AMICI CURIAE IN THE FISA COURTS: A CIVIL LIBERTIES IMPACT ASSESSMENT

FAIZA PATEL AND RAYA KOREH***

Table of Contents

* Senior Director, Brennan Center for Justice at NYU School of Law, Liberty & National Security Program.

** J.D. Candidate, Harvard Law School, 2023; Brennan Center for Justice at NYU School of Law, Liberty & National Security Program, Research & Program Associate, 2018-2020; A.B., Harvard College, 2018.

INTRODUCTION

Whistleblower Edward Snowden's 2013 public disclosure of constitutionally suspect surveillance programs being carried out by the National Security Agency (NSA) prompted Congress to consider a range of reforms. While many of these were focused on the substance of the NSA's authorities, others targeted the ex parte operation of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) (together the FISA Courts). Both courts were established by the 1978 Foreign Intelligence Surveillance Act (FISA) and play a pivotal part in overseeing foreign intelligence surveillance programs.[1] The lack of any adversarial process in these courts, critics argued, meant that judges were not sufficiently informed of the privacy and civil liberties concerns raised by the NSA's programs. As President Barack Obama explained, "One of the concerns that people raise is that a judge reviewing a request from the government to conduct programmatic surveillance only hears one side of the story, may tilt it too far in favor of security, may not pay enough attention to liberty."[2] To address this problem, the USA Freedom Act of 2015: (1) required the FISA Courts to appoint an amicus in any case involving "novel or significant interpretation of the law," unless the court hearing the case determined that it was not appropriate to do so; and (2) explicitly gave the courts the authority to appoint amicus curiae in any instance they deemed appropriate.[3] The law also re-

1. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified in scattered sections of 50 U.S.C.) [hereinafter Foreign Intelligence Surveillance Act of 1978].

2. Washington Post Staff, *Transcript: President Obama's August 9, 2013, News Conference at the White House*, WASH. POST (Aug. 9, 2013), http://wapo.st/15kwbZP [https://perma.cc/2TNC-K9MU].

3. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114–23, sec. 401(i)(2)(A), 50 U.S.C. § 1803(i)(2)(A)), 129 Stat. 268 (2015) [hereinafter USA FREEDOM Act of 2015].

quired the Director of National Intelligence, acting in consultation with the Attorney General, to conduct declassification reviews of court decisions that include a significant construction or interpretation of law.[4]

This Article analyzes the amicus record of the FISA Courts over the past five years with an eye towards evaluating whether the concerns that prompted the reforms—i.e., that civil liberties were being shortchanged—have been ameliorated. Based on the decisions that have thus far been declassified, the Article concludes that the record is mixed at best. No amici have been appointed in several cases that seem to present obviously novel or significant issues of law. In cases where amici have been appointed, their influence has been limited. Amici's legal arguments, often based on decisions made by regular federal courts, have mostly been rejected by the FISA Courts, which have instead tended to agree with the government's position. Only where there has been overwhelming evidence of non-compliance have the FISA Courts forced the government to make changes, mostly relatively modest procedural requirements.[5] At the same time, the inclusion of amici has forced the FISA Courts to grapple substantively with civil liberties and transparency arguments and, because at least some of their decisions have been made public, subjected those decisions to ongoing scrutiny from policymakers, the press, and the public. And, although amici were not involved, over the last couple of years the NSA has curtailed programs where it was unable to comply with legal safeguards and in March 2020 Congress allowed the legal authority for the agency's chronically troubled call-detail record program to expire without reauthorization.[6]

4. *Id.* sec. 402(a), § 1872(a).

5. *See infra* text accompanying notes 139–???? and 236–288. R

6. *Reauthorizing the USA Freedom Act of 2015*: *Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (questions for the record for Hon. Adam Klein, Chairman and Member, Privacy and Civil Liberties Oversight Board); Press Release, Nat'l Sec. Agency, *NSA Stops Certain Section 702 'Upstream' Activities* (Apr. 28, 2017), https://www.nsa.gov/news-features/press-room/Article/1618699/nsa-stops-certain-section-702-upstream-activities/ [https://perma.cc/SKZ6-NBPH]. *See also* Charlie Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, N.Y. TIMES (Mar. 4, 2019), https://nyti.ms/2Vy3gDW [https://perma.cc/5ZP4-JZLJ]; Ellen Nakashima, *Repeated Mistakes in Phone Record Collection Led NSA to Shutter Controversial Program*, WASH.POST (June 26, 2019), https://wapo.st/31TDBK4?tid=SS_mail&utm_term=.29b5bed90d23 [https://perma.cc/9ZKS-LYL9]; Charlie Savage, *House Departs Without Vote to Extend Expired F.B.I. Spy Tools*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html [https://perma.cc/FA36-S6PA]. For further discussion of the problems leading to

Part I of this Article reviews the establishment and evolution of the FISA Courts from their starting point of issuing a few hundred warrant-like orders for surveilling specific individuals to their more recent role in authorizing sweeping surveillance programs that impact the privacy of millions of people. It then turns in Part II to the effort to reform the courts, explaining how robust proposals for introducing an adversarial element into the courts' proceedings were replaced by a narrower provision requiring the courts to appoint amici in cases presenting "novel or significant interpretation of the law" unless they believed it was "not appropriate" to do so and providing a statutory basis for the court's inherent authority to appoint amici when they believed it was appropriate.[7] In Part III, we assess the impact of the amicus provision, focusing on whether amici were appointed in all critical cases and the extent to which their participation influenced the courts' willingness to accept civil liberties arguments. We find that some FISA Court judges seem reluctant to engage amici in the first place. On substantive issues, national security imperatives continue to have the greatest sway over judges. In this Part, we also explore the role of precedent in limiting the impact of civil liberties arguments and the different strategies employed by amici in fulfilling their mandate. We ultimately conclude that the hope of reformers that amici could convince the FISA Courts to impose serious constraints on the NSA's surveillance programs have mostly not been met. Despite this limited impact, the amicus provisions of the USA Freedom Act, together with other reforms, have increased transparency and public understanding of some aspects of the NSA's programs and the FISA Courts' jurisprudence. This provides a starting point for Congress and the public to hold these institutions accountable.

Based on our analysis of the five years of experience with the operation of the amicus provision, we propose changes that Congress and the FISA Courts themselves could make to allow amici to play a bigger and better role in the courts' proceedings and increase public confidence in their operation. The discovery of serious misrepresentations in the government's FISA application to surveil President Trump's former campaign aide Carter Page, as well as in other applications, has triggered renewed interest in reforming FISA, including by re-imagining the role and authorities of amici. Some of our suggestions are reflected in legislation overwhelmingly passed by the Senate as part of the USA Freedom

the discontinuation of these programs, see *infra* text accompanying notes 90–94 and 272-276, and 349. R R

7. USA FREEDOM Act of 2015, sec. 401, §§ 1803(i)(2)(A)-(B).

Reauthorization Act of 2020.[8] As of this writing, however, the fate of this legislation is unclear.

