges of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (Court of Review), as well as with other judges who serve or have served on those courts.

It is the responsibility of the political branches to decide, within the bounds of the Constitution, what legal requirements and processes or substantive limitations should apply to intelligence gathering operations. For that reason, the focus of these comments is not to provide policy advice on issues of national security, foreign relations or privacy. Rather, the principal objective of these comments is to explain how certain proposals for substantive or procedural changes to FISA would significantly affect the operations of the FISC and the Court of Review (collectively, “the Courts”). These comments are presented in an effort to enhance the political branches’ ability to assess whether, on balance, it would be wise to adopt those proposals. This discussion also notes where we perceive that certain proposals may implicate serious constitutional concerns, although detailed analysis of the constitutional issues is precluded where those issues could foreseeably come before one of the Courts in the event that a proposal is adopted.

The following is a summary of our key comments:

- It is imperative that any significant increase in workload for the Courts be accompanied by a commensurate increase in resources.
- Some proposed changes would profoundly increase the Courts’ workload. Even if additional financial, personnel, and physical resources were provided, any substantial increase in workload could nonetheless prove disruptive to the Courts’ ability to perform their duties, including responsibilities under FISA and the Constitution to ensure that the privacy interests of United States citizens and others are adequately protected.
- The participation of a privacy advocate is unnecessary and could prove counterproductive in the vast majority of FISA matters, which involve the application of a probable cause or other factual standard to case-specific facts and typically implicate the privacy interests of few persons other than the specific target. Given the nature of FISA proceedings, the participation of an advocate would neither create a truly adversarial process nor constructively assist the Courts in assessing the facts, as the advocate would be unable to communicate with the target or conduct an independent investigation. Advocate involvement in run-of-the-mill FISA matters would substantially hamper the work of the Courts

without providing any commensurate benefit in terms of privacy protection or otherwise; indeed, such pervasive participation could actually undermine the Courts' ability to receive complete and accurate information on the matters before them.

- In those matters in which an outside voice could be helpful, it is critical that the participation of an advocate be structured in a manner that maximizes assistance to the Courts and minimizes disruption to their work. An advocate appointed at the discretion of the Courts is likely to be helpful, whereas a standing advocate with independent authority to intervene at will could actually be counterproductive.
- Drastically expanding the FISC's caseload by assigning to it in excess of 20,000 administrative subpoena-type cases per year – even with a corresponding injection of resources and personnel – would fundamentally transform the nature of the FISC to the detriment of its current responsibilities.
- It is important that the process for selection of FISC and Court of Review judges remain both expeditious and fully confidential; the Chief Justice is uniquely positioned to select qualified judges for those Courts.
- In many cases, public disclosure of Court decisions is not likely to enhance the public's understanding of FISA implementation if the discussion of classified information within those opinions is withheld. Releasing freestanding summaries of Court opinions is likely to promote confusion and misunderstanding.
- Care should be taken not to place the Courts in an "oversight" role that exceeds their constitutional responsibility to decide cases and controversies.

The adoption of many of the measures discussed herein would impose substantial new responsibilities on the FISC and ultimately the Court of Review. For the Courts to meet such new responsibilities effectively and with the dispatch often required by national security imperatives, they would need to receive commensurate augmentation of resources. Depending on what exactly is enacted, the augmentation may require increased legal or administrative staff, additional judges or devotion of more of the current judges' time to the work of the Courts, appointment of magistrate judges to work on the FISC, and enhanced secure spaces and communications facilities. The provision of some of these resources could well come at the expense of the work of judges in their home districts and circuits, thereby negatively affecting the operations of their respective federal courts.

We also wish to stress, however, that even significantly increasing resources will not guarantee that all proposed changes will be successful. Giving new responsibilities to the Courts, while also establishing more elaborate procedures for the Courts to follow, may actually detract from their ability to identify and resolve the issues that are most critical to national security and privacy interests. Thoughtful assessment of the advantages and disadvantages of proposed changes is therefore crucial.

In our view, some proposals that have been made – especially those that would create a full-time independent advocate to oppose a wide range of government applications before the Courts – present substantial difficulties that would not be resolved by simply increasing the Courts’ resources. We anticipate that this form of advocate participation would not only be cumbersome and resource-intensive, but also would impair the FISC’s ability to receive relevant information, thereby degrading the quality of its decisionmaking. We turn first to this question.

