



Introducing a Public Advocate into the Foreign Intelligence Surveillance Act's Courts: Select Legal Issues

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Summary

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

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

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

Moreover, Article III of the Constitution which vests the judicial power of the United States in the courts of law over certain “cases” or “controversies” may also restrict the role of a public advocate. The nature of the FISA courts and their analogous position to how federal courts approve ordinary search warrants may arguably limit the application of Article III’s case-or-controversy requirement to FISA proceedings. Nonetheless, Article III typically requires that parties asking a federal court to exercise its remedial powers on his or her behalf must either (1) have personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the other party before the court or (2) be authorized by a party that has suffered such an injury to represent that entity. It is at the very least doubtful that a public advocate has either personally suffered a constitutionally sufficient injury or been properly authorized by an entity that has suffered a constitutionally sufficient injury. Moreover, Article III generally prevents the government from litigating against itself, making it constitutionally problematic to have an intra-branch dispute over foreign surveillance resolved by a federal court. In other words, allowing a public advocate to formally seek judicial relief from an Article III court presents serious constitutional questions. Instead, a more modest proposal that would allow the advocate to generally share its views of the law as friend of the court or *amicus curiae* may be less likely to run afoul of Article III’s restrictions.

Other constitutional questions are prompted by FISA public advocate proposals. For example, separation of powers concerns that no branch should aggrandize itself at the expense of a co-equal branch may also prevent a public advocate from being housed within the judicial branch. Likewise, Article III of the Constitution may present an obstacle to efforts that would make appeals of FISA court decisions more frequent. This report will explore all of these difficult constitutional issues prompted by the idea of including a new adversary in FISA court proceedings.

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Introduction

Recent controversies over the nature of the government's foreign surveillance activity have prompted some to argue that the judiciary's review of government surveillance requests under the Foreign Intelligence Surveillance Act of 1978 (FISA) should be far more exacting. Accordingly, some have proposed transforming proceedings before the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review into a far more adversarial process where a designated attorney or "public advocate" actively argues in opposition of the government's foreign surveillance requests.¹ The concept of incorporating a public advocate into FISA proceedings is a novel one, as "[p]ublic [a]dvocates do not have any identical comparators in the American legal system."² The few analogues to the FISA public advocate proposals that do exist in American laws appear in contexts far removed from the typical FISA proceedings, such as an administrative agency hearing or in a state court.³ While the novelty of such FISA reforms does not evidence that the law is constitutionally infirm,⁴ proposals advocating that a public advocate participate in the FISA court raise several difficult constitutional questions. This report will explore this novel legal concept and discuss several major constitutional issues surrounding the FISA advocate idea, including what is the legal role of a public advocate; how a FISA advocate can be constitutionally appointed; and whether employing a public advocate before a federal court adheres to the demands of Article III of the United States Constitution.

Background on the Concept of a "Public Advocate"

An underlying principle of the Anglo-American legal system is the adversarial process, whereby attorneys gather and present evidence to a generally passive and neutral decision maker.⁵ The basic assumption of the adversarial system is that a "sharp clash of proofs presented" by opposing advocates allows a neutral judge to best resolve difficult legal and factual questions.⁶

¹ FISA generally establishes procedures for the Government, acting through the Attorney General, to obtain a judicial warrant for electronic surveillance in the United States to acquire foreign intelligence information. 50 U.S.C. § 1802(a)(1). "With limited exceptions, the Government may not conduct electronic surveillance without a court-authorized warrant." *United States v. El-Mezain*, 664 F.3d 467, 564 (5th Cir. 2011). Application for a FISA warrant is made to the FISC, which is comprised of eleven district court judges designated by the Chief Justice of the United States. 50 U.S.C. § 1803(a)(1). The FISC's rulings are subject to review by the Foreign Intelligence Surveillance Court of Review, which consists of three judges also designated by the Chief Justice, whose rulings are, in turn, reviewed by the Supreme Court. 50 U.S.C. § 1803(b).

² Max Havelston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFFALO L. REV. 749, 799 (May 2012) (noting that skeptics to a proposal for allowing a public advocate to participate in class action lawsuits might object because the idea is "based around the creation of an entity that is unlike any that our legal system has recognized.").

³ *Id.* at 799-800 (noting that certain public advocates have been employed by the U.S. International Trade Commission and in certain state regulatory and civil proceedings).

⁴ See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) ("Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation."); see also *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 346 (1935); "By the same token, the fact that a given law . . . is efficient, convenient, and useful . . . standing alone . . . will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

⁵ See STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2-3 (1984).

⁶ *Id.*; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("[C]oncrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]"); see also *Franks v. Delaware*, 438 U.S. 154, 168 (1978) ("The usual reliance of our legal system on adversary proceedings itself should be (continued...)").

Nonetheless, there are rare exceptions to the adversary method wherein a court allows only one party to address the court without opposition. Such *ex parte* proceedings typically exist in the context of pretrial criminal procedure.⁷ For example, the only parties allowed to be present in a grand jury proceeding are the jurors, prosecutor, witnesses, and a court stenographer,⁸ and an authorized magistrate can issue a search warrant upon the request of an attorney for the government.⁹ In this vein, FISA proceedings are also primarily *ex parte* in nature, as the FISC is authorized to issue orders approving of electronic surveillance,¹⁰ certain physical searches,¹¹ the use of a pen register or a trap and trace device,¹² or the access to certain business records for foreign intelligence and international terrorism investigations¹³ upon a proper showing made in an application by a federal officer.

In the wake of the recent revelations regarding the size and scope of the government's foreign surveillance activities, lawmakers and others have suggested transforming FISA proceedings such that the process is more adversarial in nature.¹⁴ Critics of the current FISA proceedings have cited the infrequency of the FISC's rejections of government surveillance requests¹⁵ as evidence that the lack of an adversarial process has prevented the court from fully and properly scrutinizing the government's position.¹⁶ While some reject this line of reasoning,¹⁷ those who have found the *ex*

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an indication that an *ex parte* inquiry is likely to be less vigorous.”)

⁷ See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“Our system of [criminal] justice is, and has always been, an inquisitorial one at the investigatory stage . . .”).

⁸ See Fed. R. Crim. P. 6(d).

⁹ See Fed. R. Crim. P. 41(b).

¹⁰ See 50 U.S.C. § 1804.

¹¹ See 50 U.S.C. § 1824.

¹² See 50 U.S.C. § 1843.

¹³ See 50 U.S.C. § 1861.

¹⁴ See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013); see also Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013); Orin Kerr, *A Proposal to Reform FISA Court Decisionmaking*, THE VOLOKH CONSPIRACY (July 8, 2013), <http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking/>. It should be noted that not all FISA proceedings are *ex parte* in nature, as certain government applications and directives can be challenged by either an electronic communication service provider, see, e.g., 50 U.S.C. § 1881a(h)(4), or by a criminal defendant against whom the government uses information derived from its foreign intelligence gathering, see *id.* §§ 1806(c), 1806(e), 1881e(a).

¹⁵ For example, the Electronic Privacy Information Center, extracting statistics from a list of annual reports required under FISA, reports that since the court's inception the FISC has rejected eleven of over 34,000 FISA applications. See Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Court Orders 1979-2012*, May 4, 2012, http://epic.org/privacy/wiretap/stats/fisa_stats.html.

¹⁶ See, e.g., Office of Senator Patty Murray, “Senator Murray Co-Sponsors Major Legislation To Reform FISA Courts,” press release, August 1, 2013, http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=a06c2586-06c6-45b9-be23-e22a0ae4f128, (“For example, in its 33-year history, the FISA courts have rejected just 11 out of nearly 34,000 surveillance requests made by the federal government, which raises questions about whether they provide a meaningful check and balance on government surveillance.”); see generally Judge James Robertson, Comments before the Privacy and Civil Liberties Oversight Board, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, July 9, 2013, <http://www.pclob.gov/SiteAssets/9-july-2013/Public%20Workshop%20-%20Full.pdf> (“[T]he FISA process is *ex parte* . . . and that's not a good thing . . . anybody who has been a judge will tell you that a judge needs to hear both sides of a case before deciding.”).

¹⁷ See, e.g., Robertson, *supra* footnote 16, (“The fact – the numbers that are quoted about how many reports – how many warrants get approved do not tell you how many were sent back for more work before they were approved . . . the (continued...)”).

parte nature of FISA proceedings troubling have argued that allowing another attorney to argue in opposition to the requests of the Department of Justice (DOJ) to conduct foreign intelligence activity would allow the FISC to better protect civil liberty interests.¹⁸

Proposals on the public advocate issue have varied, even with respect to the title of the attorney who would be charged with opposing the government's surveillance requests. For example, such an office has been referred to as the "Special Advocate,"¹⁹ the "Privacy Advocate General,"²⁰ the "Public Advocate,"²¹ the "Constitutional Advocate,"²² a "public interest advocate,"²³ or an "ombudsman."²⁴ Beyond nomenclature, ideas for enhancing the adversarial nature of FISA proceedings have differed in structure. Several proposals envision having an office of a public advocate as part of the executive branch, either as a wholly new "independent" agency²⁵ or as a part of an existing agency, such as within the DOJ's National Security Division.²⁶ In contrast, others have suggested establishing the office of a public advocate as an independent entity within the judicial branch,²⁷ perhaps akin to the structure of Federal Public Defender Organizations that

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FISA process has integrity . . ."); *see generally* Robert Litt, General Counsel, Office of the Director of National Intelligence, testifying before U.S. Congress, House Judiciary, Crime, Terrorism, and Homeland Security, *PATRIOT Act Reauthorization*, 112d Cong., 2d sess., March 11, 2011 (" . . . FISA is not a rubber stamp but gives a searching review to each application that comes before it and often requires changes in modification . . . [i]n addition FISA applications get extensive high level review within the executive branch even before they are submitted to the court."); *see also* Stewart A. Baker, Partner with Steptoe & Johnson LLP, testifying before U.S. Congress, Senate Judiciary, *FISA Surveillance Programs*, 113th Cong., 1st sess. July 31, 2013 ("[T]he process is already full of such checks. The judges of the FISA court have cleared law clerks who surely see themselves as counterweights to the government's lawyers. The government's lawyers themselves come . . . from a Justice Department office that sees itself as a check on the intelligence community and feels obligated to give the FISA court facts and arguments that it would not offer in an adversary hearing . . . [t]here may be a dozen offices that think their job is to act as a check on the intelligence community's use of FISA.").

¹⁸ *See* Senator Richard Blumenthal, *Blumenthal Applauds President Obama's Support for Special Advocate in FISA Courts*, press release, August 9, 2013, <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-applauds-president-obamas-support-for-special-advocate-in-fisa-courts> ("[T]he Constitution needs a zealous advocate. My legislation would empower . . . an advocate to protect precious Constitutional rights if threatened by government overreaching, and thereby strike a critical balance that serves the interests of both liberty and security."); *see also* Patricia L. Bellia, *Brave New World: U.S. Responses to the Rise in International Crime*, 50 VILL. L. REV. 425, 475-76 (2005) ("In terms of legitimacy, the benefits of having security-cleared opposing counsel argue before the FISC are obvious: doing so would ensure that, despite the secrecy of the FISA process, concerns about FISA's application in particular factual contexts were fully aired. Moreover, use of opposing counsel would relieve any pressure on both OIPR and the FISC itself to act as "devil's advocate" by narrowly interpreting the statute.").

¹⁹ FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013) § 3(a).

²⁰ Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013) § 901(a).