I.
THE FISA COURTS: ORIGINS AND EVOLUTION

Established in 1978, the FISC is made up of 11 federal trial judges[9] appointed by the Chief Justice of the U.S. Supreme Court for a single seven-year term.[10] The government can appeal any FISC decision to the Foreign Intelligence Surveillance Court of Review (FISCR), which is composed of three federal trial judges, also designated by the Chief Justice.[11] The Supreme Court may grant a writ of certiorari for review of a decision by the FISCR.[12]

The FISC's original mandate was to review the government's applications for orders to collect the electronic communications of individuals for "foreign intelligence" purposes. To obtain an order, the government had to certify that the purpose of the surveillance was to obtain foreign intelligence, broadly defined to include information relating to "the conduct of the foreign affairs of the United States" or national security.[13] And it had to satisfy the court that

8. S. Amend. 1584 to H.R. 6172, 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020); USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. (2020).

9. The initial number of FISA Court judges was seven. Foreign Intelligence Surveillance Act of 1978 § 103 (current version at 50 U.S.C. § 1803). This was increased to 11 by the Patriot Act of 2001, which also added a requirement that at least three of the judges reside within 20 miles of the District of Columbia. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, sec. 208 (codified as amended at 50 U.S.C. § 1803) (2001) [hereinafter Patriot Act].

10. 50 U.S.C. §§ 1803(a)(1), 1803(d).

11. Foreign Intelligence Surveillance Act of 1978 § 103(b) (codified at 50 U.S.C. § 1803(b)).

12. 50 U.S.C. § 1803(b). In reviewing a FISCR decision, the Supreme Court "may" appoint one of the designated amicus curiae or another individual to provide briefing or other assistance. 50 U.S.C. § 1803(k)(2).

13. 50 U.S.C. §§ 1801(c)(2), 1804(a)(6). The Patriot Act of 2001 made a significant change to this requirement. Instead of certifying that acquiring foreign intelligence was "the purpose" of the surveillance, under the Patriot Act, the government need only certify that acquiring foreign intelligence was "a significant purpose" of the surveillance. Patriot Act, sec. 218 (codified as amended at 50 U.S.C §§ 1804(a)(6)(B), 1823(a)(6)(B)). By specifying that acquiring foreign intelligence need not be the sole or primary purpose of surveillance, the Patriot Act enabled the government to obtain an order from the FISA Court even when the government's primary purpose was to obtain evidence for ordinary criminal prosecutions. For more on the history underlying this shift, see Elizabeth Goitein, Faiza Patel, and Fritz Schwarz, *Lessons from the History of National Security Surveillance, in*

there was probable cause to believe that a particular target was a foreign power or agent of a foreign power (such as a foreign government or an international terrorist group),[14] and the telephone number or other communication facility to be monitored was used, or was about to be used, by a foreign power or one of its agents.[15] At the time the court's establishment was debated in Congress, many lawmakers warned of constitutional problems with a court that operated in total secrecy, without all parties present, and outside the normal "adversarial" process.[16] But stricter limits on when Americans[17] could be targeted for "foreign intelligence" purposes mitigated concerns that the court would be used to validate spying on political activity in the U.S. or to avoid the regular warrant requirement in criminal cases.[18] Moreover, the majority of

THE CAMBRIDGE HANDBOOK ON SURVEILLANCE 533, 547–48 (David Gray & Stephen E. Henderson eds., 2017).

14. Foreign power is broadly defined to include foreign governments; factions of foreign nations; entities that foreign governments control; international terrorist groups; foreign-based political organizations; and foreign entities engaged in the proliferation of weapons of mass destruction. 50 U.S.C. § 1801(a).

15. 50 U.S.C. § 1805(a)(2).

16. *See, e.g.*, *Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice on the Comm. on the Judiciary*, 95th Cong. 115 (1978) (statement of Rep. George E. Danielson, Member, H. Comm. on the Judiciary) ("Who is the counter-advocate when the Executive comes before the court to ask for this warrant? Is the court itself to play the role of advocate? Who is coming in for the Soviet Union to decide whether or not this alleged espionage agent should be surveilled? I respectfully submit we have none."); *Foreign Intelligence Surveillance Act of 1978: Hearing Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. 2d Sess. 39 (1978) (statement of Sen. William D. Hathaway, Member, S. Select Comm. on Intelligence) ("[I]t seems to me it's extremely important that we protect the rights of people, particularly of our own citizens, from being tapped . . . . [W]e could have someone designated to protect the rights of the individual who is going to be tapped, so it wouldn't be strictly an ex parte proceedings, so you would have some adversarial aspect to it."); 124 CONG. REC. 28145 (1978) (statement of Rep. Allen Ertel, Member, H. Comm. on the Judiciary) ("We are compromising our Constitution . . . . Decisions will be made in secret . . . . There will be no exposure to the public, no way to review them."); *Id.* at 28143 (statement of Rep. Robert Drinan, Member, H. Comm on the Judiciary) ("If the application for a warrant is conducted in secret and without the presence of any opposing party . . . how can this constitute a 'case or controversy' within the meaning of the Constitution?").

17. FISA defines "U.S. persons" as citizens or legal permanent residents of the United States. 50 U.S.C. § 1801(i). In this article, the terms "Americans" and "U.S. persons" will be used interchangeably.

18. The term "agent of a foreign power" is more narrowly defined for U.S. persons—U.S. citizens or legal permanent residents—than for non-U.S. persons, requiring a showing of probable cause that the target's activities "involve or may involve" a violation of U.S. criminal law. 50 U.S.C. § 1801(b)(2). U.S. persons must

Congress was reassured by similarities between FISC proceedings and the traditionally ex parte hearings that take place when the government seeks a search warrant in a criminal investigation.[19]

The warrant analogy was never perfect,[20] but it became entirely unconvincing when the court shifted from just issuing individualized, warrant-like orders to also signing off on broad surveillance programs. For example, Section 215 of the Patriot Act of 2001 permitted the government to gather records—such as logs of Americans' telephone calls—so long as they were "relevant" to an authorized foreign terrorism investigation.[21] The FISC interpreted this already expansive provision extremely broadly, ruling that because call records *could* reveal individuals linked to such an investigation, the NSA had the authority to gather all of them, allowing the agency to accumulate a huge database of Americans' information.[22] The NSA was only permitted to search the records if it had

"knowingly" aid and abet foreign powers in order to be considered an agent of a foreign power and cannot be designated an agent of a foreign power "solely upon the basis of activities protected by the First Amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A). The legislative history shows that Congress intentionally employed this narrower definition to prevent FISA from ensnaring Americans exercising their First Amendment rights. *See* S. REP. NO. 95-701, at 13, 28 (1978).