Proposals for a Special Advocate to Appear Before the Courts

The vast majority of FISC matters are *ex parte* requests by the government for search warrants, electronic surveillance orders, production of records or pen register/trap-and-trace orders. Every day, United States district courts receive dozens of such requests in criminal investigations and rule on them in an *ex parte* manner, with no party present except the government. The FISC process is very similar to the one employed by the district courts in these criminal matters.

Consistent with this well-established procedure for entertaining requests of this nature, FISA does not currently provide a means for the FISC to solicit the assistance of non-governmental entities in considering issues presented by such requests. Moreover, except in the rare situation where substantial information about an ongoing case has been declassified,¹ non-governmental individuals and entities now lack the information needed to seek leave to participate as *amici curiae* and to assist the FISC or Court of Review in resolving difficult legal or technological issues. An effort to address these narrow concerns would not be objectionable, as long as it does not burden Court operations in the large majority of cases where there is no need for a quasi-adversarial process.

Recent public debate has focused on matters such as NSA’s bulk collection of call detail records under Section 501 of FISA, codified at 50 U.S.C. § 1861, and the government’s acquisition of information pursuant to Section 702 of FISA, codified at 50 U.S.C. § 1881a. Such matters, however, comprise only a small portion of the FISC’s workload, measured either by number of cases or allocation of time. In all but a small number of matters, the FISC’s role is to apply a probable cause or other factual standard to target-specific sets of facts and to assess whether the government’s proposed minimization procedures are adequate under the particular circumstances. The authorizations sought in the large majority of cases do not implicate the privacy interests of many U.S. persons because the collections at issue are narrowly targeted at particular individuals or entities that have been found to satisfy the applicable legal standards. Nor, except in a small handful of cases, do such matters present novel or complex legal or technical issues. Accordingly, as the President’s Review Group on Intelligence and

¹ See *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Memorandum Opinion and Order, Docket No. BR 13-158 (FISA Ct. Dec. 18, 2013), where the FISC authorized a non-governmental advocacy group to file an *amicus* brief addressing the bulk telephony metadata collection program.

Communications Technologies (“Review Group”) has recognized,² most FISA cases are similar to law enforcement applications for search warrants and Title III wiretaps, which also are considered *ex parte*. Providing for an advocate in the large majority of cases, then, would be superfluous and would create the unusual situation in our judicial system of affording, at this stage of the proceedings, greater procedural protections for suspected foreign agents and international terrorists than for ordinary U.S. citizens in criminal investigations.

To be sure, genuinely adversarial processes, such as criminal or civil trials, provide an excellent means of testing a party’s factual contentions. But introducing an advocate into the FISA process would not produce that result. Advocates of the type put forward in various proposals to change FISA would not actually represent a proposed target of surveillance or any other particular client.³ For operational security reasons, such an advocate would not be able to conduct an independent factual investigation, *e.g.*, by interviewing the target or the target’s associates. An advocate therefore would be of little, if any, assistance in evaluating the facts of particular cases which, as noted above, is the heart of the FISC’s consideration in the large majority of cases.

Indeed, we are concerned that proposals to create a full-time advocate with the discretion to participate, or seek leave to participate, in any or all cases would impair rather than improve the FISC’s ability to receive information and rule on applications in an effective and timely manner. Enhanced resources would help the FISC overcome these impairments, but only to a limited extent. In order to explain the reasons for these concerns, it is helpful to summarize how the FISC operates.

² When the FISC was created, it was assumed that it would resolve routine and individualized questions of fact, akin to those involved when the government seeks a search warrant. It was not anticipated that the FISC would address the kinds of questions that benefit from, or require, an adversary presentation[;] . . . however, the FISC is *sometimes* presented with novel and complex issues of law. The resolution of *those issues* would benefit from an adversary proceeding.

Liberty and Security in a Changing World: Report and Recommendations of the President’s Review Group on Intelligence and Communications Technologies (Dec. 12, 2013) (“*Review Group Report*”) at 203 (emphasis added). The Review Group further acknowledged that “[b]ecause the number of FISA applications that raise novel or contentious issues is probably small, the Advocate might find herself with relatively little to do.” *Id.* at 204.

³ See, *e.g.*, *Review Group Report* at 200 (recommending creation of a “Public Interest Advocate to represent privacy and civil liberties interests” before the FISC).