²¹ *See* Merton Bernstein, *One-Sided FISA Court Procedure Widely Distrusted as Unfair and Unreliable*, August 20, 2013, http://www.huffingtonpost.com/merton-bernstein/onesided-fisa-court-proce_b_3785797.html.

²² Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(b).

²³ Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(a).

²⁴ *See* Greg Nojeim, Center for Democracy and Technology, Comments before the Privacy and Civil Liberties Oversight Board, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, July 9, 2013, <http://www.pclob.gov/SiteAssets/9-july-2013/Public%20Workshop%20-%20Full.pdf>.

²⁵ *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(a); *see also* Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(a).

²⁶ *See* Kerr, *supra* footnote 14 (suggesting establishing a public advocate in the Oversight Section of the National Security Division of the DOJ).

²⁷ *See* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(a); *see also* (continued...)

exist in many federal judicial districts in aid of providing criminal defense representation.²⁸ Moreover, with respect to who would appoint the attorney to lead a public advocate's office, a variety of government actors, including the President or a Cabinet officer, such as the Attorney General,²⁹ the Privacy and Civil Liberties Oversight Board,³⁰ or a federal court³¹ have been suggested as potential appointing authority. Other proposals have eschewed establishing a formal government office to serve in the devil's advocate role in favor of requiring the FISC court to appoint private, qualified attorneys to participate in discrete proceedings.³²

Nonetheless, while the various efforts aimed at making FISA proceedings more adversarial in nature differ, three unifying themes underlie all of the reform proposals. First, proposals for a FISA public advocate appear to be unified in the mission of the advocate. Specifically, FISA reform efforts envision a public advocate as providing an "opposing" voice to argue on statutory or constitutional grounds against applications made by the government under FISA.³³ In other words, a public advocate would "represent the privacy and civil liberties" interests³⁴ of the general public by advocating for "legal interpretations that minimize the scope of surveillance and the extent of data collection and retention."³⁵ Second, public advocate proposals contemplate the advocate taking on a robust role in FISA court proceedings.³⁶ While the various proposals

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Bernstein, *supra* footnote 21; Geoffrey R. Stone, "Reflections on the FISA Court," July 5, 2013, http://www.huffingtonpost.com/geoffrey-r-stone/reflections-on-the-fisa-c_b_3552159.html (suggesting creating an office analogous to a public defender's office for FISA proceedings).

²⁸ See 18 U.S.C. § 3006A(g)(2)(A) (providing for a "Federal Public Defender Organization" headed by a Federal Public Defender who is appointed by a "majority vote of the judges of the court of appeals" for a given circuit.); see generally Steve Vladeck, "Making FISC More Adversarial: A Brief Response to Orin Kerr," *Lawfare* (July 8, 2013), available at <http://www.lawfareblog.com/2013/07/making-fisc-more-adversarial-a-brief-response-to-orin-kerr/>.

²⁹ See Kerr, *supra* footnote 14.

³⁰ Cf. Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(a). The Privacy and Civil Liberties Oversight Board, a so-called "independent agency," is an advisory and oversight body that consists of a chair and four additional members, all appointed by the President with the advice and consent of the Senate. See 42 U.S.C. § 2000ee.

³¹ See FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(b) (providing for an appointment by the presiding judge of the FISA Court of Review from a list of candidates submitted by the Privacy and Civil Liberties Oversight Board); see also Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(b)(1) (allowing for a "joint" appointment by the Chief Justice the Supreme Court and the "most senior associate justice . . . appointed by a President that at the time of appointment was a member of a political party other than the political party of the President that appointed the Chief Justice."); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(b)(2) (allowing for appointment by the Chief Justice).

³² See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b) (requiring the FISC, FISA court of review or Supreme Court to appoint a public interest advocate in certain proceedings from an approved list provided by the Privacy and Civil Liberties Oversight Board). One commentator has suggested that a private attorney appointed by the FISC would not be representing a client, but instead would be serving as a consultant to the court and would be compensated pursuant to Title 5's provisions on employing temporary or intermittent experts and consultants. See David S. Kris, *On the Bulk Collection of Tangible Things*, Vol. 1, No. 4 LAWFARE RESEARCH PAPER SERIES 36 n.151 (September 29, 2013).

³³ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(c)(1) ("[T]he Privacy Advocate General . . . shall serve as the opposing counsel with respect to any application by the Federal Government . . .").

³⁴ See Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b).

³⁵ See FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(d)(2); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d)(2).

³⁶ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3) ("A public interest advocate . . . shall participate fully in the matter before the court . . . with the same rights and privileges (continued...)

differ at the margins,³⁷ public advocate proposals generally envision the advocate having a range of responsibilities, such as being able to brief the FISC on relevant matters,³⁸ conduct some forms of discovery,³⁹ file motions seeking discrete forms of relief from the court,⁴⁰ or even appeal an adverse ruling.⁴¹ Finally, FISA reforms establishing a public advocate envision that the advocate will have some independence from the President and those seeking the approval from the FISC. While some proposals would provide that the advocate be in an entirely separate division of the DOJ aimed at providing oversight to the FISA process,⁴² other proposals establish a public advocate in an “independent agency” or “independent establishment”⁴³ or the judicial branch⁴⁴ with “for cause” removal protections.⁴⁵ Regardless of the specific structure, public advocate proposals appear to envision the advocate having nearly unfettered discretion with respect to types of argumentation and general strategy the advocate could employ.

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as the Federal Government.”).

³⁷ For example, H.R. 3159 would allow a public advocate to participate in any “covered court involving a significant interpretation or construction of a provision” of the FISA or “an issue relating to the fourth amendment to the Constitution of the United States.” See Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(i). Other proposals would allow the advocate to take on a broader role, such as being able to oppose “any application” by the Federal Government with respect to an order or directive under the FISA. See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(c)(1) (“[T]he Privacy Advocate General . . . shall serve as the opposing counsel with respect to any application by the Federal Government . . .”); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d) (providing a role for the advocate in nearly all stages of foreign surveillance requests before the FISA courts).

³⁸ See FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 4(c) (allowing the advocate to participate as an *amicus curiae*); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 403(c) (same).

³⁹ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3)(C); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d)(4).

⁴⁰ See Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3)(C); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d)(1)(H); Kerr, *supra* footnote 14.

⁴¹ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(d); see also FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 5(a)(1); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d)(1)(I).

⁴² See Kerr, *supra* footnote 14.

⁴³ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(a); see also FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(a). The term “independent,” in and of itself, has no “set meaning,” as the term can be used to signify agencies that are (1) not placed in “one of the old-line executive departments,” (2) “Article I” courts, or (3) agencies with structural protections that allow “substantial freedom” from presidential oversight. See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 50.

⁴⁴ See Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(a). Attorney David Kris has suggested that Congress could expand the number of legal advisors employed by the FISC and allow them to be “formally” “appoint[d] . . . as an opposition advocate or ‘red team,’ to write the opposing brief in appropriate cases . . .” See Kris, *supra* footnote 32 at 38-39.

⁴⁵ See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(b)(2)(D) (stating that the “Special Advocate” may be fired “only for good cause shown, including the demonstrated inability to qualify for an adequate security clearance.”); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(b)(2)(D) (providing a good cause removal protection for the Constitutional Advocate).

The Role of a Public Advocate

It is a basic principle of American constitutional law that with one exception⁴⁶ the Constitution only applies to the federal government and, via the Fourteenth Amendment and certain other clauses, to the governments of the states.⁴⁷ Accordingly, before evaluating the constitutional implications of including a public advocate in FISA proceedings a threshold issue is to assess what the exact role of the FISA advocate is as a legal matter and, more specifically, whether the advocate is a sovereign entity that can be subject to the constraints of the Constitution.⁴⁸

At first blush, one can argue that an opposition advocate in a FISA proceeding cannot be considered a government actor, as a public advocate represents the privacy interests of either the general public or those being targeted. Indeed, as one scholar noted in another context regarding the concept of a public advocate, the institution itself, in actively opposing the position of a government agent, is “so different from the traditional three branches of government” that the advocate “would be like a fourth branch of government, totally different from anything contemplated by the framers at the time of the ratification of the Constitution,” and, therefore, free of the constraints of the Constitution.⁴⁹

Moreover, if one assumes a public advocate is a direct analogue to that of a public defender in a federal criminal case, the adversarial relationship of the FISA advocate with the government arguably prevents consideration of the opposition advocate as an instrument of the federal government.⁵⁰ Specifically, a public advocate, being bound by the canons of professional responsibility, must exercise independent judgment on behalf of his client—the public—and cannot be considered a “servant of an administrative superior”—that is, the government.⁵¹ Put another way, an opponent of the government’s position cannot be converted into its “virtual agent.”⁵² In this light, some proposals for including an advocate have described the advocate’s client as not being the government, but the “people of the United States” in “preserving privacy and civil liberties.”⁵³

⁴⁶ The Thirteenth Amendment is the only constitutional provision that directly regulates the conduct of private parties, as the amendment is “not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” *See Civil Rights Cases*, 109 U.S. 3, 20 (1883).

⁴⁷ *See San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 542 (1987).

⁴⁸ Whether the office of a public advocate can be described as an arm of the federal government is particularly important with respect to whether appointment of an attorney to lead that office must comply with the Appointments Clause of Article II, *see infra* “Appointment of a Public Advocate,” and with respect to whether the public advocate is representing the views of a third party or the government for purposes of complying with Article III of the Constitution, *see infra* “Third-Party Standing and a Public Advocate.”

⁴⁹ *See Robert P. Davidow, Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939, 952 (1982).

⁵⁰ *Cf. Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

⁵¹ *Id.* This is not to say that the adversarial relationship of a public defender with the state precludes a finding of state action under certain circumstances, as the Supreme Court has found that the determination of whether a public defender is a government actor for a particular purpose “depends on the nature and context of the function he is performing.” *See Georgia v. McCollum*, 505 U.S. 42, 54 (1992). In *Polk County*, the Court noted that a public defender could act under the color of law when performing certain administrative functions. 454 U.S. at 325.

⁵² *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 304 (2001).

⁵³ *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3)(B); *see also* Blumenthal, *supra* footnote 18 (“The Special Advocate’s client would be the Constitution and the individual rights of the American people.”).

Nonetheless, Congress's disavowal of a federally created entity's status as a government agent in a statute is not controlling.⁵⁴ After all, Congress cannot merely label an entity as "nongovernmental" to "evade the most solemn obligations imposed in the Constitution."⁵⁵ Instead, in evaluating whether an actor qualifies as a federal entity, courts will look to whether the (1) government created the entity by special law; (2) government created the entity to further governmental objectives; and (3) government retains a "permanent authority" to appoint the directors of the newly created entity.⁵⁶

With respect to the proposals for creating an office of a public advocate, the first and third prongs of the test employed to determine whether an entity functions as a governmental unit are easily met, as most proposals entail a special law where a government actor retains the authority to appoint a public advocate.⁵⁷ The central question is, therefore, whether the proposals to establish an office of a public advocate are created to further a governmental objective.⁵⁸ Courts, applying the three-prong test, have envisioned a broad range of activities furthering government objectives, including functions that can be provided by private entities such as library services⁵⁹ and higher education facilities.⁶⁰ More broadly, courts have held that a legally authorized entity that carries out a benefit for the general public is engaging in a governmental function.⁶¹ After all, a public advocate would not be seeking private relief from the FISA courts, such as a damages remedy, but would instead be seeking broad based injunctive or declaratory relief arising from a violation of the government's laws.⁶² Given this, it appears that the office of a public advocate would likely be considered a governmental entity, as that office would be created for the broad purpose of ensuring that the privacy interests of the general public are properly enunciated and respected in foreign intelligence proceedings.⁶³ In this sense, a public advocate, in evaluating the applications before the FISC and in seeking judicial relief against the approval of a FISA application on behalf of the general public, would be engaging in the "very essence" of executing the law and would be subject to the Constitution's requirements.⁶⁴ As a public advocate would be representing a generalized interest divorced from any particular individual's harm, the FISA advocate's role is likewise distinguishable from that of a public defender in an ordinary criminal case.⁶⁵

⁵⁴ See *Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado*, 84 F.3d 487, 492 (1st Cir. 1996).