19. For instance, ex parte proceedings are a standard feature for both traditional warrant applications. S. REP. NO. 95-701, at 8 (1978). *See also Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 2d Sess. 224 (1978) (statement of Hon. Laurence Silberman).

20. For instance, while "probable cause" is used in both FISA and warrant applications, it refers to very different things. A regular warrant requires probable cause to believe that a crime has been or is being committed. By contrast, for a FISA order, the government's probable cause showing relates to whether the surveillance target is a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a)(2). In addition to a showing of probable cause, the Fourth Amendment requires the identification of the object of the search or seizure with particularity and ex ante approval by a neutral magistrate. The target of a traditional warrant must be given notice and has an opportunity to challenge the validity of the warrant either in a criminal trial or in stand-alone proceedings. FED. R. CRIM. P. 41. In contrast, FISA orders are mostly used to collect intelligence and notice is not required except in the rare cases where they are used for prosecutions. 50 U.S.C. § 1806(c). For more on the differences between traditional warrants and FISA warrants, see ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR. FOR JUSTICE , WHAT WENT WRONG WITH THE FISA COURT, 8–18 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Went_%20Wrong_With_The_FISA_Court.pdf [https://perma.cc/NZ74-WH28].

21. Patriot Act, sec. 215 (codified as amended at 50 U.S.C. §§ 1861–2).

22. Amended Memorandum Opinion, *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-109, at 20-22 (FISA Ct. 2013) (Eagan, J.), https://

reasonable articulable suspicion to believe that its search terms (e.g., phone numbers) were associated with a terrorist group, but the agency itself got to decide when that standard was met—an outcome far removed from traditional FISC ex parte proceedings for obtaining a surveillance order based on individualized suspicion.[23] Under another law enacted after 9/11, Section 702 of the 2008 FISA Amendments Act (FAA), the NSA was authorized to undertake warrantless surveillance of foreigners overseas, inevitably gathering the communications of Americans along the way.[24] The program is overseen by the FISC, but the court's role is limited to reviewing generic rules for how targeting decisions are made and how data is handled after collection. As Judge James Robertson, who served on the FISC from 2002 to 2005, explained: by requiring the FISA Court to review and approve entire surveillance programs ex parte, the FAA "turned the FISA Court into something like an

www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf [https://perma.cc/G2MR-AWMG]. This interpretation was first revealed as part of the Snowden disclosures. Ellen Nakashima & Sari Horwitz, *Newly Declassified Documents on Phone Records Program Released*, WASH. POST (July 31, 2013), http://wapo.st/1cnzEhH [https://perma.cc/63H3-AD3T].

23. The Patriot Act also allowed the government to obtain more types of business records and made them easier to obtain. Previously, the authority to collect business records was set out in the Intelligence Authorization Act for Fiscal Year 1999, which only allowed the government to collect business records from common carriers, public accommodation facilities, storage facilities, and rental car companies. Notably, records held by phone companies were not among those that the government could access. In addition, the government's applications to obtain business records had to identify the subject of the records and show "specific and articulable facts giving reason to believe the person to whom the records pertain is a foreign power or an agent of a foreign power." *See* Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2411 (1998). The Patriot Act permitted the government to acquire records held by phone companies and dispensed with the requirements to identify the subject and to demonstrate the subject's connection to a foreign power, replacing them with a requirement that the records be relevant to an authorized investigation. Prominent constitutional scholars have argued that by untethering the government's request from a particular subject or target, this change arguably eviscerated the "adversity in fact"—the existence of specific parties with adverse interests—that Article III requires. For more on this aspect of the Article III adversity requirement, see Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA 'Special Advocate,'* JUST SEC. (Nov. 4, 2013), http://justsecurity.org/2873/fisa-special-advocate-constitution [https://perma.cc/7K3X-2RJN]; Steve Vladeck, *Why a "Drone Court" Won't Work—But (Nominal) Damages Might. . .*, LAWFARE (Feb. 10, 2013, 5:12 PM), http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/ [https://perma.cc/527Q-PMR9].

24. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2435 (2008), § 101(a)(2) (codified as amended at 50 U.S.C. § 1881a) (creating Section 702 of FISA).

administrative agency which makes and approves rules for others to follow."[25] The gulf between the original mandate of the court and its new role in approving vast surveillance programs that impact hundreds of millions dramatically increased the civil liberties impacts of its rulings.

II.
PROPOSALS FOR REFORMING THE FISA COURTS

There are serious questions about whether the FISA Courts' role overseeing broad, programmatic surveillance comports with Article III of the Constitution, which mandates that courts adjudicate concrete disputes rather than abstract questions.[26] But wholesale reform to bring the FISA Courts' role back in line with Article III[27] was not on the table when Congress began to consider ways to

25. Transcript of Privacy and Civil Liberties Oversight Board Public Workshop at 36, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act 109* (July 9, 2013) (statement of James Robertson, former U.S. District Court Judge who served on the FISA Court).

26. *See, e.g.*, Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2278 (2016); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015); GOITEIN & PATEL, *supra* note 20, at 4. R

27. For example, one of the authors has suggested replacing Section 702 with a regime requiring an individualized court order for the interception of communications involving U.S. persons, regardless of whether they are the identified target of the surveillance. GOITEIN & PATEL, *supra* note 20, at 4, 45. *See also* Mondale, R
Stein & Fisher, *supra* note 26, at 2297–98. Congress could also shore up the Article R
III soundness of the FISA Courts by facilitating collateral challenges by imposing notice requirements on the government and prohibiting the practice of "parallel construction," in which the government builds a criminal case based on FISA-derived evidence but then reconstructs the evidence using other means. GOITEIN & PATEL, *supra* note 20, at 46. *See also* Letter from Advocacy for Principled Action in R
Government, American-Arab Anti-Discrimination Committee, et al., to Hon. James R. Clapper, Director, Office of the Director of National Intelligence (Oct. 29, 2015), https://www.aclu.org/sites/default/files/field_document/coalition_letter_dni_clapper_102915.pdf [https://perma.cc/XKT5-E4AJ]; *Today's NSA-Related Orwellianism: "Derived From,"* EMPTYWHEEL (Feb. 14, 2014), http://www.emptywheel.net/2014/02/14/todays-nsa-related-orwellianism-derived-from/ [https://perma.cc/H28V-GVJF]; Patrick C. Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance – Again?*, JUST SEC. (Dec. 11, 2015), www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again [https://perma.cc/6Z6K-ZLG7]; Dan Novack, *DOJ Still Ducking Scrutiny After Misleading Supreme Court on Surveillance*, INTERCEPT (Feb. 26, 2014), https://theintercept.com/2014/02/26/doj-still-ducking-scrutiny/ [https://perma.cc/2BV9-M9T4]; Beryl A. Howell & Dana J. Lesemann, *FISA's Fruits in Criminal Cases:*

improve them. Instead, reform efforts focused on finding ways to ensure that the courts did not hear only a one-sided presentation of cases, especially those involving issues of statutory and constitutional construction that had broad implications.