Judges appointed to the FISC retain all their regular responsibilities for civil and criminal cases assigned to them in their respective districts. Each week, one of those judges is on duty for the FISC in Washington, D.C. Eight of the eleven judges do not reside in the Washington, D.C. area and must travel from their home districts in order to serve as the duty judge. The duty week assignment rotates among the judges, so that each judge takes one week every few months away from district court responsibilities to do FISC work. This rotation system avoids serious disruption to the work of any one district when a judge serves on the FISC.

Because much of the material reviewed by the FISC is highly classified, its work generally must be performed in a Sensitive Compartmented Information Facility (SCIF). FISC quarters in Washington, D.C., including office space and a court room (which are also shared by the Court of Review), are within such a SCIF. In contrast, a lack of secure communication and storage facilities makes it very difficult for eight of the eleven judges to review FISC pleadings or communicate about FISC matters when they are in their home districts. The large majority of FISC cases are handled by the duty judge within one week while in Washington (though preparatory work by Court staff often commences during the prior week). More complex or time-consuming matters are sometimes handled by judges outside of the duty-week rotation, at the discretion of the Presiding Judge.

FISC judges currently have substantial flexibility in deciding how best to receive from the government information they consider relevant to a particular case. Formal hearings are conducted when necessary. On the other hand, when deemed appropriate by a judge (for example, in a time-sensitive matter), the FISC may request or receive information from the applicant informally through its legal staff. This range of options enables the FISC duty judge to routinely entertain 40 or more applications in a typical week. In keeping with the *ex parte* nature of the proceedings, the government generally responds to these inquiries with a high degree of candor; indeed, the government routinely discloses in an application information that is detrimental to its case. This candor is also essential to the FISC's ability to discharge its responsibilities.

Introducing an advocate into a substantial number of FISC proceedings would likely slow down and complicate the Court's information-gathering and consideration of these fact-intensive cases. Under current FISC rules and practice, in non-emergency cases the government is required to submit proposed applications to the FISC within seven days of when it seeks to have the final application ruled upon. In order for an independent advocate to have a meaningful opportunity to review an application, decide whether he wishes to participate in its consideration, and prepare and submit views to the FISC, and for the FISC to consider the advocate's submission together with the application, the government would have to submit a proposed application substantially earlier than the present seven-day period. That requirement would likely conflict with the government's interest and the public's interest to obtain expedited consideration of an application or of successive applications when necessary to respond to a rapidly evolving threat. Moreover, even relatively routine national security investigations often involve changing facts, such that proposed applications would frequently require change or

supplementation. This process of keeping the FISC and the advocate apprised of changing circumstances over a longer period of time would be cumbersome and time-consuming.

This prolonged period of consideration in routine cases would also complicate the assignment of matters to FISC judges because such proceedings would likely extend beyond a judge's normal duty week. The more cases in which an advocate is involved, the more likely it would be that the Court would have to modify its current practice of having each FISC judge sit for one week at a time. A different approach, requiring a judge to engage with FISC matters for longer periods, is likely to require more time away from judges' home districts, to the detriment of their regular district court work.

The difficulties of such a process would be exacerbated by the need to interact on equal terms with the applicant and the advocate. In order for the FISC to abide by the procedural and ethical requirements that apply in adversarial proceedings, and for the advocate to appear on equal footing with the applicant, the FISC would have to ensure that the advocate was involved in all such interactions in any case in which the advocate may participate (or, if the advocate must seek leave to participate from the FISC, perhaps only in those cases where such a request is pending or has been granted). We expect that the logistical challenges of administering such a three-way process for more than a handful of cases would be considerable. And even if it were appropriate under the terms of a specific enactment to limit the involvement of the advocate in such interactions to cases where the advocate has sought or received leave to participate, the FISC may well need to ensure that the advocate, upon entering a matter, becomes fully apprised of any interactions that have already occurred.⁴

At an institutional level, there are difficult policy, and potentially constitutional,⁵ questions regarding how an advocate would fit within existing governmental structures. The Review Group recognized that where to house the advocate presents a "difficult issue" and came to no particular recommendation on this point. *See Review Group Report* at 204-05. Some proposals for an advocate may also compromise judicial independence.⁶

⁴ If the advocate and an applicant have a dispute about what information the advocate should receive, then the FISC may be required to resolve collateral, discovery-type issues, which would place new forms of demands on the resources of the Court and create the potential for delays that would impact national security.