⁵⁵ See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

⁵⁶ See *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 84 (2d Cir. 2000) (quoting *Lebron*, 513 U.S. at 400).

⁵⁷ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013).

⁵⁸ *Lebron*, 513 U.S. at 400.

⁵⁹ *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 153 (2d Cir. 2004).

⁶⁰ *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 84 (2d Cir. 2000).

⁶¹ *Ernst v. Rising*, 427 F.3d 351, 377 n.2 (6th Cir. 2005) (quoting *Black's Law Dictionary* (7th ed. 1999)).

⁶² *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

⁶³ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3)(B) (noting that a public advocate would represent the "interests of the people of the United States in preserving privacy and civil liberties . . .").

⁶⁴ See *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (explaining that exercising judgment concerning facts as they apply to a law and interpreting the provisions of the law is a decision that is typically made by an officer charged with executing a statute).

⁶⁵ In other contexts, where a public defender is not representing a client in a criminal proceeding, the Supreme Court has held that the public defender can be deemed an agent of the state for constitutional purposes. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 533 (1980) (holding that a public defender is a state actor when he makes personnel decisions on behalf of the state).

Appointment of a Public Advocate

Assuming that the office of a FISA public advocate is an agent of the government and subject to the general requirements of the Constitution, several constitutional questions are raised by the proposals establishing such an entity. To begin, if a public advocate is “part of the [federal] government for constitutional purposes,” a congressional establishment of such an agency must adhere to the requirements of the Appointments Clause of Article II of the Constitution.⁶⁶

Appointments Clause

The Appointments Clause establishes that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁶⁷

Under the text of the Clause, it is “[o]fficers of the United States” whose appointments are established by law that are to be subject to Senate confirmation. Thus, principal officers will be appointed in this manner; however, Congress may choose to vest the appointment of those they consider “inferior [o]fficers” in either the President, the courts of law, or in the heads of departments. The Supreme Court deemed the Appointments Clause to be “among the significant structural safeguards of the constitutional scheme” and has acknowledged that its purpose is to “preserve political accountability relative to important government assignments.”⁶⁸

Is the Public Advocate an Officer of the United States?

The first key question with respect to appointing the public advocate is to determine whether the advocate would qualify as an officer of the United States, or whether a person is a non-officer, or employee, whose appointment is not of the kind that invokes the constitutional requirements of the Appointments Clause. The Supreme Court has long held that the term “[o]fficers of the United States” “does not include all employees of the United States.... Employees are lesser functionaries subordinate to the officers of the United States.”⁶⁹ In contrast, the Court has noted that an office or officer “embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary.”⁷⁰

The seminal case explicating what being an “officer” of the United States entails is *Buckley v. Valeo*, where the Court analyzed whether the appointment of certain members of the eight-

⁶⁶ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010).

⁶⁷ U.S. Const., art. II, § 2, cl. 2.

⁶⁸ See *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

⁶⁹ *Buckley*, 424 U.S. 1, 126 n. 162. (1976) (per curiam).

⁷⁰ *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (discussing the term “officers”) (*citing* *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867) (discussing the term “office”).

member Federal Election Commission (FEC) established by the Federal Election Campaign Act of 1971 (Act) to oversee federal elections complied with the Appointments Clause. Specifically at issue was the congressionally mandated composition of the FEC, which was to consist of two non-voting ex-officio members and six voting members. According to the Act, each of the six voting members were required to be confirmed by the majority of both houses of Congress, with two members being appointed by the President pro tempore of the Senate, two members by the Speaker of the House of Representatives, and two by the President.⁷¹ The Court looked to the powers and duties of the FEC and described them as falling into three general categories: (1) functions relating to the flow of information—receipt, dissemination, and investigation; (2) functions with respect to promoting the goals of the act—rulemaking and advisory opinions; and (3) functions necessary to ensure compliance with the statute—informal procedures, administrative determinations and hearings, and civil suits.⁷² Given the nature of the duties assigned by law to the FEC, the Court concluded that the FEC was exercising executive power, as it found that the FEC's enforcement power “is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress.”⁷³ Thus, the Court held that the method of appointment prescribed in the Federal Election Campaign Act violated the Appointments Clause because certain powers of the FEC could only be discharged by “Officers of the United States,” who must be appointed in conformity with the Appointments Clause.

In reaching this conclusion, the Court held that the term “Officers of the United States” encompasses “any appointee exercising *significant authority* pursuant to the laws of the United States.”⁷⁴ The appointment of such officers, whether principal or inferior, must conform with the Appointments Clause. In its analysis, the *Buckley* Court compared the office of FEC commissioner with lower-level positions that had been identified as “inferior officers” in earlier cases. The Supreme Court determined that the FEC commissioners, at a minimum, were inferior officers whose appointment would be subjected to Senate confirmation or be vested in the President, the courts of law, or heads of departments as prescribed by the Appointments Clause.⁷⁵ The Court did not engage in a substantive analysis of the meaning of “significant authority” to distinguish principal officers from inferior officers in order to determine what mode of appointment would be appropriate for FEC commissioners.

Nonetheless, an opinion from the DOJ's Office of Legal Counsel (OLC) discusses what are in its view two essential elements of an office subject to the Appointments Clause.⁷⁶ OLC stated that it took the phrase “significant authority pursuant to the laws of the United States,” and other similar phrases “to be shorthand for the full historical understanding of the essential elements of a public office.”⁷⁷ The first element is the delegation by legal authority of a portion of the sovereign powers of the federal government. OLC described the “delegation of sovereign authority” as involving “a legal power which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the

⁷¹ *Buckley*, 424 U.S. at 113.

⁷² *Id.* at 137.

⁷³ *Id.* at 138.

⁷⁴ *Id.* at 126 (emphasis added).

⁷⁵ *Id.* Subsequent to the decision in *Buckley*, Congress in 1976 amended the appointments of the six voting members so that they are appointed by the President, with the advice and consent of the Senate. P.L. 94-283; 90 Stat. 475 (1976).

⁷⁶ See *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459 at *3 (OLC) (April 16, 2007).

⁷⁷ *Id.* at *10.

State, in contrast with a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature.”⁷⁸

The second element is that the position must be “continuing,” which OLC described as having two characteristics. The first is that “an office [for purposes of the Appointments Clause] exists where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very fact of performance.”⁷⁹ The second characteristic of “continuing” deals with a temporary delegation of sovereign authority. Whether such a temporary position qualifies as “continuing” depends on the presence of three factors. These three factors are:

- the position’s existence should not be personal, meaning that the duties should continue even though the person is changed;
- the position should not be “transient”; and
- the duties should be more than “incidental” to the regular operations of the government.⁸⁰

Pursuant to this analytical rubric, the central issue is whether, under the various proposals for establishing a formal adversary in certain FISA proceedings, the FISA advocate would be exercising “significant authority” on behalf of the United States. Assuming the office of a public advocate is an arm of the federal government, it appears likely that under many of the public advocate proposals the advocate would be exercising the sovereign authority of the United States in a “continuing” manner and therefore would be an “officer” of the United States whose appointment is subject to the Appointments Clause. Specifically, many of the proposals for establishing a public advocate envision the advocate having wide, significant, and permanent authority to litigate on behalf of the privacy and civil liberties interests of the general public⁸¹ in the FISA court and seek judicial relief that would bar certain foreign intelligence gathering by the executive branch.⁸² As the Court found in *Buckley*, the function of having “primary responsibility” to conduct “civil litigation in the courts of the United States for vindicating *public rights* ... may be discharged only by ... ‘Officers of the United States’ within the language of [the Appointments Clause.]”⁸³ In other words, just as the *Buckley* Court found that members of the FEC exercised significant authority insofar as they were empowered to seek judicial relief for violations of the Federal Election Campaign Act of 1971, it may also be concluded that a public advocate vested with the authority to engage in litigation against foreign surveillance applications is such a significant function that it can only be conducted by an officer of the United States.⁸⁴ It

⁷⁸ *Id.* at *17 (internal quotations omitted, quoting *Opinion of the Justices*, 3 Greenl. at 482).

⁷⁹ *Id.* at *30 (internal quotations omitted).

⁸⁰ *Id.*

⁸¹ *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(3) (“A public interest advocate . . . shall participate fully in the matter before the court . . . with the same rights and privileges as the Federal Government.”).

⁸² *See supra* “Background on the Concept of a Public Advocate” (explaining that under many of the “public advocate proposals contemplate the advocate taking on a robust role in the FISA court proceedings.”).

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

⁸⁴ *Buckley*, 424 U.S. at 140. In this sense, conducting litigation on behalf of the United States and formally invoking a court’s power to decide issues of public rights differs from the role of an entity that merely informs the court of its (continued...)

should be noted that some proposals⁸⁵ that would allow for attorneys to be appointed from the private sector for a single case would likely not run afoul of the Appointments Clause because of the temporary nature of such a position.⁸⁶ Nonetheless, the bulk of public advocate legislation establishes an advocate who would have a role that would be “continuing and permanent” and “not occasional and temporary,”⁸⁷ as such proposals would create a FISA advocate that would be a non-personal position generally charged with continuously reviewing the requests made to the FISA courts and litigating in opposition of such requests.⁸⁸

Would a Public Advocate be a Principal or Inferior Officer?

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

Although the Supreme Court has determined various offices to be inferior,⁸⁹ the High Court has acknowledged that the case law has until recently “not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”⁹⁰ In

(...continued)

views. As such, while the *Buckley* Court would not allow Congress to appoint individuals to conduct litigation on behalf of the United States, *id.* at 138, it is unclear if the same limitation would apply to individuals who are merely empowered to serve as in the role of an *amicus curiae*.

⁸⁵ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b) (requiring the FISC, FISCER or Supreme Court to appoint a public interest advocate in certain proceedings from an approved listed provider by the Privacy and Civil Liberties Oversight Board).

⁸⁶ Such temporary assignments would likely not be subject to the Appointments Clause. Cf. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (“His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an ‘officer’ within the meaning of the clause of the constitution referred to.”).

⁸⁷ *Germaine*, 99 U.S. at 511-12.

⁸⁸ See, e.g., Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (1st Sess. 2013), § 901(c)(1) (“[T]he Privacy Advocate General . . . shall serve as the opposing counsel with respect to any application by the Federal Government . . .”); see also Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(d) (providing a role for the advocate in nearly all stages of foreign surveillance requests before the FISA courts). Nonetheless, arguably for proposals that allow for the advocate to participate in only certain types of proceedings when called upon by the FISC, see, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(i), the advocate would not be acting as an officer because the role would not be continuing and permanent. Cf. *Germaine*, 99 U.S. at 512 (holding that a surgeon appointed by the Commissioner of Pensions was not an officer because the surgeon was “only to act when called upon by the Commissioner . . . in some special case, as when some pensioner or claimant of a pension presents himself for examination.”). Nonetheless, if the types of cases that the advocate can appear at are sufficiently broad, the role of the public advocate likely would be less of a fleeting and temporal role and more of a robust position that is subject to the Appointments Clause. Cf. *Auffmordt*, 137 U.S. at 327 (noting that actors that “act[] only occasionally and temporarily” are not an “officer” within the meaning of the Appointments Clause); see *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (holding that an office with a limited jurisdiction and limited tenure was an inferior officer).