The Snowden disclosures triggered a wave of proposals to find ways to include a person or entity to advocate for Americans' privacy rights in the FISA Courts. The proposals varied considerably in terms of the standing that the advocate or amicus would have, the materials available to them, and whether they could appeal a FISC decision to the Foreign Intelligence Surveillance Court of Review. The most ambitious options envisioned an independent office in either the executive[28] or judicial branch,[29] which would be headed by a special advocate who would serve in opposition to the government in proceedings before the FISA Courts,[30] and would have broad authorities such as the ability to intervene in ongoing cases,[31]

An Opportunity for Improved Accountability, 12 UCLA J. INT'L L. & FOREIGN AFF. 145, 155–62 (2007).

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

29. *See* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(a) (2013); Geoffrey R. Stone, *Reflections on the FISA Court*, HUFFINGTON POST (July 5, 2013, 4:50 PM), http://www.huffingtonpost.com/geoffrey-r-stone/reflections-on-the-fisa-c_b_3552159.html [https://perma.cc/F6XB-Y28K] (suggesting creating an office analogous to a public defender's office for FISA proceedings).

30. *See, e.g.*, Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(c)(1) (2013), https://www.congress.gov/bill/113th-congress/house-bill/2849/text [https://perma.cc/3C2J-PBAF] ("[The Privacy Advocate General] shall serve as the opposing counsel with respect to any application by the Federal Government . . . ."); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(i)(1) (2013), https://www.congress.gov/bill/113th-congress/house-bill/3159/text [https://perma.cc/5NEP-96U6] (envisioning the public advocate's role as "represent[ing] the privacy and civil liberties interests of the people of the United States in the matter before the court."); FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(d)(2) (2013), https://www.congress.gov/bill/113th-congress/senate-bill/1467/text [https://perma.cc/8WNJ-PMZN] (the advocate would advance "legal interpretations that minimize the scope of surveillance and the extent of data collection and retention.").

31. *See* LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGY 204 (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/YRV4-JL8V].

conduct some forms of discovery,[32] move the court to reconsider past orders,[33] and appeal adverse rulings.[34]

A March 2014 report from the Congressional Research Service (CRS Report) analyzing several key proposals raised constitutional issues with the creation of a permanent adversarial advocate.[35] In particular, the report argued that proposals to enable amici to act in a way that generally requires standing, for example by giving them the right to appeal FISC decisions, could violate Article III.[36]

32. *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3)(C) (2013).

33. *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. §4(b) (2013).

34. *See* Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(d) (2013); *see also* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 5(a)(1) (2013); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(1)(I) (2013). For an overview of the various proposals on the public advocate issue, see ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RESEARCH SERV., REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 4–7 (2014), https://fas.org/sgp/crs/intel/R43260.pdf [https://perma.cc/LPS2-VNZF]. In addition to these Congressional proposals, there were a multitude of other suggestions for introducing an adversarial element into the FISA Courts made in newspapers, blogs, and other fora. *See, e.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html [https://perma.cc/J3KC-L767] (former FISC judge proposing that Congress authorize FISA judges to appoint independent lawyers to challenge the government when an application for a FISA order raises new legal issues); Editorial, *Privacy and the FISA Court*, L.A. TIMES (July 10, 2013, 12:00 AM), http://articles.latimes.com/2013/jul/10/opinion/la-ed-fisacourt-20130710 [https://perma.cc/B367-HGSC] (suggesting that government lawyers should be appointed to oppose cases that raise novel legal questions); Orin Kerr, *A Proposal to Reform FISA Court Decision Making*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), http://volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking/ [https://perma.cc/Q8KR-BXUA] (proposing that Congress amend the FISA statute to allow the Oversight Section of the Department of Justice's National Security Division to file a motion to oppose any application before the FISC); Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, LAWFARE (July 8, 2013, 11:46 PM), https://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr [https://perma.cc/AUQ9-7UZ8] (suggesting that private lawyers serve as adversarial "special advocates" in the FISC to avoid "the difficulties inherent in expecting government lawyers zealously to critique the government's legal position in ongoing litigation"); Benjamin Wittes, *My Statement Today Before the Senate Intelligence Committee*, LAWFARE (Sept. 26, 2013, 2:00 PM), https://www.lawfareblog.com/my-statement-today-senate-intelligence-committee [https://perma.cc/AKP2-MJ88] (arguing that "the FISA judges [should] have the option—at their discretion—of appointing cleared counsel to argue against the government's submissions").

35. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 9–10, 17–19, 44–45. For a contrary view, see Lederman & Vladeck, *supra* note 23. R R

36. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 22–35, 46–49; ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., REFORM OF THE FOR- R

Around the same time, John D. Bates, Director of the Administrative Office of the United States Courts and former Presiding Judge of the FISC, wrote to the Senate Intelligence and Judiciary Committees—purportedly on behalf of his fellow FISA judges—arguing that Congressional proposals for making the courts more adversarial were both unnecessary and counterproductive.[37] Judge Bates particularly took issue with proposals that gave the FISA judges no discretion regarding the appointment of "special advocates" to serve as amicus curiae. He argued that introducing an adversarial element to proceedings would impede the courts' ability to obtain "complete and accurate information . . . in a timely fashion" because—as compared to ex parte proceedings during which Executive Branch representatives have a "heightened duty of candor"[38]—the government would be more reluctant to disclose information to the courts if doing so would also disclose the information to an independent adversary.[39] In the wake of the CRS Report and Judge

EIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 14–17 (2014), https://fas.org/sgp/crs/intel/R43362.pdf [https://perma.cc/6MRU-RRHU]; *see also In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158, 2013 WL 12335411, at *2 (FISA Ct. Dec. 18, 2013) ("Regardless of whether the role of an amicus curiae is to act as an impartial advisor or as an advocate, most courts have recognized that the role of an amicus curiae is limited, and does not rise to the level of a party to the litigation.").