⁵ *See* Congressional Research Service, *Introducing a Public Advocate into the Foreign Intelligence Surveillance Act's Courts: Select Legal Issues* (Oct. 25, 2013) at 8-14 (discussing issues under the Appointments Clause).

⁶ Some proposals would grant the advocate broad access, not only to government pleadings and Court decisions, but also to Court material relevant to those decisions. Such broad access could be understood to encompass draft decisions and memoranda from legal staff to a
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In short, the burdens and complications arising from a full-time advocate who could elect to participate (or seek leave to participate) in fact-intensive, run-of-the-mill cases, weighed against the negligible benefits from involving an independent advocate in consideration of those cases, strongly counsel against creation of such a position.

Perhaps most troubling, however, is our concern that providing an institutional opponent to FISA applications would alter the process in other ways that would be detrimental to the FISC's timely receipt of full and accurate information. As noted above, the current process benefits from the government's taking on – and generally abiding by – a heightened duty of candor to the Court. Providing for an adversarial process in run-of-the-mill, fact-driven cases may erode this norm of governmental behavior, thereby impeding the Court's receipt of relevant facts. (As noted above, the advocate would rarely, if ever, serve as a separate source of factual information.) Instead, intelligence agencies may become reluctant to voluntarily provide to the Court highly sensitive information, or information detrimental to a case, because doing so would also disclose that information to a permanent bureaucratic adversary. This reluctance could diminish the Court's ability to receive relevant information, thereby undermining the quality of its decisions. In some cases, that reluctance could result in those agencies' opting not to pursue potentially valuable intelligence-gathering operations governed by FISA in order to protect extremely sensitive intelligence methods or targets from disclosure to that adversary.⁷

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judge. Such materials are privileged communications under both ethical canons and separation-of-powers principles and their disclosure to the advocate would seriously infringe on the independence of the judges' decisionmaking.

⁷ Some might suggest that an advocate who can engage across-the-board in FISA matters would enhance public perception that the process is fair and takes into account privacy, as well as national security, interests. Recent disclosures by the FISC and the Executive Branch have done much to dispel the misperception that the FISC “rubber stamps” government requests. *See, e.g., Review Group Report* at 202 (“As illustrated by the [recently declassified] section 215 and section 702 non-compliance incidents . . ., the FISC takes seriously its responsibility to hold the government responsible for its errors.”); Letter of the Honorable Reggie B. Walton, FISC Presiding Judge, to the Honorable Patrick J. Leahy, Chairman, Senate Committee on the Judiciary (Oct. 11, 2013) (“During the three month period from July 1, 2013 through September 30, 2013, we have observed that 24.4% of matters submitted [to the FISC] ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of Court inquiry or action.”). Moreover, public action such as enhancing transparency and modifying the substantive rules and standards governing intelligence collection (or reaffirming current rules and standards after public examination and debate) would be more likely to improve confidence in the FISA process than would introducing a new layer of secret bureaucracy.

A mechanism that facilitates the involvement of an advocate in those particular cases that, in the Court's judgment, would benefit from an advocate's participation would largely avoid these difficulties. Contrary to the suggestion of the Review Group, *see Review Group Report* at 204, we believe that judges are fully capable of determining which matters would benefit from such participation and how best to structure participation within a particular case.⁸ If an advocate's participation is at the discretion of the Court, however, placing statutory limitations on the types of cases in which that participation is available may prevent the Court from benefitting from the advocate's contributions in an appropriate case. For example, limiting an advocate's participation to cases presenting a novel or significant interpretation of the law could prevent the Court from taking advantage of an advocate's participation in a case that presented challenging technological, rather than legal, issues. Such limitations might also raise constitutional questions. *See Congressional Research Service, Requiring a Federal Court to Hear from an Amicus Curiae* (Dec. 9, 2013) at 4.

Proposals that would empower a permanent advocate to independently seek reconsideration of FISC decisions, or to appeal them to the Court of Review, would pose difficulties in addition to those summarized above. As others have noted, substantial standing and other constitutional issues would be presented if the advocate sought to challenge an authorization granted by the FISC. *See Congressional Research Service, Introducing a Public Advocate into the Foreign Intelligence Surveillance Act's Courts: Select Legal Issues* at 21-26 (Oct. 25, 2013).