⁸⁹ See *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk); *Ex parte Siebold*, 100 U.S. 371, 397-98 (an election supervisor); *United States v. Eaton*, 169 U.S. 331, 343, (1898) (a vice consul charged temporarily with the duties of the consul); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 252-54 (1931) (a “United States Commissioner” in district court proceedings); *Morrison*, 487 U.S. at 671-72 (an independent counsel).

⁹⁰ *Edmond*, 520 U.S. at 661. It should be noted that the Court did not explicitly overrule *Morrison*'s analysis of an inferior officer's status, discussed *infra*, but instead stated that *Morrison* did not “purport to set forth a definitive test (continued...)”

fact, in *Morrison v. Olson*, the Court observed that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear”⁹¹ and employed a multi-factor test regarding the nature of the officer’s duties to determine when an officer could be considered either inferior or principal.⁹² In dissent in that case, Justice Scalia argued that an officer’s subordination to a principal officer, and not the nature of his or her duties, should guide the inquiry as to the officer’s status.⁹³ In *Edmond v. United States*, the Court appears to have departed from the multi-factor test and adopted Justice Scalia’s position, holding that “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President ... [and] whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”⁹⁴ The reasoning in *Edmond* was again confirmed by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁹⁵ which concluded that the members of an oversight board were properly appointed inferior officers because the Securities and Exchange Commission, consisting of five principal officers, oversaw the board’s conduct and had the power to remove members of the oversight board at-will.⁹⁶ Thus, in analyzing whether an officer is an inferior one, the Court’s decisions appear to be centered on the ability of an officer’s conduct to be controlled by an officer who is politically accountable through a presidential appointment and Senate confirmation.⁹⁷

With respect to a public advocate, it appears that under many of the proposals for creating a FISA advocate, the advocate would likely be considered a principal officer. A unifying theme behind all of the proposals creating an office of the public advocate is to ensure that the advocate is independent from other entities within the executive branch, who would, presumably, be seeking an order from the FISA court authorizing foreign surveillance activities.⁹⁸ Few, if any, proposals envision any other entity supervising the public advocate by, for example, reviewing the advocate’s litigation strategies or by editing the submissions of the public advocate before they are filed with the FISA court. Moreover, several of the proposals would provide the advocate with “for cause” removal protections,⁹⁹ such that any other office of government is “powerless to intervene” if they disagree with the advocate’s decisions, unless the decisions are “so unreasonable as to constitute ‘inefficiency, neglect of duty, or malfeasance in office.’”¹⁰⁰ By

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for whether an office is ‘inferior’ under the Appointments Clause.” *Id.*

⁹¹ *Morrison*, 487 U.S. at 671-72 (finding that the independent counsel clearly falls on the inferior side of the line).

⁹² *Id.* at 671-672 (including factors, such as that the independent counsel being subject to removal by a higher officer, that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited to conclude that the independent counsel was an inferior officer).

⁹³ *See Morrison*, 487 U.S. at 719-21 (Scalia, J., dissenting).

⁹⁴ *Edmond*, 520 U.S. at 662-63. This characterization of inferior officers by the Court presumably would not preclude the ability of the Congress to vest the appointment of an inferior officer in the President alone as prescribed by the Appointments Clause.

⁹⁵ 130 S. Ct. 3139, 3162-63 (2010).

⁹⁶ *Id.* at 3162. Earlier in *Free Enterprise Fund* decision, the Court struck down a provision that would have provided members of the oversight board with “for cause” removal protections on separation of powers grounds. *Id.* at 3151. Hence, when assessing the Appointments Clause issue raised in *Free Enterprise Fund*, the Court found that the Securities and Exchange Commission “properly viewed . . . under the Constitution . . . as possessing the power to remove” members of the oversight board at will. *Id.* at 3162.

⁹⁷ *Id.*

⁹⁸ *See supra* “Background on the Concept of a Public Advocate.”

⁹⁹ *See, e.g.*, Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(b)(2)(D).

¹⁰⁰ *See Free Enter. Fund*, 130 S. Ct. at 3154 (internal quotations omitted).

ensuring that the public advocate is autonomous, a law creating an office of a public advocate would appear to be creating an office headed by a principal officer, as the advocate's work would not be "directed and supervised at some level by" another principal officer.¹⁰¹ As a consequence, in order to ensure the principles of political accountability that underlie the Appointments Clause,¹⁰² there is a substantial likelihood that a reviewing court would find that the Constitution requires that an autonomous public advocate exercising significant authority in litigating on behalf of the United States in the FISA courts be appointed by the President with the advice and consent of the Senate.¹⁰³ Nonetheless, if the Supreme Court retreats from the stance taken in *Edmond* and *Free Enterprise Fund* and instead embraces the multi-factor approach endorsed in *Morrison*, an argument could be made that the public advocate is an inferior officer if the new office, similar to independent counsel in *Morrison*, is created such that the FISA advocate can be removed in some way by a higher officer, has limited duties, a narrow jurisdiction, and a limited tenure.¹⁰⁴

Inter-branch Appointments and the Public Advocate

Assuming that the Supreme Court, in analyzing the appointments question presented by establishing a public advocate, abandons the *Edmond* test in favor of the *Morrison* approach such that a public advocate could be an inferior officer, an additional issue is raised for those proposals that would allow the advocate, who is arguably acting in an executive role,¹⁰⁵ to be appointed by the courts of law. Specifically, apart from constitutional questions arising from Article III of the Constitution or general separation-of-powers concerns, the Court has recognized that Congress's decision to vest the appointment power in the courts would be in violation of the Appointments Clause if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.¹⁰⁶ In *Morrison*, the Court, relying on cases allowing for judicial appointment of federal marshals and prosecutors, found no incongruity with having a court appoint an independent counsel, as "courts are especially well qualified to appoint prosecutors."¹⁰⁷

¹⁰¹ See *Edmond*, 520 U.S. at 661.

¹⁰² *Id.* at 663.

¹⁰³ In this sense, viewing the head of the office that would oppose the DOJ's National Security Division's applications before the FISA courts as a principal officer appears to be in line with how the law views the public advocate's counterpart—the Assistant Attorney General for the National Security Division, a position that requires a Presidential appointment and Senate confirmation. See 28 U.S.C. §§ 506 & 507A.

¹⁰⁴ Cf. *Morrison*, 520 U.S. at 671-72 (holding that the Special Division of the D.C. Circuit could appoint the independent counsel because the independent counsel was an inferior officer whose appointment can be vested in the "courts of law.").

¹⁰⁵ See *supra* "The Role of a Public Advocate."

¹⁰⁶ See *Morrison*, 487 U.S. at 676 (citing *Ex Parte Siebold*, 100 U.S. 371, 398 (1880)). The Supreme Court has rejected the broader argument that Congress wholly lacks the authority to allow for inter-branch appointments. See *Morrison*, 487 U.S. at 673.

¹⁰⁷ See *id.* at 676-77 & n.13. Other inter-branch appointments upheld include the court appointment of private attorneys to act as a prosecutor for judicial contempt judgments, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the court appointment of United States commissioners who exercised certain limited prosecutorial powers, *Go-Bart Importing Co.*, 282 U.S. at 344, the judicial appointment of federal marshals, *Ex parte Siebold*, 100 U.S. at 397, and the judicial appointment of temporary U.S. Attorneys. *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

Applying these principles, one could argue that the FISA advocate would be analogous to the independent counsel position in *Morrison*, in that the position would be one in which the government is especially concerned with avoiding a conflict of interest with the executive branch's prerogatives with respect to foreign surveillance, making appointment by the judiciary "logical."¹⁰⁸ In addition, especially in light of the legal advisors already employed by the FISC to critically analyze government surveillance applications, the federal courts, especially the FISA courts, are "well qualified to appoint" a public advocate.¹⁰⁹ In this sense, it would be appropriate for a court of law to appoint a public advocate housed within the executive branch. On the other hand, it could be argued that, in contrast to *Morrison*, where the Special Division appointing the independent counsel was "ineligible to participate in any matters relating to an independent counsel they have appointed,"¹¹⁰ proposals allowing a public advocate to be appointed by a FISA court or even members of the Supreme Court do not appear to have such an ineligibility provision,¹¹¹ raising the specter of an "incongruity" between the functions normally performed by the FISA court and the appointment power.¹¹² More broadly, in contrast to a federal court's general familiarity with criminal law that formed the basis for why the appointment in *Morrison* was appropriate,¹¹³ federal courts generally "lack ... competence" in the area of national security and foreign affairs,¹¹⁴ and, accordingly, it could be incongruent with a federal court's general competencies to be charged with appointing an individual authorized to litigate on behalf of the United States to ensure that foreign surveillance efforts respect the public's right to privacy.¹¹⁵

Article III Issues Raised by a FISA Public Advocate

Apart from issues raised by the Appointments Clauses of the United States Constitution, Article III of the Constitution, which vests the judicial power of the United States in the Supreme Court and any inferior courts created by Congress, also poses significant legal questions with respect to proposals creating a FISA public advocate.¹¹⁶ Specifically, some commentators have questioned

¹⁰⁸ *Id.* at 677.

¹⁰⁹ See Kris, *supra* footnote 32 at 38-39.

¹¹⁰ See *Morrison*, 487 U.S. at 677.

¹¹¹ See, e.g., Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b).

¹¹² See *Morrison*, 487 U.S. at 676.

¹¹³ *Id.* at 676-77 & n.13.

¹¹⁴ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

¹¹⁵ Many of the proposals would set qualifications for the role of the public advocate, such as having them be one of a group recommended by the Privacy and Civil Liberties Oversight Board. See, e.g., FISA Court Reform Act of 2013, S. 1467, 113th Cong. (1st Sess. 2013), § 3(b) (providing for an appointment by the presiding judge of the FISA Court of Review from a list of candidates submitted by the Privacy and Civil Liberties Oversight Board); In its majority opinion in *Myers v. United States*, the Supreme Court noted that "the legislative power" comprehends the authority "to prescribe qualifications for office, or reasonable classification for promotion, . . . provided of course that these qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." See *Myers v. United States*, 272 U.S. 52, 129 (1926). It has been generally acknowledged that Congress has broad authority in this area, however, executive branch views, as articulated through presidential signing statements and opinions of the DOJ, have ranged from the assertion that Congress has no such authority to an acknowledgment of some such authority that lacks clear boundaries. See, e.g., U.S. President (Clinton), "Statement on Signing the Lobbying Disclosure Act of 1995," Weekly Compilation of Presidential Documents, vol. 31, December 19, 1995, pp. 2205-2206; 3 Op. O.L.C. 388, 389 (1979); 20 Op. O.L.C. 279, 280-281 (1996).

¹¹⁶ U.S. Const. Art. III, § 1.

whether the judicial power, which extends to “cases” or “controversies,”¹¹⁷ allows the government, through the National Security Division of the DOJ and the newly created public advocate, to “literally argue both sides of a legal case,” which casts doubt on whether the court would truly be overseeing a contested action.¹¹⁸ With this general concern in mind, there are two central lines of argumentation for how a public advocate can be included in current FISA proceedings without violating Article III, each of which will be analyzed *in seriatim*.