37. *See* Letter from John D. Bates, Dir., Admin. Office of the U.S. Courts, to the Hon. Dianne Feinstein, Chairman, Select Comm. on Intelligence, U.S. Senate (Jan. 13, 2014), https://www.hsdl.org/?view&did=749880 [https://perma.cc/X5FZ-W3BH]; Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, John D. Bates, Dir. , Admin. Office of the U.S. Courts (Jan. 10, 2014) (on file with the Homeland Security Digital Library), https://www.hsdl.org/?view&did=749882 [https://perma.cc/CRA4-49FS]. In a subsequent letter in August 2014, Judge Bates specifically opposed the Senate's USA FREEDOM Act of 2014 which contained a more robust amicus provision and stated his preference for the model of amicus participation outlined in the USA FREEDOM Act proposed in the House of Representatives. *See* Letter from John D. Bates, Dir., Admin. Office of the U.S. Courts, to the Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Aug. 5, 2014), http://online.wsj.com/public/resources/documents/Leahyletter.pdf [https://perma.cc/6687-PKES]. The amicus provisions of the latter were largely adopted in the USA Freedom Act of 2015. *See* USA FREEDOM Act of 2015, sec. 401; USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (2013).

38. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(d) (AM. BAR ASS'N, 1983) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

39. *See* Letter from Bates to Leahy, *supra* note 37, at 2–3. R

Bates' controversial judicial lobbying,[40] the more far-reaching proposals to add an adversarial element to the FISA Courts process lost momentum and lawmakers focused instead on a more traditional amicus model, which vested considerable discretion in the courts.[41]

The statute and rules that originally established the FISA Courts in 1978 made no mention of the possibility of amicus participation.[42] However, the courts occasionally used their inherent authority to allow the filing of amicus briefs.[43] From 1979 until Snowden made his first revelations in 2013, the FISA Courts are known to have allowed two amicus briefs, both in a single case.[44]

40. The Chief Judge of the Ninth Circuit wrote to Congress expressing his disapproval of Judge Bates's actions. *See* Letter from Alex Kozinski, Chief Judge, Ninth Circuit Court of Appeals, to the Hon. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 14, 2014), https://www.fjc.gov/sites/default/files/2015/TRFISC05.pdf [https://perma.cc/N567-Q843]. *See also* J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 402–03 (2016); Stephen I. Vladeck, *The Wars of the Judges*, 92 WASH. L. REV. 1, 1 (2017); Steve Vladeck, *Judge Bates and a FISA "Special Advocate,"* LAWFARE (Feb. 4., 2014, 9:24 AM), https://www.lawfareblog.com/judge-bates-and-fisa-special-advocate [https://perma.cc/QNX3-CGZU].

41. Already in mid-2014, the version of the USA FREEDOM Act passed by the House had replaced the independent advocate position with an amicus provision similar to the one that eventually passed. *Compare* USA FREEDOM Act, S. 2685, 113th Cong. § 401 (2014), *with* USA FREEDOM Act of 2015, sec. 401 (2015).

42. *See* Foreign Intelligence Surveillance Act of 1978, 92 Stat.

43. *See In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158, at *2 (FISA Ct. Dec. 18, 2013) (concluding that allowing amicus participation is "within the sound discretion" of the FISC).

44. *See* Brief for ACLU et al. as Amici Curiae Supporting Affirmance, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002) (No. 02-001); Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Affirmance, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002) (No. 02-001). In this case, the FISCR reviewed the FISC's decision in *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. May 17, 2002) (No. 02-429), which was the first FISA Court decision released publicly in over 20 years. The publication of *In re All Matters* in the Federal Supplement enabled the public to be aware of the case and gave interested parties the opportunity to file motions to intervene in the matter. In the decision, the first ever issued by the FISCR, the court did not say much about why it had decided to solicit amicus briefs other than to note that otherwise the government would be the only party to the case. *See In re* Sealed Case, 310 F.3d at 719. In any event, the FISCR did not accept amici's arguments, instead holding that search or surveillance applications should be approved under FISA if the government articulated any "measurable" foreign intelligence purpose for the investigation, even if the primary purpose of the investigation was for a criminal prosecution. After the review court handed down its decision, the amici moved to intervene so that they could petition for a writ of certiorari. *See* Press Release, ACLU, In Legal First, Groups Urge High Court To Review Secret Court Ruling On Government Spying (Feb. 18, 2013), https://

The small number is hardly surprising given that the courts operated in almost absolute secrecy; during this period only six of their decisions were made public.[45] The pressure from the 2013 Snowden disclosures prompted some improvements. In the approximately two years before the passage of the amicus provisions of the USA Freedom Act in 2015, the courts appointed amici on an additional seven occasions,[46] six of which were in cases related to access to court decisions, and the public was able to obtain a glimpse into

www.aclu.org/press-releases/legal-first-groups-urge-high-court-review-secret-court-ruling-government-spying [https://perma.cc/RRR6-DWB9]. The Supreme Court denied the motion. *See* ACLU v. United States, No. 02M69, 2003 WL 1447870 (Mar. 24, 2003) (mem.).

45. The six decisions released before the Snowden revelations are: *In re* Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (FISA Ct. June 11, 1981), *as reprinted in* S. REP. NO. 97-280, at 16–19 (1981); *In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (FISA Ct. 2002); *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002); *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISA Ct. Dec. 1, 2007); *In re* Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008, No. Misc. 08-01 (FISA Ct. Aug. 27, 2008); *In re* Directives [REDACTED] Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. Aug. 22, 2008).