As a practical matter, a full-time advocate empowered to seek reconsideration in the FISC and to appeal decisions to the Court of Review would significantly impact the operations of both Courts. An increased number of reconsideration requests would pose scheduling and logistical challenges in the FISC's current mode of operations. FISC judges frequently rule on cases toward the end of their duty week, so in many cases it is highly unlikely that an advocate's request for reconsideration would even be filed before a sitting judge from a district outside of the District of Columbia area returned to his or her district. As a result, judges would need to arrange their regular district court schedules to allow for an additional, return trip to Washington in the event a request for reconsideration were filed. If requests for reconsideration became sufficiently common, the FISC would likely need to reexamine its current one-week rotation schedule. Either approach would negatively affect judges' ability to perform their district court duties.

In the Court of Review, any meaningful increase in the number of appeals would transform the operations of that Court, which heretofore has not had a workload requiring full-time operation. Because Court of Review judges also serve full-time on district courts or courts of appeal, a significant increase in the number of FISA appeals might necessitate more judges being appointed to the Court of Review. And because the Court of Review currently relies on FISC staff and uses the FISC's secure space to conduct its work, a significant increase in its

⁸ An approach in which the FISC could appoint an advocate in a particular case where the advocate's participation would be helpful would also enable the Court to select an advocate who does not present recusal issues for the judge handling the case.

workload would likely require the Court to hire its own staff and construct or acquire its own secure space.

Effect of Certain Substantive Proposals on Court Operations

The following substantive proposals would impose significant new demands on the FISC and ultimately the Court of Review.

Changes to National Security Letter Practices: The Federal Bureau of Investigation (FBI) uses national security letters (NSLs), which are akin to administrative subpoenas, mainly to obtain subscriber information, *see Review Group Report* at 90, although other types of records may also be obtained, *see, e.g.,* 15 U.S.C. § 1681u (consumer report records).

An NSL-related recommendation of the Review Group could increase the FISC's annual caseload severalfold. Under that recommendation, an NSL could be issued in non-emergency circumstances "only upon a judicial finding" of "reasonable grounds to believe that the particular information sought is relevant to an authorized investigation intended to protect against international terrorism or clandestine intelligence activities." *Review Group Report* at 89, 93 (internal quotations omitted). The Review Group did not reach a conclusion about whether to give jurisdiction over NSL requests to the FISC or other federal courts. *Id.* at 93. The Review Group recognized, however, that assigning such cases to the FISC "would pose a serious logistical challenge. The FISC has only a small number of judges and the FBI currently issues an average of nearly 60 NSLs per day.⁹ *It is not realistic to expect the FISC, as currently constituted, to handle that burden.*" *Id.* (emphasis added). We strongly agree. We are skeptical, however, that the suggestions put forward to revamp the FISC to take on such demands – "a significant expansion in the number of FISC judges" or "creation within the FISC of several federal magistrate judges to handle NSL requests," *id.* – would be adequate.

Moreover, even if one assumes that adequate resources can be made available to the FISC to handle the sheer volume of new cases without compromising the district court work of FISC judges, jurisdiction over 21,000 NSL requests per year would transform the FISC from an institution that is primarily focused on a relatively small number of cases that involve the most intrusive or expansive forms of intelligence collection to one primarily engaged in processing a much larger number of more routine, subpoena-type cases. We fear that such a drastic shift of emphasis would diminish the FISC's effectiveness in adjudicating and overseeing cases involving electronic surveillance, physical search or Section 702 acquisitions.

⁹ In annual terms, the FBI issued 21,000 NSLs in Fiscal Year 2012. *Review Group Report* at 90. By way of comparison, the FISC entertained 212 business records applications and 1,856 applications for electronic surveillance and/or physical search in calendar year 2012. Letter of Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Honorable Harry Reid, Senate Majority Leader (Apr. 30, 2013).

Others have proposed changes to NSL requirements that would also have substantial, albeit less direct, effects on the FISC's caseload. For example, requiring an NSL to disclose to the receiving party the factual predicate for issuing the NSL would implicate investigative information that the FBI presumably would have good operational security reasons not to disclose in national security cases, regardless of how well-supported the NSL may be.¹⁰ These changes would likely result in the government's decreasing its reliance on NSLs for records subject to such a disclosure requirement and instead bringing to the FISC more applications under Section 501 for production of such records, in order to avoid disclosure of such information to private parties.