***Morrison and Mistretta* “Incidental” Argument**

The first question that should be addressed with respect to Article III concerns over creating a FISA advocate is whether current FISA proceedings are even subject to Article III’s general limitations. Arguably, because FISA proceedings are merely “incidental” or “ancillary” to the federal judiciary’s general Article III powers, they may not be subject to the same requirements as other Article III judicial proceedings. To fully explore this argument, the nature of the “judicial power” as defined in Article III must first be assessed.

Judicial Power and Article III

As far back as 1792, the Supreme Court intimated that federal courts are limited to exercising Article III’s “judicial power,”¹¹⁹ which, in turn, is limited to the adjudication of “cases” or “controversies.”¹²⁰ From this case-or-controversy concept, the Court has developed rules of justiciability such as standing, mootness, and ripeness to delineate which matters federal courts can hear and which ones must be dismissed.¹²¹ These constraints promote separation of powers interests by ensuring the judiciary does not overstep the bounds of its constitutionally allocated power and encroach on those of its coordinate branches.¹²²

As part of the case-or-controversy requirement, the Court has generally required litigant adverseness—a live dispute that is “definite and concrete, touching the legal relations of parties having adverse legal interests.”¹²³ This “concrete adverseness” helps to “sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitution questions[.]”¹²⁴ It appears that the case-or-controversy requirement does not necessarily require the presence of two adverse parties, but rather there be adversity in legal interests. In *Pope v. United States*, for instance, the Court observed that “[w]hen a plaintiff brings suit to enforce a legal obligation it is not any the less a case-or-controversy upon which a court

¹¹⁷ *Id.*

¹¹⁸ See Kris, *supra* footnote 32 at 38.

¹¹⁹ See *Hayburn’s Case*, 2 U.S. 408, 410 n.* (1792); *United States v. Ferreira*, 54 U.S. 40, 48 (1851).

¹²⁰ U.S. CONST. art. III, § 2; see *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950) (“Federal judicial power itself extends only to adjudication of cases and controversies . . .”).

¹²¹ See *Allen v. Wright*, 468 U.S. 737, 750 (1984).

¹²² *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

¹²³ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *but see United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that the parties had adverse interests even though the parties agreed that the law in question, the Defense of Marriage Act (DOMA) was unconstitutional).

¹²⁴ *Baker*, 369 U.S. at 204.

possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable."¹²⁵

Several cases bear out this principle. In *United States v. Johnson*, the Supreme Court dismissed a suit brought by the plaintiff at the behest of the defendant, and in which the defendant had paid the plaintiff's legal fees.¹²⁶ The Court explained that "the absence of a genuine adversary issue between the parties" precluded resolution of the case.¹²⁷ In *Muskrat v. United States*, the Court was assessing a federal statute which purported to confer authority upon specific litigants to challenge the constitutionality of a previously enacted statute.¹²⁸ In dismissing this case, the Court noted that "there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress."¹²⁹ In deciding that this was not an exercise of the judicial power, and therefore prohibited by Article III, the Court observed that "judicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."¹³⁰ In both cases, the Court held that the parties did not have adverse legal interests and therefore dismissed the suits as nonjusticiable.

Judicial Acts that are "Incidental" to the Judicial Power

Notwithstanding the general nature of the judicial power under Article III, it can be argued that the federal judiciary's role in FISA proceedings is *incidental* to the exercise of the general judicial function and need not independently satisfy the case-or-controversy requirement. This line of reasoning derives from *Morrison*¹³¹ and *Mistretta v. United States*,¹³² in which the Court held that Article III judges may, in certain limited instances, engage in non-adjudicatory, non-adversarial activities without flouting Article III restrictions.

In *Morrison*, the Court tested the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.¹³³ The act created a Special Division of the U.S. Court of Appeals for the District of Columbia Circuit, a court presided over by federal judges, appointed by the Chief Justice. The Special Division was empowered to appoint an independent counsel, set the parameters of his jurisdiction, receive reports from the counsel, and terminate an independent counsel when his task was completed.¹³⁴ In assessing whether these duties exceeded Article III constraints, the Court looked to analogous duties placed on federal judges:

By way of comparison, we also note that federal courts and judges have long performed a variety of functions that, like the functions involved here, do not necessarily or directly involve adversarial proceedings within a trial or appellate court. For example, federal courts

¹²⁵ *Pope v. United States*, 323 U.S. 1, 11 (1944).

¹²⁶ *United States v. Johnson*, 319 U.S. 302, 304 (1943).

¹²⁷ *Id.*

¹²⁸ *Muskrat v. United States*, 219 U.S. 346 (1911).

¹²⁹ *Id.* at 361.

¹³⁰ *Id.* at 362-63.

¹³¹ 487 U.S. at 654.

¹³² *Mistretta*, 488 U.S. at 361.

¹³³ *Morrison*, 487 U.S. at 659.

¹³⁴ *Id.* at 680.

have traditionally supervised grand juries and assisted in their “investigative function” by, if necessary, compelling the testimony of witnesses. Federal courts also participate in the issuance of search warrants, and review applications for wiretaps, both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.¹³⁵

Adopting a similar line of reasoning, the Court in *Mistretta v. United States* upheld the constitutionality of placing Article III judges on the United States Sentencing Commission.¹³⁶ In that case, the Court observed that “although the judicial power of the United States is limited by express provision of Article III to ‘Cases’ and ‘Controversies,’” the Constitution does not “prohibit[] Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are ‘necessary and proper ... for carrying into execution all of the judgments which the judicial department has power to pronounce.”¹³⁷ In this vein, the Court, citing to *Morrison*, noted that Article III courts can constitutionally perform a variety of functions not necessarily connected to adversarial proceedings, such as issuing search warrants and wiretap orders.¹³⁸

In 2002, the Foreign Intelligence Surveillance Court of Review adopted the reasoning from *Morrison* and *Mistretta* to uphold an Article III challenge to the FISA proceedings. In *In re Sealed Case*, the Court of Review noted that “[i]n light of *Morrison v. Olson* and *Mistretta v. United States* ... there is not much left to the argument ... that the statutory responsibilities of the FISA Court are inconsistent with Article III case-or-controversy responsibilities because of the secret, non-adversary process.”¹³⁹ It is unclear, however, whether the Court of Review was (1) asserting that the *ex parte* nature of the FISA proceedings did not necessarily mean that the proceedings were not grounded in adversity or (2) holding, based on *Morrison* and *Mistretta*, that FISA proceedings, like warrant proceedings, are wholly removed from the strictures of Article III because the proceedings are incidental to and merely carrying into effect the Article III judicial power.

Assuming the Foreign Intelligence Surveillance Court of Review adopted the latter position, there is at least some authority for the proposition that just like the role of the Special Division in *Morrison* or the role of the United States Sentencing Commission in *Mistretta*, FISA proceedings are merely incidental to the federal judiciary’s broader Article III powers and not a formal exercise of the judicial power. Moreover, once the federal judiciary is engaging in a non-adjudicatory function, none of the typical constraints imposed by Article III, like the doctrines of standing, mootness, ripeness, and political questions,¹⁴⁰ would arguably govern. After all, the Special Division at issue in *Morrison* did not need a “ripe” controversy in order to appoint a special prosecutor to investigate a crime, and an expert testifying before the United States Sentencing Commission does not have to have “standing” to appear. Accordingly, assuming the FISA proceedings are not constricted by Article III, allowing a public advocate to appear before and obtain relief from the FISA courts would not be constitutionally infirm.

¹³⁵ *Id.* at 681 n.20 (internal citations omitted).

¹³⁶ *Mistretta*, 488 U.S. at 412.

¹³⁷ *Id.* at 389 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 22 (1825)).

¹³⁸ *Id.* at 389-90 n.16.

¹³⁹ *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002).

¹⁴⁰ *Allen*, 468 U.S. at 750.

Problems with the *Morrison* and *Mistretta* Argument

However, the argument made above is premised on the assumption that FISA proceedings merely “carry[] into execution all of the judgments which the judicial department has power to pronounce.”¹⁴¹ The central rationale for why FISA proceedings are incidental to the federal judicial powers is because such proceedings are directly analogous to a traditional warrant proceeding, an example of an incidental function of the judicial power provided in *Morrison* and *Mistretta*.¹⁴² However, in a traditional warrant proceeding the results can be contested through some judicial process.¹⁴³ In this regard, FISA proceedings differ from traditional warrant procedures. For instance, under Federal Rule of Criminal Procedure 41, an officer executing a warrant must give a copy of the warrant and a receipt of the property taken to the target of the search.¹⁴⁴ Additionally, the target may request the return of his property,¹⁴⁵ and may move to suppress the evidence if offered at trial.¹⁴⁶ As one esteemed commentator noted, with notice and an opportunity to contest the search, “a case or controversy is made, the issues are appropriate for judicial determination, and a final judgment can be rendered and reviewed on appeal.”¹⁴⁷ In other words, while a traditional warrant proceeding is incidental to a traditional adjudication by an Article III court, there is some connection that exists between the traditional warrant proceeding and the judicial power.

Targets of FISA orders, on the other hand, are generally not notified of the surveillance, and have no statutory method of contesting their legality or requesting a return of the things taken. Moreover, unlike the traditional warrant setting, information obtained from surveillance under FISA is infrequently used in a criminal prosecution that could independently satisfy the case-or-controversy requirement.¹⁴⁸ In this sense, FISA proceedings, to the extent they are not adversarial in nature, are engaging the federal judiciary in a role that is far removed from the traditional Article III functions and are, at least arguably, not incidental to the federal judicial power.

Nevertheless, several district courts have upheld FISA under an Article III challenge. For example, the District Court for the Southern District of California rejected a similar argument in *In re Kevork*, accepting the warrant analogy:

“The *ex parte* nature of FISC proceedings is also consistent with Article III. Government applications for warrants are always *ex parte*. Authorizations under Title III are raised on an *ex parte* basis. The FISA Court retains all the inherent powers that any court has when considering a warrant.”¹⁴⁹

¹⁴¹ *Mistretta*, 488 U.S. at 389 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 22 (1825)).

¹⁴² See *Morrison*, 487 U.S. at 860 n.20; *Mistretta*, 488 U.S. at 389-90 n.16.

¹⁴³ See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 86 (1969).

¹⁴⁴ FED. R. CRIM. P. 41(f)(C).

¹⁴⁵ FED. R. CRIM. P. 41(g).

¹⁴⁶ FED. R. CRIM. P. 41(h).

¹⁴⁷ Taylor, *supra* note 143.

¹⁴⁸ *But see* *United States v. Isa*, 923 F.3d 1300, 1305 (8th Cir. 1991) (information obtained from FISA surveillance used as evidence in state murder prosecution). If a criminal prosecution is brought against a target of the surveillance and the government intends on entering into evidence at trial or other court proceeding any evidence derived from “electronic surveillance,” the government must notify the target of this intended use prior to the proceeding. 50 U.S.C. § 1806(c).

¹⁴⁹ *In re Kevork*, 634 F. Supp. 1002, 1014 (S.D. Cal. 1985).