46. The seven amicus briefs filed in the FISA Courts between the Snowden revelations and the passage of the USA Freedom Act are: Brief for Center for National Security Studies as Amicus Curiae Opposing Authorization, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. Misc. 14-01 (FISA Ct. Apr. 3, 2014); Brief for U.S. Representatives Amash et al. as Amici Curiae Supporting Release of Records, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. June 28, 2013); Brief for Reporters Committee for Freedom of the Press, et al. as Amici Curiae Supporting Release of Records, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, *In re* Motion for Declaratory Judgment of a First Amendment Right to Publish Aggregate Information about FISA Orders, No. Misc. 13-03, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (FISA Ct. July 15, 2013); Brief for First Amendment Coalition, et al. as Amici Curiae Supporting Declaratory Judgment, *In re* Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information about FISA Orders, No. Misc. 13-03, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (FISA Ct. July 8, 2013); Brief for Dropbox, Inc. as Amicus Curiae Supporting Service Providers, *In re* Motions To Disclose Aggregate Data Regarding FISA Orders and Directives, Nos. Misc. 13-03, 13-04, 13-05, 13-06 (FISA Ct. Sept. 23, 2013); Brief for Apple, Inc. as Amicus Curiae Supporting Declaratory Judgment, *In re* Motions for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, Nos. Misc. 13-03, 13-04, 13-05, 13-06, 13-07 (FISA Ct. Nov. 5, 2013); Brief for Reporters Committee for Freedom of the Press and 25 Media Organizations, et al. as Amici Curiae Supporting Release of Records, *In re* Opinions and Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, Misc. 13-02, *In re* Motion for the Release of Court Records, Misc. 13-08, *In re*

the FISA Courts' jurisprudence because 27 of their decisions were declassified and released—15 of these decisions related to cases decided before the Snowden revelations, and 12 to cases decided after.[47]

The final reform package passed as the USA Freedom Act of 2015 sought to improve on the system in two ways. First, it required the Director of National Intelligence, acting in consultation with the Attorney General, to conduct declassification reviews and make publicly available "to the greatest extent practicable" all decisions, orders, and opinions issued by the FISA Courts that include significant constructions or interpretations of law.[48] The enhanced transparency presaged by this provision opened the door to greater public engagement with the courts' decisions and allowed analyses such as this Article. Second, the law included a new two-part amicus provision. The FISA Courts:

> (A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, *presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate*; and
>
> (B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion,

Motion of ProPublica, Inc. for the Release of Court Records, Misc. 13-09 (FISA Ct. Nov. 26, 2013).

47. There is no publicly available list of released FISC and FISCR decisions. Amicus Laura Donohue included a list in her brief in a case before the FISCR and an updated listing of these decisions can now be found on a website that she maintains. *See* Brief for Laura K. Donohue as Amicus Curiae App. at 1–17, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Amicus%20Appendix%20-%20Part%201.pdf [https://perma.cc/F43U-TNB8]; *FISC/FISCR Opinions*, GEO. L. LIBR., FOREIGN INTELLIGENCE L. COLLECTION, https://repository.library.georgetown.edu/handle/10822/1052699 [https://perma.cc/P4K6-MKD2].

48. USA FREEDOM Act of 2015, sec. 402(a), § 1872(a). The Director of National Intelligence (DNI) and the Attorney General (AG) are permitted to waive the requirement to conduct declassification reviews and make decisions, orders, and opinions "publicly available to the greatest extent practicable" if they determine that such as waiver is "necessary to protect the national security of the United States or properly classified intelligence sources or methods," but in that case they must publish an unclassified statement "summarizing the significant construction or interpretation of any provision of law." *Id.* sec. 402(c), §1872(c).

permit an individual or organization leave to file an amicus curiae brief.[49]

The statute thus both added a new provision that weighed in favor of appointing amici in cases involving new or significant interpretations of the law (hereinafter referred to as the "novel/significant amicus provision") and codified the inherent authority of the courts to appoint amici (hereinafter referred to as the "general amicus provision"). The former overlapped considerably with the types of cases for which the new law required a declassification review.

The general amicus provision and the novel/significant provision operate somewhat differently and the FISA Courts have availed themselves of both mechanisms.

The general amicus law simply reiterates the courts' authority to appoint individuals and organizations as amici at their discretion and specifies only that they may be appointed to provide "technical expertise," among other things. It also provides statutory authorization for the court to allow amicus curiae briefs by individuals or organizations upon motion. Since the FISA Courts' proceedings are secret, however, it is difficult for an individual or organization to file a motion unless specifically solicited by the court.[50]

The novel/significant amicus provision is differently structured. It begins with mandatory-sounding language (the court "shall appoint"), but then gives the FISA Courts significant latitude to decide not to appoint amici so long as they make a specific finding that doing so would be inappropriate (although not an explanation of why).[51] Amici can only be appointed to assist the court "in the consideration of any application for an order or review," a limi-

49. *Id.* sec. 401, §§ 1803(2)(A)-(B) (emphasis added).

50. For an example of the FISA Courts appointing an amicus upon motion, *see infra* discussion accompanying notes 180–186. R

51. This decision was in keeping with traditional amicus practice and perhaps in recognition of the national security stakes at issue in FISA cases. *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., RECOMMENDATIONS ASSESSMENT REPORT 7 (2016), https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf [https://perma.cc/AUQ4-XWMF] (noting that amicus appointments are left to the discretion of the FISA Court judges, and encouraging greater amicus participation "where it is feasible to do so consistent with national security"); Mondale, Stein & Fisher, *supra* note 26, at 2296–97; NOLAN & THOMPSON, *supra* note 36, at 11–14. The discretion left to judges may also reflect separation of powers concerns with Congressional attempts to make the FISA Courts more adversarial. *See* Nolan & Thompson, *supra* note 36, at 14; Ben Cook, *The New FISA Court Amicus Should Be Able to Ignore Its Congressionally Imposed Duty*, 66 AM. U. L. REV. 539 (2017) ("While Congress retains total authority to control the jurisdiction and procedures of the FISC, the judicial power inherent in any court includes the authority to decide the law, administer justice, and control the amicus process."). R R R

tation not found in the general amicus provision. This type of amicus can only be appointed from a pool of individuals (no organizations) designated by the FISA Courts who are required to "possess expertise in privacy and civil liberties, intelligence collection, communications, technology, or any other area that may lend legal or technical expertise."[52]

While the novel/significant amicus provision does not constrain the type of amici the FISA Courts may appoint, there is little doubt that they were envisioned as robust advocates for Americans' civil liberties. The sentiment was encapsulated by Senator Richard Blumenthal (D-CT), a leading advocate for the amicus provision, who explained that amici would "present[ ] the side opposing the government," "protect[ ] public constitutional rights, and . . . help safeguard essential liberties not just for the individuals who might be subjects of surveillance . . . but for all of us."[53] To a certain extent, the text of the provision reflects this understanding. While the FISA Courts are permitted to consider for amici individuals recommended by any source they deem appropriate, the Privacy and Civil Liberties Oversight Board, an expert body established by Congress to review the impact of counterterrorism efforts on Americans' privacy and civil liberties, is singled out as a potential advisor.[54] And

52. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(3)(A).