Section 501 – Bulk Call Detail Records: Some proposals call for elimination of bulk production to the government of call detail records under Section 501. *See, e.g., Review Group Report* at 86-89, 115-19. If the bulk production of such records were eliminated, we anticipate that the government would bring to the FISC many more particularized applications for productions of such records or, as envisioned by the Review Group, for authorization to query bulk metadata retained in private hands. *Id.* at 115, 118-119. Others have considered preserving the government's ability to obtain bulk production of call detail records, provided that the FISC would review the substantive basis for querying that information (either before or after the fact). Any of these variations would impose significant new burdens on the FISC.

Nondisclosure Provisions of FISC Orders: It is not apparent that recipients of FISC orders are generally interested in publicly disclosing those orders. For example, a recipient of an order to produce records under Section 501 may challenge a related nondisclosure order after one year from the date the latter order was issued. *See* § 501(f)(2)(A)(i), codified at 50 U.S.C. § 1861(f)(2)(A)(i). From 2005 through 2012, the FISC granted approximately 750 applications under Section 501. To date, no recipient of a Section 501 order has ever challenged its non-disclosure obligations pursuant to Section 501(f)(2)(A)(i).¹¹

Nevertheless, some have proposed substantial changes in this area. For example, the Review Group recommends that nondisclosure obligations should be placed on recipients of NSLs, Section 501 orders, pen register and trap-and-trace orders, Section 702 directives, and “similar orders directing individuals, businesses, or other institutions to turn over information to the government . . . only upon a judicial finding” – presumably by the FISC in matters within its purview – “that there are reasonable grounds to believe that disclosure would significantly threaten the national security” or another specified type of harm. *Review Group Report* at

¹⁰ We note that the President's Review Group recognizes that the factual predication for NSLs is likely to involve classified information. *See Review Group Report* at 93.

¹¹ In cases now pending before the FISC, several providers are seeking a declaratory judgment that they may lawfully release certain aggregate statistical information about various types of orders they have received, including Section 501 orders. Those cases, however, were not brought under Section 501(f)(2)(A)(i).

122-23. It further recommends that a nondisclosure order “remain in effect for no longer than 180 days without judicial re-approval.” *Id.* at 123.

Practically all FISC orders of various types identify the target, either directly or by disclosing target-specific information, such as a phone number the target uses. As we understand long-standing Executive Branch classification practices, the government typically regards the targets of counterintelligence or international terrorism investigations as classified while those investigations are ongoing and for at least several years thereafter. Under an approach such as the one recommended by the Review Group, we would anticipate that each application would be accompanied by a request for a nondisclosure order and that practically all applications would entail successive requests to extend those nondisclosure orders. This new form of request would require the government to present, and the FISC to assess, facts and considerations that are distinct from whether the proposed collection is warranted and U.S. person privacy interests are adequately protected. Without arriving at a policy conclusion, we are skeptical that this proposed new process would lead to greater public understanding of the implementation of FISA or other tangible benefits, and whether any such benefits are commensurate with the burdens imposed by entertaining a line of periodic requests to extend nondisclosure obligations for a large percentage of current and former FISA targets.

Querying Section 702 Information: Section 702 of FISA concerns certain acquisitions of foreign intelligence information targeting non-U.S. persons who are reasonably believed to be outside the United States. Currently, the government may not target U.S. persons for acquisition under Section 702, *see* § 702(b)(1), (3), but information about U.S. persons may still be obtained (*e.g.*, when a U.S. person communicates with a targeted non-U.S. person). Proposals have been made to generally prohibit querying data acquired under Section 702 for information about particular U.S. persons, with an exception for emergency circumstances and for U.S. persons for whom a probable cause showing has been made.¹² These proposals would engender a new set of applications to the FISC. Decisions about querying Section 702 information are now made within the Executive Branch. As a result, the Courts do not know how often the government performs queries of data previously acquired under Section 702 in order to retrieve information about a particular U.S. person. It seems likely to us, however, that the practice would be common for U.S. persons suspected of activities of foreign intelligence interest, *e.g.*, engaging in international terrorism, so that the burden on the FISC of entertaining this new kind of application could be substantial.¹³

¹² *See, e.g., Review Group Report* at 146 (recommending that such queries be allowed “when the government obtains a warrant based on probable cause to believe that the United States person is planning or is engaged in acts of international terrorism”).