The Traditional Argument and the Role of a Public Advocate

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

The Traditional Argument for the Constitutionality of FISA Proceedings

Relying on the traditional understanding of Article III, the DOJ opined during the late 1970s FISA debates that the FISA proceedings then under consideration satisfied Article III's case-or-controversy requirement.¹⁵⁰ Acknowledging that the proceedings proposed under that bill "differ in many respects from the usual sort of case-or-controversy brought before Article III courts," DOJ nonetheless argued that the bill satisfied Article III. In addressing the adverseness argument, DOJ posited that two parties need not be present in every case, but instead there need only be "adversity in fact,"¹⁵¹ or, "possible adverse parties."¹⁵² The adverse interests of the United States in conducting surveillance and the interests of the target to not be surveilled were sufficient, DOJ argued, to satisfy the adversity requirement.¹⁵³ Additionally, DOJ argued that the proposed FISA orders were sufficiently analogous to traditional warrants to uphold their constitutionality.¹⁵⁴

The DOJ's argument appears to have been accepted by at least one court. Specifically, in *United States v. Megahey*, the United States District Court for the Eastern District of New York rejected an argument that a court exercising exclusively *ex parte* powers exceeded the boundaries of Article III.¹⁵⁵ The court noted that "applications for electronic surveillance submitted to the FISC pursuant to FISA involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them."¹⁵⁶

¹⁵⁰ See *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 26 (1978) (statement of John M. Harmon, Asst. Att'y Gen., Office of Legal Counsel).

¹⁵¹ *Id.* at 28 (citing 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3530 (1975)).

¹⁵² *Id.* (citing *Muskrat v. United States*, 219 U.S. 346, 357 (1911)) (emphasis added).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y.1982); see also *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982).

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

Id. at 1313 n.16.

¹⁵⁶ *Megahey*, 553 F. Supp. at 1196.

Standing and a Public Advocate

Assuming that current FISA proceedings are an adjudicatory function of an Article III court and require adherence to Article III's case-or-controversy requirements, the question that remains is whether a FISA advocate could constitutionally participate in the proceedings in some manner. Generally, whenever an individual "invo[kes] ... [a] federal court[']s jurisdiction" and formally asks an Article III court to exercise its "remedial powers on his [or her] behalf,"¹⁵⁷ the Supreme Court has "consistently ... required" that the "party seeking judicial resolution of a dispute 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party."¹⁵⁸ The injury must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."¹⁵⁹ In addition to suffering an injury, the "irreducible constitutional minimum" of "standing" also requires that there be a "causal connection" between the injury and the conduct that is complained of, such that the injury is "fairly traceable" to the challenged action.¹⁶⁰ Finally, constitutional standing requires that it be likely that the injury will be redressed by a favorable decision.¹⁶¹ The rationale for these requirements is that Article III courts, in exercising judicial power, have the ability to "profoundly affect the lives, liberty, and property of those to whom it extends,"¹⁶² and, accordingly, the power to seek relief from an Article III court must be placed in the hands of those who have a "direct stake" in the outcome of the case, and not merely in the "hands of 'concerned bystanders.'"¹⁶³

Nonetheless, there is ample case law that indicates that when a federal court is *already* adjudicating over an adversarial proceeding a third party can play a limited role in the proceeding without needing to satisfy the basic requirements of constitutional standing. For example, in *Diamond v. Charles*, the Supreme Court stated that an entity that lacks Article III standing can "ride 'piggy-back' on" another active party that does have standing by filing briefs on that party's behalf and by participating in argumentation before the court.¹⁶⁴ In the wake of *Diamond*, a circuit split has developed as to the broader question of whether a party without Article III standing can constitutionally intervene in a case in federal court.¹⁶⁵ However, even in circuits that accept that a party without standing can intervene in an on-going federal case, those courts require that at least one party exists that adopts the same position as the intervenor.¹⁶⁶

¹⁵⁷ See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

¹⁵⁸ See *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

¹⁵⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

¹⁶³ *Diamond*, 476 U.S. at 62.

¹⁶⁴ *Id.* at 64. In *Diamond*, the State of Illinois opted not to appeal a lower court ruling striking down an Illinois law, and the Supreme Court held that a private citizen could not, without Illinois actually participating before the Court. *Id.* ("But this ability . . . exists only if the State in fact is an appellant before the Court; in the absence of the State in that capacity, there is no case for *Diamond* to join.").

¹⁶⁵ Compare *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[D]ecisions of this court hold an intervenor must also establish its standing under Article III of the Constitution."), with *San Juan Cnty v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("On rehearing . . . we . . . hold that parties seeking to intervene . . . need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'").

¹⁶⁶ See, e.g., *San Juan Cnty*, 503 F.3d at 1172.

More broadly, the Supreme Court has recognized the power of Article III courts to appoint friends of the court or *amici curiae* “to represent the public interest in the administration of justice.”¹⁶⁷ In this vein, it is generally recognized and “uncontroversial” that a federal court can obtain briefing from a third party functioning as an *amicus*.¹⁶⁸ Having said that, the exact limits on the role of an *amicus* are unclear, as courts have had a range of opinions on when and how *amici* can participate in an Article III proceeding. Some courts have limited when an *amicus* can participate in a proceeding to instances where the *amicus* would be offering (1) a different perspective than the named parties;¹⁶⁹ (2) impartial information on matters of public interest;¹⁷⁰ or (3) observations on legal questions, as opposed to “highly partisan ... account[s] of the facts.”¹⁷¹ Other courts have allowed *amici* to take a far broader role in Article III proceedings, including allowing *amici* to conduct discovery,¹⁷² to present and question witnesses,¹⁷³ and even to enforce the district court’s judgment.¹⁷⁴ However, if courts begin to allow a broader role for *amici* in Article III proceedings beyond merely providing a non-partisan account of the law in briefing, the *amicus* could become, as one commentator has noted, a “vessel enabling third parties, lacking the requisite standing, to enter federal courts” and make an end-run around Article III standing requirements.¹⁷⁵

With these principles in mind, it appears that a public advocate who has a more limited role in the FISA proceedings, such as through providing briefing on a topic of general interest, would not be constitutionally infirm under Article III.¹⁷⁶ However, if a public advocate is envisioned to take on a broader role than that of the traditional third party *amicus* or intervenor, such as allowing the advocate to participate in discovery, move for a judgment against the court, or file an appeal of an adverse ruling, it appears more likely that the privacy advocate would need to satisfy the traditional requirements of constitutional standing, as the advocate is formally seeking relief from an Article III court.¹⁷⁷ And it seems unlikely that the FISA advocate, in his or her individual capacity, would have personally suffered any form of non-generalized injury as a result of the

¹⁶⁷ See *Universal Oil Products Co. v. Root Rfg. Co.*, 328 U.S. 575, 581 (1946) (Frankfurter, J.).

¹⁶⁸ See Rebecca Haw, *Amicus briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1250 (May 2011) (“But *amicus* participation has opened a constitutional back door to interested third parties who want to influence a judicial decision but lack standing or injury. Although the constitutionality of *amicus* briefs is uncontroversial, at times the Court has seemed ambivalent about their proper role.”).

¹⁶⁹ See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) (opining that the “vast majority of *amicus curiae* briefs are filed by allies of litigants” and “[t]hey are an abuse.”).

¹⁷⁰ See *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991); see also *Miller-Wohl, Inc. v. Commissioner of Labor & Indus., Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (describing *amicus curiae*’s role as directing court on matters of public interest to law); see generally 4 Am. Jur. 2d *Amicus Curiae* § 1 (1995) (describing traditional *amicus curiae* as neutrally providing information to court).

¹⁷¹ See *New England Patriots Football Club, Inc. v. University of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979).

¹⁷² See *Northside Indep. Sch. Dist. of Bexar v. Texas Educ. Agency* 410 F. Supp. 360, 362-63 (W.D. Tex. 1975)

¹⁷³ See *United States v. Dougherty*, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972).

¹⁷⁴ See *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972).

¹⁷⁵ See Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1280-82 (1992) (warning that expanded use of the *amicus* device allows would-be litigants to circumvent the standing requirements of Article III).

¹⁷⁶ See *Universal Oil Products Co.*, 328 U.S. at 581 (“No doubt a court . . . may avail itself . . . of *amici* to represent the public interest in the administration of justice.”). More controversial would be the role of a public advocate as an intervenor. See *supra* footnote 165. With respect to the role of a public advocate in FISA proceedings, allowing an advocate to intervene would require another party, such as a telecommunications provider, to already be actively engaged in the FISA proceeding. *Id.*

¹⁷⁷ See *Defenders of Wildlife*, 504 U.S. at 560.

government's foreign surveillance activities.¹⁷⁸ Even if the FISA advocate could show that, for example, the government, pursuant to Section 215 of the Patriot Act, collected telephone metadata that included information on the advocate, standing remains as “an obstacle for litigants [to] challenge government surveillance programs” because the advocate did not personally suffer a concrete and particularized injury.¹⁷⁹ Moreover, Congress cannot obviate the standing requirements by statutorily authorizing the advocate to appeal a FISC ruling.¹⁸⁰ While there is some case law that would allow the advocate to intervene in an Article III case without having to establish standing, even in the circuit courts that adopt such a view, the advocate would still require another party, such as a telecommunications provider, to already be engaged in the FISA proceeding.¹⁸¹

Third-Party Standing and a Public Advocate

Even if a public advocate cannot, in his or her individual capacity, satisfy the requirements of Article III standing, the advocate can still participate in a FISA proceeding if he or she is authorized to appear and assert the interests of a party who does have standing.¹⁸² For instance, in the case of *Hollingsworth v. Perry*, the Court considered an Equal Protection challenge to Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.¹⁸³ Because the state officials had declined to appeal an adverse district court ruling, however, the Supreme Court requested briefing on the question of whether the official “proponents”¹⁸⁴ of the proposition had standing under Article III to appeal the district court’s decision.¹⁸⁵ After rejecting the argument that the

¹⁷⁸ See generally *Allen*, 468 U.S. at 754 (“[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”).

¹⁷⁹ See CRS Report R43107, *Foreign Surveillance and the Future of Standing to Sue Post-Clapper*, by Andrew Nolan, *Foreign Surveillance and the Future of Standing to Sue Post-Clapper*, by Andrew Nolan at pg. 12 (explaining *Clapper v. Amnesty International USA*, 568 U.S. --, 133 S. Ct. 1138 (2013)).

¹⁸⁰ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) (“Congress may, by legislation, expand standing to the full extent permitted by Article III of the Federal Constitution, thus permitting litigation by one who otherwise would be barred by the prudential standing rules; in no event, however, may Congress abrogate the Article III minima to the effect that a plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted.”). *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing.”).

¹⁸¹ *Diamond*, 476 U.S. at 62.

¹⁸² See *Karcher v. May*, 484 U.S. 72, 84 (1987) (White, J., concurring) (noting that an authorized representative has the authority to participate as a party in an Article III court) (citing *INS v. Chadha*, 462 U.S. 919, 940 (1983)); see also *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2665 (2013) (noting that *Karcher* stands for the proposition that authorized official acting in an official capacity can act as a party in an Article III proceeding).

¹⁸³ *Hollingsworth*, 133 S. Ct. at 2659.

¹⁸⁴ Under Cal. Elec. Code Ann. §342, “[p]roponents of an initiative or referendum measure’ means . . . the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General . . . ; or . . . the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body.”