53. 161 CONG. REC. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal), https://www.congress.gov/114/crec/2015/06/01/CREC-2015-06-01-pt1-PgS3385.pdf [https://perma.cc/6WJQ-WMBS]. Rep. Sensenbrenner similarly described an earlier proposal for an adversarial addition to the FISA process as aiming to "represent the public and privacy interests in particular" and "would allow a judge to be a judge rather than hearing one side of the argument and making a guesstimate of what the law and the regulations require." Andrea Peterson, *Patriot Act Author: "There Has Been a Failure of Oversight,"* WASH. POST (Oct. 11, 2013, 11:57 AM), https://www.washingtonpost.com/news/theswitch/wp/2013/10/11/patriot-act-author-there-has-been-a-failure-of-oversight [https://perma.cc/PF58-MDRZ].

54. *See* 50 U.S.C. § 1803(i)(1) (2018). The PCLOB is an independent agency within the Executive Branch established in 2007 by the Implementing Recommendations of the 9/11 Commission Act. The Board continually reviews proposed legislation, regulations, and policies related to efforts to protect the nation from terrorism, and oversees the implementation of such terrorism-related Executive Branch policies, procedures, regulations, and information-sharing practices in order to ensure that privacy and civil liberties are protected. *History and Mission*, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, https://www.pclob.gov/about/ [https://perma.cc/FL8C-GJ2U]. An earlier version of the USA FREEDOM Act was even stronger. The language proposed by Sen. Leahy in the unenacted USA FREEDOM Act of 2014 required that "special advocates" be appointed "in consultation with the Privacy and Civil Liberties Oversight Board" and those appointed "shall advocate, as appropriate, in support of legal interpretations that advance individ-

although the statute allows the FISA Courts to appoint amici to present all relevant legal arguments, it singles out "legal arguments that advance the protection of individual privacy and civil liberties privacy and civil liberties."[55] As discussed later in this Article, however, the FISA Courts have not always prioritized civil liberties expertise in appointing amici under this provision.

III.
ASSESSING THE IMPACT OF AMICI

Any assessment of the impact of amici is necessarily preliminary because the USA Freedom Act has only been in effect for a few years and many of the courts' activities are not public. As noted earlier, compared to the pre-Snowden era, the FISA Courts' decisions are being released far more frequently.[56] But there are likely decisions covering issues of public interest that have not been declassified, either because the Director of National Intelligence and the Attorney General have decided that they do not meet the "significant construction or interpretation" standard set out in the USA Freedom Act for declassification or because their continued classification is considered by the executive branch to be "necessary to protect the national security of the United States or properly classified intelligence sources or methods."[57] Even where decisions have been declassified, they often have significant redactions that prevent a full evaluation of the court's conclusions. Moreover, amicus briefs are not always made public, so the full extent of amici's arguments to the court are not visible to the public. Thus far, of the 13 post-USA Freedom Act cases[58] in which amicus briefs are known to

ual privacy and civil liberties." USA FREEDOM Act of 2014, S. 2685, 113th Cong. §§ 401(i)(1), (4)(A)(i) (2014).

55. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(4) (Amici appointed under section 401 of the USA Freedom Act are required to provide to the court: "(A) legal arguments that advance the protection of individual privacy and civil liberties; (B) information related to intelligence collection or communications technology; or (C) legal arguments or information regarding any other area relevant to the issue presented to the court.")

56. *See supra* text accompanying notes 45–47. Since the USA Freedom Act became law in 2015, the FISA Courts have released 45 decisions. *See FISC/FISCR Opinions*, *supra* note 47. R R

57. USA FREEDOM Act of 2015, sec. 402(a), §§1872(a)-(c).

58. *See infra* note 172. There were two amicus appointments in 2019 and for the purposes of this Article they are counted as separate cases. However, since court documents related to those appointments are not publicly available, it is not clear whether the appointments occurred in one case or two. If both appointments were in a single case, the actual number of post-USA Freedom Act cases in which amicus briefs are known to have been filed would be 12 rather than 13. *See* FOR- R

have been filed, briefs from only six have been released.[59] In sum, while we certainly know more about the FISA Courts' decision-making than we did prior to 2013, our information is far from complete.

Then there is the question of what criteria should be used to make this impact assessment. This Article adopts the perspective of those pushing for reform of the FISA Courts and focuses on two criteria: whether amici have been appointed in all critical cases, and whether as a result of their participation, the FISA Courts have been less likely to endorse all or part of the government's position. Measured against these criteria, the amicus experiment seems to have met with limited success so far. At least some judges are skeptical of the value of amicus participation and in a number of cases that seem to fit the criteria identified by Congress, judges have either not considered appointing amici or have concluded that doing so was unnecessary. Where amici have been called upon, their arguments have impacted the decisions of the FISA Courts in some instances, but for the most part have not changed the courts' extreme deference to the government's national security arguments.

A. Extent of amicus participation

At the time that the USA Freedom Act was being debated, many reformers worried that the FISA Courts simply would not appoint amici. The courts had only availed themselves of this option twice in the 35 years of their existence prior to the Snowden disclosures.[60] Amici appointments picked up after the Snowden leaks (six appointments in the two years following),[61] a trend that has continued since the passage of the USA Freedom Act (17 appointments in 13 cases over roughly five years).[62]

EIGN INTELLIGENCE SURVEILLANCE COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2019, at 4 (Apr. 2020) [hereinafter 2019 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2019_0.pdf [https://perma.cc/7B23-6JCG].

59. For more on the six cases for which amicus briefs are publicly available, see *infra* text accompanying notes 139–148, 180–191, 213–235, 293–320. R

60. *See supra* note 44. R

61. *See supra* note 46. R

62. *See infra* note 172 and *supra* note 58. The number of amici appointments saw a noticeable jump in 2018, but this is attributable primarily to the repeated appointment of amici in two cases that were heard by both the FISC and the FISCR. In the case concerning the 2018 Section 702 certifications, the FISC appointed Jonathan Cedarbaum, John Cella, and Amy Jeffress as amicus curiae. All three were then appointed to serve again when the case was certified by the FISCR. *See infra* text accompanying notes 236–292. Similarly, Laura Donohue was ap- R R

But these numbers only tell part of the story since we do not know the universe of cases in which the courts would have been expected to appoint amici under the novel/significant provision of the USA Freedom Act, but did not do so.[63] John D. Cline, a prominent criminal defense lawyer who was appointed to the amicus pool in November 2015, did not believe that the courts were appointing amici to the extent that Congress had intended. He resigned from his position as part of the pool because in the over two years that he had been part of the amici panel, he had not been asked to handle a case in either of the FISA Courts, noting that his "fellow amici have been assigned only a small handful of matters among them, and some have had no cases at all."[64]

While it is not possible to come to a firm assessment of whether the FISA Courts have appropriately involved amici, three publicly available FISC decisions discussed below suggest resistance to involving amici. There is also no publicly released decision which involves the appointment of an amicus in relation to an application for an individual surveillance order. However, the FISC recently appointed David Kris (a member of the amicus pool) under the general amicus provision to review FBI procedures in light of the DOJ Inspector General's finding of factual deficiencies in the FISA applications to surveil Carter Page.[65]

It also bears mention that the amicus pool for novel/significant cases appointed by the FISA Courts is weighted considerably towards lawyers who previously worked in high-level national security and prosecutorial positions in the government. These attorneys come with sterling credentials and undoubtedly have the skills and knowledge to present civil liberties arguments. Nonetheless, their predominance in the amicus pool feeds the perception that the FISA Courts are resistant to the representation of civil liberties concerns.[66]

pointed once in the FISCR and again when the case was remanded to the FISC. *See infra* text accompanying notes 293–320. **R**

63. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2).