¹³ For a variety of reasons, a U.S. person suspected of such activity may not otherwise be a FISA target. For example, there may be probable cause to believe that a U.S. person is engaged in international terrorism, but intelligence agencies may not have the ability to implement current forms of FISA collection against that person because of the person’s location or lack of

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Selection of FISA Judges

Currently, the Chief Justice selects eleven district court judges to serve on the FISC for staggered terms not to exceed seven years. 50 U.S.C. § 1803(a)(1), (d). In order to ensure that judges bring to the FISC experiences and practices developed around the country, these judges must represent at least seven of the judicial circuits. § 1803(a)(1). At least three of the FISC judges must reside within 20 miles of Washington, D.C., so that a judge will be continuously available to entertain urgent matters. *Id.* The Chief Justice also selects three district court or circuit court judges to serve on the Court of Review for terms not to exceed seven years. § 1803(b), (d).

Various proposals have been made to alter the selection or composition of judges on these Courts,¹⁴ apparently reflecting a concern that their current membership is, or may be perceived to be, politically or ideologically slanted.¹⁵ We urge those considering these proposals to be mindful that a smoothly functioning selection process is necessary for the Courts to discharge their responsibilities.

For the Courts to operate effectively, prolonged vacancies must be avoided. Maintaining a full complement of judges will become even more imperative if other legislative changes result in a heavier workload for the Courts. We are concerned that a selection process that involves more persons – and especially one that is likely to introduce political factors – would result in vacancies detrimental to Court operations and possibly to national security.

It has also happened from time to time that a judge being considered for service on one of the Courts is not ultimately selected because of issues arising from the mandatory background investigation.¹⁶ Knowledge of a problematic background investigation would be more widespread if more persons were involved in the selection process. The prospect of potential

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information about particular facilities.

¹⁴ The Review Group recommends dispersing the authority to select FISC judges, such that “each member of the Supreme Court would have the authority to select one or two members of the FISC from within the Circuit(s) over which she or he has jurisdiction.” *Review Group Report* at 208. Various other proposals would involve the chief judges of the judicial circuits, the President or Congressional leadership in the selection of FISC or Court of Review judges.

¹⁵ See, e.g., *Review Group Report* at 207-08 (noting that ten out of the eleven current FISC judges were appointed to the district court bench by Republican presidents). The fact that both current Court of Review judges were appointed to the federal appellate bench by a Democratic president receives less attention.

¹⁶ This background investigation is required by the security measures adopted by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence, pursuant to 50 U.S.C. § 1803(c).

embarrassment – potentially for an individual who would continue to serve publicly for the remainder of her career as a sitting federal judge – might deter qualified judges from wanting to serve on the Courts.

With specific regard to FISC operations, it is also important to maintain the practice of having multiple judges based in Washington, D.C., or its immediate vicinity. In its current form, FISA explicitly relies on a pool of local judges to handle particular kinds of time-sensitive cases. 50 U.S.C. § 1803(e)(1). This approach is sensible, given the severe security-related limitations on the ability of non-local judges to work on FISC matters in their home districts. For the same reason, there is a further need for local judges to handle other types of emergency situations, as well as complex matters that require a judge’s engagement for longer than a single week in the ordinary duty rotation. *See, e.g.*, Section 702(i)(1)(B) & (3)(C) (thirty-day period for FISC to review certifications and procedures for acquisitions targeting non-U.S. persons outside the United States and to provide a written statement of the reasons for its decision). Proposals that would make it more difficult to ensure that multiple FISC judges are based in the Washington area would negatively affect FISC operations.

Finally, proposals to disperse the selection authority among the associate justices of the Supreme Court or chief judges of the federal circuits ignore the Chief Justice’s unique role in the Judicial Branch. The Chief Justice is the President of the Judicial Conference of the United States, which includes the responsibility to assign federal judges across the country to the various Conference committees and other tasks, including service on special courts such as the Judicial Panel on Multidistrict Litigation.¹⁷ The Chief Justice is therefore uniquely positioned, with the assistance of the Director of the Administrative Office of the United States Courts, to review the federal judiciary and select qualified judges for additional work on the FISC or the Court of Review.¹⁸

*Public Disclosure and Declassification of Court Opinions
and Other FISA-Related Information*

The Judicial Branch is committed to making court opinions available to the public unless there is a compelling need for secrecy. The FISC regularly makes publicly available those of its opinions that do not contain classified information.