¹⁸⁵ *Hollingsworth*, 133 S. Ct. at 2661.

proponents of Proposition 8 had a particularized injury,¹⁸⁶ the Court considered the argument that the plaintiffs were litigating on behalf of the State of California.¹⁸⁷

Hollingsworth ultimately rejected this proposition, noting that while a third party can be authorized to represent the interests of a state when that party is an officer of the state, acting in an official capacity,¹⁸⁸ California law, as interpreted by the California Supreme Court, did not “describe[the] petitioners” as being “authorized to act” as “agents of the people.”¹⁸⁹ Instead, the Supreme Court found that the California High Court had merely allowed the “petitioners [to] argue in defense of Proposition 8,” which did not mean that the proponents were “*de facto* public officials.”¹⁹⁰ The Supreme Court went further to dispute the contention made by the petitioners that they were the “agents of” California¹⁹¹ because, among other things, there existed no principal controlling the agent’s actions,¹⁹² and the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal.¹⁹³

With respect to the FISA privacy advocate, assuming the advocate, in asking to appeal the decisions of the FISC, is representing the views of the “public at large” or of those who are targeted by the government’s surveillance efforts, the logic of *Hollingsworth* would lead to the conclusion that the advocate cannot constitutionally participate in the proceeding. First, to the extent the advocate is representing the views of the public at large, the advocate would not be representing the views of a party who does have standing, but instead would be representing the views of a very generalized interest.¹⁹⁴ Moreover, to the extent the advocate purports to be the agent of those who are harmed in a way by government surveillance that amounts to an injury for constitutional standing purposes,¹⁹⁵ the privacy advocate does not appear to be authorized in any sort of official capacity by those targeted by the government.¹⁹⁶ After all, those targeted by the government under FISA are generally unaware of any specific government surveillance conduct.¹⁹⁷ Additionally, there does not appear to be any of the elements of an agency relationship

¹⁸⁶ *Id.* at 2663 (holding that the official petitioners “have no ‘personal stake’ in defending its enforcement that is distinguishable from the general interest of every citizen of California.”).

¹⁸⁷ *Id.* at 2664.

¹⁸⁸ *Id.* at 2665 (citing *Karcher*, 484 U.S. at 84). The Court did note that there are historical exceptions to the rule that a third party typically does not have standing to assert the interests of another. *Hollingsworth*, 133 S. Ct. at 2665 (noting the historical anomalies of the *qui tam* action, “next friend” standing, and shareholder-derivative suits).

¹⁸⁹ *Id.* at 2666.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (“And petitioners are plainly not agents of the State . . .”).

¹⁹² *Id.* at 2666-67 (noting that the proponents “decided what arguments to make and how to make them.”).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2667 (“And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”).

¹⁹⁵ It remains unclear as to what party from the general public would have standing to challenge government foreign intelligence surveillance efforts. See generally CRS Report R43107, *Foreign Surveillance and the Future of Standing to Sue Post-Clapper*, by Andrew Nolan; see also *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1008 (FISA Ct. Rev. 2008) (holding that communication service provider had Article III standing to challenge the legality of FISA surveillance directives based on the Fourth Amendment rights of third-party customers).

¹⁹⁶ Cf. *Hollingsworth*, 133 S. Ct. at 2665 (noting to have standing to represent the interests of another, the actor must be an “officer, acting in an official capacity.”).

¹⁹⁷ See, e.g., *Amnesty Int’l USA*, 133 S. Ct. at 1148 (noting that plaintiffs challenging section 702 of the FISA have “no actual knowledge of the Government’s . . . targeting practices.”).

between the injured party and the privacy advocate, such as the injured party having the ability to control the litigation or potentially remove the advocate.¹⁹⁸

On the other hand, it should be noted that *Hollingsworth* on its face is a case about the standing of a *private* party defending the constitutionality of the law of a government.¹⁹⁹ Employing a public advocate for FISA proceedings could arguably be distinguished from *Hollingsworth* on the grounds that the advocate is, as discussed earlier in this report, an agent of the *government*,²⁰⁰ in that the advocate would be an officer of a government agency and, thus, a representative of a party who does have standing.²⁰¹ The fact that the FISA advocate would be making arguments on behalf of a third party not before the court is not prohibited under Article III so long as he or she is authorized to represent a party that *does* have standing.²⁰²

Article III and Intra-branch Litigation

Nonetheless, having two agents of the same branch of government arguing opposite of each other in the same proceeding may raise questions as to whether the proceeding is in line with the underlying principles of Article III.²⁰³ Specifically, the Constitution's "case-or-controversy" requirement gives rise to a "general principle that no person may sue himself," as federal courts "do not engage in the academic pastime of rendering judgments in favor of persons against themselves."²⁰⁴ Applying this general principle to the federal government, the Supreme Court has noted that it is "startling" to even propose that there can be "more than one 'United States' that may appear" before a federal court.²⁰⁵ While the government suffers an injury for constitutional standing purposes when its sovereign interests, as expressed through federal law, are threatened,²⁰⁶ there is only one sovereign entity that is the United States. And it is questionable whether two agents of the government can litigate against each other in an Article III court with each asserting an injury stemming from a threat to the general sovereign interests of the United States.²⁰⁷ Indeed, if two agencies of the federal government, with competing views about the sovereign interests of the United States, can have their dispute resolved before a federal court, the fear is that "[s]uch a state of affairs would transform the courts into ombudsmen of the

¹⁹⁸ *Cf. Hollingsworth*, 133 S. Ct. at 2666-67.

¹⁹⁹ *Id.* at 2668 ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").

²⁰⁰ *See supra* "The Role of a Public Advocate."

²⁰¹ *See Karcher*, 484 U.S. at 84.

²⁰² *See In re Directives*, 551 F.3d at 1008.

²⁰³ *See, e.g., Valley Forge Christian College*, 454 U.S. at 472 (noting that Article III requires "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

²⁰⁴ *See United States v. ICC*, 337 U.S. 426, 430 (1949).

²⁰⁵ *See United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988).

²⁰⁶ *See Stevens*, 529 U.S. at 771 (holding that the Government suffers injury from the "violation of its laws"); *see also United States v. City of Pittsburgh*, 757 F.2d 43, 45 (3d Cir. 1985) ("[T]he United States may bring suit to protect its sovereign interests notwithstanding the lack of any immediate pecuniary interest.").

²⁰⁷ *Cf. OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 n.3 (1995) (explaining in the context of the Administrative Procedure Act that agencies asserting an injury against the government apart from the agency's role as a market participant are not "adversely affected or aggrieved."); *see Joseph W. Mead, Interagency Litigation and Article III*, 47 Ga. L. Rev. 1217, 1263-64 (Summer 2013) ("[T]he United States has no sovereign interest in proceeding against itself, like it does against another, to ensure its vision of the public interest or interpretation of the law is realized. It has no interest in reversing itself.").

administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory.”²⁰⁸

Nonetheless, the “mere assertion” that a legal action “is an ‘intra-branch dispute, without more,’” does not operate to defeat federal jurisdiction.²⁰⁹ Instead the Supreme Court has cautioned that “courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.”²¹⁰ In this vein, the High Court has found cases to be justiciable that on the surface appear to be intra-branch conflicts. For example, in *United States v. ICC*, the Supreme Court held that the United States had standing to sue the Interstate Commerce Commission (ICC) in federal court to overturn a Commission order that denied the government recovery of damages for an allegedly unlawful railroad rate, as the dispute, at bottom, would settle who was “legally entitled to sums of money, the Government or the railroads.”²¹¹ In other words, instead of being a dispute between two government agents, the dispute involved the government’s interests conflicting with those of private entities—the railroads—who were the “real parties in interest.”²¹² The Court, in *Newport News Shipbuilding*, explained *ICC*’s holding in a slightly different sense, emphasizing that the *ICC* case was justiciable despite being between the various agents of the government because one agency was participating as a “statutory beneficiary” or “market participant” by being subject to the railroad rates set by the ICC.²¹³ In *United States v. Nixon*, a “unique[.]” conflict between the Watergate special prosecutor and the Chief Executive over the release of subpoenaed tapes, the Court held that the setting of an evidentiary dispute arising from a criminal prosecution assured that the matter was “within the traditional scope of Article III power.”²¹⁴ Other settings have yielded justiciable intra-branch disputes, including when one agency, acting as an employer, is sued by another agency as enforcer of federal labor laws.²¹⁵ Nonetheless, despite these varied exceptions to the rule that the government cannot sue itself,²¹⁶ the Supreme Court has not enunciated any formal test for resolving when an Article III court can adjudicate a dispute between two government agencies.²¹⁷

Assuming an office of a public advocate is viewed as a government entity,²¹⁸ with respect to a proposal allowing the FISA courts to resolve disputes between a public advocate and the DOJ’s National Security Division, such proposals will likely raise Article III justiciability concerns. One

²⁰⁸ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *Duke L.J.* 1219, 1232 (April 1993).

²⁰⁹ See *United States v. Nixon*, 418 U.S. 683, 693 (1974).

²¹⁰ See *ICC*, 337 U.S. at 430.

²¹¹ *Id.*

²¹² *Id.* at 432.

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

²¹⁴ 418 U.S. at 695-97.

²¹⁵ See *Mead*, *supra* footnote 207 at 1239-1249 (providing an overview the various instances of intra-branch litigation).

²¹⁶ See *ICC*, 337 U.S. at 430.

²¹⁷ See *Mead*, *supra* footnote 207 at 1249 (“Courts and commentators have proposed several theories for squaring these cases with the general proposition that no entity can sue itself.”). Some lower courts have attempted to articulate a test for the justiciability of intra-branch litigation. See, e.g., *TVA v. EPA*, 278 F.3d 1184, 1197 (11th Cir. 2002) (explaining that *Nixon* establishes a two-pronged case or controversy analyses in the context of intrabranh disputes). These tests have been not been adopted by the Supreme Court and have been criticized by various academic sources. See *Mead*, *supra* footnote 207 at 1252 (“But this test is based on a misreading of *Nixon* and cannot be squared with basic principles of justiciability.”); Herz, *United States v. United States: When Can the Federal Government Sue Itself*, 32 *WM. & MARY L. REV.* 893, 969 (Summer 1991) (“The test was in part inadequate and in part misapplied.”).

²¹⁸ See *supra* “The Role of a Public Advocate.”

can argue, relying on *ICC*, that the case is justiciable because there are “real [private] parties in interest” underlying the dispute in that a public advocate is protecting the general public or, at the very least, those members of the public whose privacy rights are violated through the government’s foreign surveillance efforts.²¹⁹ However, this reading of *ICC* appears to conflict with the Supreme Court’s more recent interpretations of that case that cast *ICC* as a dispute where the agent was operating as a market participant,²²⁰ and only a very broad reading of that line of reasoning could conclude that a public advocate is “participating in the market” regulated by the government’s foreign surveillance efforts. More importantly, unlike in *ICC*, the “real parties in interest” with respect to disputes over foreign surveillance techniques are likely not suffering from a cognizable injury that would normally allow an Article III court to adjudicate the claim.²²¹ The remaining types of cases where a federal court can adjudicate an intra-branch dispute appear to be distinguishable from a dispute between a public advocate and the Justice Department, as a case with a public advocate does not, for example, arise out of a criminal prosecution²²² or an intra-branch labor dispute.²²³ Instead, an intra-branch dispute involving a public advocate appears to be centered on a dispute with respect to the relative importance of two conflicting sovereign interests—the need to engage in foreign surveillance to protect national security versus the need to protect the privacy rights of the public. Such a dispute may ultimately run afoul of the principle that an Article III court does not adjudicate a dispute between a solitary legal entity.²²⁴

Constitutional Issues Raised by Housing the Advocate in the Judicial Branch

Because the *ICC* line of cases primarily pertains to *intra-* as opposed to inter-branch litigation and because courts have found that Article III permits a federal court to adjudicate a dispute between two branches in certain circumstances,²²⁵ some proposals have suggested creating the office of a

²¹⁹ *Cf.* 337 U.S. at 432. 337 U.S. at 428.

²²⁰ *Newport News Shipbuilding*, 514 U.S. at 128.

²²¹ In *ICC*, the government was seeking monetary damages as a result of an allegedly unlawful railroad rate, and monetary harm generally qualifies as an injury-in-fact necessary for a party to seek relief from an Article III court. *See Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (“Monetary harm is a classic form of injury-in-fact. Indeed, it is often assumed without discussion.”). In contrast, a public advocate is seeking judicial relief in the form of an order that would deny the government the ability to conduct certain foreign surveillance. Such relief if sought by a real party in interest would require a showing of a likelihood of substantial and immediate irreparable injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Given the Court’s recent holding in *Amnesty Int’l*, it is not only doubtful that a real party in interest could be injured by foreign surveillance efforts such that a Article III could adjudicate their claim for injunctive relief, it is also unlikely that the government could represent the views of such a party in intra-branch litigation without raising standing concerns. *See* 133 S. Ct. at 1150

²²² *See Nixon*, 418 U.S. at 694.

²²³ *See, e.g., IRS v. FLRA*, 494 U.S. 922 (1990). This is particularly true because unlike in an intra-branch labor dispute where one government agency is functionally representing the views of an individual, with a FISA public advocate the advocate is representing the broad interests of the public at-large.

²²⁴ *See ICC*, 337 U.S. at 430. One may also argue that having two entities within the executive branch coming to different conclusions on how the law should be executed violates Article II’s provision vesting the executive power of the United States in the President of the United States. *See* U.S. Const. Art. II, § 1, Cl. 1. Nonetheless, after *Humphrey’s Executor v. United States*, Congress can create certain independent agencies run by principal officers appointed by the President, whom the President has limited control over because of “for cause” removal protections, undermining the argument that having two different voices executing the laws violates Article II. 295 U.S. 602, 620 (1935).

²²⁵ *See, e.g., United States v. AT&T*, 551 F.2d 384, 390 (D.C. Cir. 1976) (“[T]he mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict . . . [Nixon] resolved an analogous conflict between the executive and judicial branches and stands for the (continued...)”)

public advocate for the FISA courts in the judicial branch.²²⁶ While housing a public advocate's office in the judicial branch would likely not alleviate concerns over whether the advocate has standing to proceed before a FISA court,²²⁷ such a proposal may also raise important separation of powers concerns with respect to creating an independent agency within the judicial branch. In *Mistretta*, the Court, in upholding the constitutionality of establishing the Sentencing Commission as an independent agency within the judicial branch, found that separation of powers concerns would counsel against creating an independent agency within the judiciary if one of two conditions existed.²²⁸ Specifically, locating an agency within the judicial branch would violate the doctrine of separation of powers if the agency would either "expand the powers of the Judiciary beyond constitutional bounds by uniting the Branch with" a political power or by "undermining the integrity of the Judicial Branch."²²⁹

An argument can be made that locating a public advocate in the judicial branch would violate either of these principles. It should be noted that much like the Sentencing Commission in *Mistretta*, a public advocate housed in the judicial branch would be an auxiliary body whose power was "not united with the powers of the Judiciary,"²³⁰ as Article III judges are not envisioned as overseeing or monitoring the daily work of a public advocate. Nonetheless, a public advocate, by seeking relief in aid of the legal interests of the United States through litigation before the FISA courts, arguably is functioning much like his counterparts in the DOJ in executing the laws of the United States, a power that is generally reserved to the executive branch.²³¹ Moreover, in contrast to *Mistretta*, where the Court found that the Sentencing Commission merely formalized the "everyday business of judges" in carrying out sentencing decisions, with respect to the public advocate proposals that go beyond formalizing the role that the FISC court's legal advisors currently play,²³² allowing members of the judicial branch to actively seek judicial relief in aid of the general public would appear to enhance the current role that the third branch has in enforcing the law. However, it should be noted that courts embracing a more functionalist approach to separation of powers questions²³³ may not be as concerned with allowing the judicial branch to litigate on behalf of the United States when the underlying purpose of the litigation is to protect civil liberties.²³⁴

(...continued)

judiciability of such a case.").

²²⁶ See, e.g., Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (1st Sess. 2013) § 402(a).

²²⁷ See *Raines*, 521 U.S. at 819 (applying the traditional three part standing inquiry to an inter-branch dispute); see also *Moore v. United States House of Representatives*, 733 F.2d 946, 960-61 (D.C. Cir. 1984) (Scalia, J., concurring) ("The Supreme Court itself, of course, has never found standing to resolve, or reached the merits of, an intra- or inter-branch dispute presented by a federal officer whose only asserted injury was the impairment of his governmental powers.").

²²⁸ 488 U.S. at 393.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *Buckley*, 424 U.S. at 138 (holding that the "discretionary power to seek judicial relief, is authority" for the President who the "Constitution entrusts the responsibility to 'take care that the Laws be faithfully executed'"); *Bowsher*, 478 U.S. at 733 (noting that the "very essence" of "'execution' of the law" entails interpreting a law enacted by Congress to implement the legislative mandate).

²³² See *Kris*, *supra* footnote 32 at 38-39.

²³³ See *Mistretta*, 488 U.S. at 393 ("Rather, our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.'") (internal citations omitted).

²³⁴ Cf. *The Federalist* No. 47 (Madison) ("Were [the judicial power] joined to the executive power, the judge might behave with all the violence of an oppressor.") (quoting Montesquieu).

Likewise, locating a public advocate within the judicial branch could be seen as being inconsistent with the role of federal courts to impartially resolve certain cases and controversies.²³⁵ The Supreme Court has recognized that Congress can assign the “courts or auxiliary bodies within the Judicial Branch” certain “extrajudicial activities” that have a “close relation to the central mission of the Judicial Branch.”²³⁶ A public advocate tasked with a duty to represent a distinct viewpoint that opposes the government’s foreign surveillance efforts²³⁷ may be casting the judicial branch into the role of advocate, as opposed to neutral arbiter.²³⁸ Moreover, unlike the housing of the Sentencing Commission in the judicial branch, which was in line with the “Judiciary’s special knowledge and expertise” about criminal sentencing, locating an advocate who argues against government foreign surveillance efforts in the judicial branch would be giving the branch power in an area in which the judiciary generally has no special expertise,²³⁹ a concern of the *Morrison* and *Mistretta* courts.²⁴⁰ Nonetheless, because of the novelty of housing an agency with independent litigating authority within the judiciary, there is a lack of precedent to confirm how exactly a court would approach the relevant separation of powers issues.

Special Advocate and the Appeals Process

Given the Article III concerns raised by vesting a public advocate with the power to seek relief from a federal court, some have suggested that instead of relying on an advocate to appeal a decision by the FISC, that the FISC’s decisions be automatically reviewed by a larger panel of the Foreign Intelligence Surveillance Court of Review.²⁴¹ However, if the result of such a procedure would be to automatically stay the FISC’s ruling until affirmed by a higher court, such a proposal may raise constitutional concerns. Article III “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a ‘judicial Power’ is one to render dispositive judgments.”²⁴² While Congress may constitutionally “intervene and guide or control the exercise of the courts’ discretion,”²⁴³ including by “amend[ing] applicable law,”²⁴⁴ the legislature cannot “prescribe rules of decision to the Judicial Department of the government in cases pending before it.”²⁴⁵ More broadly, “no decision of any court of the United States can, under any circumstances, ... be liable to ... suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested.”²⁴⁶ In other words, congressional enactments that would automatically suspend the legal

²³⁵ See *Mistretta*, 488 U.S. at 394 n.20.

²³⁶ *Id.* at 389.

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

²³⁸ Such a concern may be especially troubling if a law were to allow the judiciary to appoint a public advocate, remove a public advocate from office, and adjudicate over a public advocate’s legal claims.

²³⁹ See *Humanitarian Law Project*, 130 S. Ct. at 2727.

²⁴⁰ See *Mistretta*, 488 U.S. at 389 (citing *Morrison*, 487 U.S. at 676 n.13).

²⁴¹ Cf. ACLU “In First-Ever Ruling, Secret Appeals Court Allows Expanded Government Spying on U.S. Citizens,” November 18, 2002, <https://www.aclu.org/technology-and-liberty/first-ever-ruling-secret-appeals-court-allows-expanded-government-spying-us-c> (noting lack of an automatic appeal procedure for the decisions of the FISA courts).

²⁴² See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219 (1995) (emphasis in original) (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

²⁴³ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

²⁴⁴ *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992).

²⁴⁵ *United States v. Klein*, 80 U.S. 128, 146, 13 Wall. 128 (1872).

²⁴⁶ *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D. J.).

effect of an Article III court's order may be seen as threatening the underlying "power and duty of those courts to decide cases and controversies properly before them."²⁴⁷ While the Supreme Court has upheld statutes authorizing a temporary suspension of an order by a federal court when premised on a change in the underlying substantive law,²⁴⁸ a provision that would automatically prevent the FISC's orders from having legal effect pending revision by another court may be seen as a usurpation by Congress of the judicial function of deciding cases on the merits with finality.²⁴⁹

Relatedly, proposals that would allow the FISC to certify questions of law for review by the Foreign Intelligence Surveillance Court of Review or the Supreme Court may raise similar Article III concerns.²⁵⁰ Certifying a question of law to another court usually occurs in the context of a federal court seeking the opinion of a *state* court on a question of state law.²⁵¹ When the "question is certified, the responding court does not assume jurisdiction over the parties or over the subject matter,"²⁵² and, instead, the certifying court retains the "right to determine actual controversies arising between adverse litigants."²⁵³ Such a procedure when utilized to seek answers to legal questions by another federal court may raise constitutional problems. Specifically, by allowing federal courts to respond to a certified question, the responding federal court, in answering a general question of law, would appear to be violating Article III's bar against federal courts issuing advisory opinions.²⁵⁴ Moreover, certification to a federal court would appear to conflict with the case-or-controversy requirement of Article III that a federal court can only act when a dispute is presented to it by parties with a "concrete stake" in the outcome.²⁵⁵

In short, the idea of certifying legal questions to a federal court, much like the other issues related to the concept of a FISA public advocate, presents several serious constitutional issues. More broadly, while there are no clear answers that exist to the novel questions raised by the establishment of an office for a public advocate, generally the more modest and confined the role of the advocate is in a given proposal, the more likely that proposal, if made into law, would withstand constitutional scrutiny.

²⁴⁷ *United States v. Raines*, 362 U.S. 17, 20 (1960).

²⁴⁸ *Miller v. French*, 530 U.S. 327, 349 (2000) (finding that because a statutory provision mandating a temporary, but automatic stay "operate[d] in conjunction with" a set of "new standards for the continuation of prospective relief" the provision was not constitutionally infirm).

²⁴⁹ Traditionally, a stay can be issued by a federal court under Rule 62 of the Federal Rules of Civil Procedure, which do not impose a stay of a judgment in certain circumstances, but instead empower a court to issue a stay based on the underlying claim. *See* Fed. R. Civ. P. 62.

²⁵⁰ *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013) § 2(b)(i)(4).

²⁵¹ *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (holding that "where there is doubt as to the local law and where the certification procedure is available" it is within the "sound discretion of the federal court" to use the certification process).

²⁵² The Honorable Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* 29 *SUFFOLK U. L. REV.* 677, 685-86 (Fall 1995).

²⁵³ *See Muskrat*, 219 U.S. at 361.

²⁵⁴ *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

²⁵⁵ *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000).

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