A number of legislative proposals are aimed at making more information available to the public about FISA legal interpretations and other aspects of FISA implementation. Cases involving declassification and release of such information are pending before the Courts, so we are especially constrained from addressing the substantive merits of these proposals. We do,

¹⁷ The associate justices have no role in this process.

¹⁸ Although the selection of judges for the FISC and the Court of Review is often labelled as an “appointment,” it is more accurately considered to be a designation to serve on the Court.

however, believe that the following points should be kept in mind as these proposals are assessed.

First, to the extent that the Courts may be assigned a new role in declassification and release of information, that role should accord with the constitutional allocation of functions in that sphere. Under the Constitution, classification of information in order to protect national security has been considered an Executive Branch responsibility. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). When necessary to resolve a case before it (*e.g.*, under the Freedom of Information Act, 5 U.S.C. § 552), a federal court may review classification decisions made by the Executive Branch, typically under a deferential standard. *See, e.g., Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993).

Second, while we support the highest degree of transparency consistent with protection of sensitive intelligence sources and methods and other properly classified information, we believe that there are practical limitations as to what can be achieved. Significant FISC opinions frequently involve the application of law to a complex set of facts, *e.g.*, how to apply FISA's four-part definition of "electronic surveillance," *see* 50 U.S.C. § 1801(f), to a proposed surveillance method for a new communications technology. The government may often believe it necessary to withhold from the public details about how a surveillance is conducted, so that valid intelligence targets are not given a lesson in how to evade it. But a redacted opinion that does not contain this factual information may merely recite statutory provisions or provide a partial discussion of how those provisions were applied, without the factual context necessary to understand the opinion's reasoning and result. In such cases, partial releases of opinions run the risk of distorting, rather than illuminating, the reasoning and result of Court opinions. That risk is probably even greater for summaries of opinions that are offered as public substitutes for withheld opinions, rather than as guides to opinions that are published.

We further suggest that, apart from the need to protect national security, legislative proposals for release of Court opinions should take into consideration appropriate protections for other categories of information, such as the names of government personnel or information implicating substantial privacy interests. Finally, any procedural framework for public disclosure should permit the Court a reasonable time to take any necessary action. Some proposals would impose severe time constraints.

FISC Role in Monitoring and Enforcing Executive Branch Compliance

A common objective of proposed changes to FISA is to enhance monitoring and oversight of intelligence gathering activities. Some particularly envision new roles for the FISC in this regard.

All three branches of government have responsibilities regarding FISA implementation. But it is important to recognize that the FISC does not have, and should not have, general auditing and oversight functions comparable to those performed by an Inspector General or a Congressional committee with jurisdiction over a particular Executive Branch agency. Judicial

involvement in the FISA process occurs within the context of Article III's cases or controversies requirement. FISA currently respects those Article III limitations by contemplating FISC involvement in the form of monitoring and enforcing compliance with FISC orders and authorizations, *i.e.*, within the context of FISC cases.¹⁹ To the extent that legislative proposals would enhance FISC review of Executive Branch compliance within the context of a particular FISC case, they are less likely to present constitutional difficulties. On the other hand, proposals that would assign to the FISC duties that are disassociated from any case before it would seriously risk exceeding constitutional limitations on the involvement of an Article III court in Executive Branch operations.²⁰

Finally, in line with the foregoing discussion of other matters, if the FISC were to be given a greater role in monitoring and enforcing Executive Branch compliance, it would require a commensurate increase of its current resources to discharge those responsibilities effectively.

¹⁹ See 50 U.S.C. §§ 1803(h) (“Nothing in this chapter shall be construed to reduce or contravene the inherent authority of the [FISC] to determine or enforce compliance with an order or rule of such court or with a procedure approved by such court.”); 1805(d)(3) (“At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.”); 1824(d)(3) (same for physical search).

²⁰ See, *e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009) (Article III limits the judicial power to deciding cases and controversies and, except “when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action”); *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (FISC “may well have exceeded the constitutional bounds that restrict an Article III court” by asserting authority over “the internal organization and investigative procedures of the Department of Justice which are the province of the Executive Branch (Article II) and the Congress (Article I)” (per curiam).