64. Letter from John D. Cline to Hon. Rosemary M. Collyer, Presiding Judge, Foreign Intelligence Surveillance Court, and Honorable William C. Bryce, Presiding Judge, Foreign Intelligence Surveillance Court of Review (Dec. 19, 2017), https://www.emptywheel.net/wp-content/uploads/2018/02/2017-12-19-FISC-resignation-letter-1.pdf [https://perma.cc/79AL-XG8H].

65. *See supra* text accompanying notes 136–148. **R**

66. *See supra* text accompanying notes 37–40. **R**

1. The Three Cases of Missing Amici

a. Lapse in Authority for Bulk Collection

The court's reluctance to call upon amici is apparent in the very first post-USA Freedom Act FISC decision.[67] The case involved Section 215 of the Patriot Act, which authorized the FBI to obtain an order from the FISC for records "relevant to an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[68] Snowden's most dramatic disclosure showed that the court had taken an expansive view of relevance, allowing the NSA to accumulate a database of Americans' call detail records (sometimes described as metadata, such as the date and time of a call, its duration, and the participating telephone numbers).[69] The aggregation of such records, as the Privacy and Civil Liberties Oversight Board explained, "paint[s] a clear picture of an individual's personal relationships and patterns of behavior [which] can be at least as revealing . . . as the contents of individual conversations – if not more so."[70] The goal of the USA Freedom Act was to put in place a more restrictive regime for collecting information about Americans' phone calls before June 1, 2015, the date on which this authority automatically expired unless renewed by Congress.[71] But the new law was not enacted until two days *after* the sunset date. In theory then, Section 215 expired and the law reverted back to its pre-Patriot Act incarnation. This would

67. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-77, 15-78 (FISA Ct. June 17, 2015).

68. Patriot Act, sec. 215.

69. *See* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/NW2N-Y9ZV]; PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 1, 8 (Jan. 23, 2014) [hereinafter PCLOB SECTION 215 REPORT], https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf [https://perma.cc/A2VA-HLA8]. Metadata is data that describes and gives information about other data. Communication metadata is information about the communication, including session identifying information (*e.g.*, originating and terminating telephone number or e-mail address, communications device identifiers like IP addresses, etc.), routing information, time and duration of calls, and similar non-content information.

70. PCLOB SECTION 215 REPORT, *supra* note 42, at 157. R

71. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 102(b)(1), 120 Stat. 192, 194-95 (2006), as amended by PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112- 14, § 2(a), 125 Stat. 216.

have prevented the NSA from collecting phone records maintained by phone companies.[72]

The government took the position that this lapse should be ignored, and the 180-day phase-out provision included in the USA Freedom Act applied. In June 2015, it asked the FISC for an order to continue collecting information under the Patriot Act version of Section 215. Judge F. Dennis Saylor IV agreed with the government that the USA Freedom Act intended for Section 215 collection to continue uninterrupted until the phase-out period was complete.[73] Judge Saylor's opinion displayed a fairly dismissive attitude towards amicus participation. The judge acknowledged that the case presented the type of "novel or significant" legal issues that would normally trigger appointment of an amicus but decided that he simply did not need one because the proper result was obvious. According to Judge Saylor, amicus participation was "not appropriate" in cases where the court "does not need the assistance or advice of amicus curiae because the legal question is relatively simple, or is capable of only a single reasonable or rational outcome."[74] As commentators have noted, this analysis conflates the concepts of "unnecessary" and "not appropriate."[75] Congress had identified the types of cases where an amicus would be necessary. Within this universe of cases, the court could decide that *other* concerns made participation inappropriate, but the statute did not envision the use of inappropriateness as a way to conduct a necessity analysis.

72. *See supra* text accompanying note 23. R

73. *See In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-77, 15–8, at 12–13.

74. *Id.* at 5. In a footnote, Judge Saylor went even further, suggesting that factors such as expense or delay could render it inappropriate to call on amici. While the statute itself provides that amicus appointments must be consistent with any "requirement that the court act expeditiously or within a stated time," that requirement was not at play in this case. *Id.* at 5 n.7. *See also* Steve Vladeck, *'Expense,' 'Delay,' and the Inauspicious Debut of the USA FREEDOM Act's Amicus Provision*, JUST SEC. (June 23, 2015), https://www.justsecurity.org/24152/expense-delayinauspicious-debut-usa-freedom-acts-amicus-provision [https://perma.cc/Y5RP-EZ7N].

75. Elizabeth Goitein, *The FISC's Newest Opinion: Proof of the Need for an Amicus*, JUST SEC. (June 23, 2015), https://www.justsecurity.org/24134/fiscs-newest-opinion-proof-amicus [https://perma.cc/MQF3-QLTU]; Vladeck, *supra* note 74; Julian Sanchez, *The Hidden Meaning (Maybe) of the New FISC Opinion*, JUST SEC. (June 19, 2015), https://www.justsecurity.org/24053/hidden-meaning-maybe-fisc-opinion/ [https://perma.cc/Q52S-N6ZU]. R

b. Application of New USA Freedom Act Provisions

A similar reluctance to invite amicus participation is evident in the FISC's first decision applying the new system set up by the USA Freedom Act to a government application to acquire certain call detail records. Under the new law, the government could only obtain call records if they included a "specific selection term," defined as a term that "specifically identifies a person, account, address or personal device" in a way that "limit[s], to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking the tangible things."[76]

Based on the redacted opinion, which was made public in April 2016, it appears that Judge Thomas F. Hogan did not even consider appointing an amicus to weigh in on the government's first use of "specific selection term[s]" in an application.[77] This was surprising given that in the months leading up to the enactment of the new system for accessing call records, this provision was the subject of much public debate. Civil liberties groups expressed concerns that "specific selection term" could be interpreted broadly to allow the collection of swaths of records, as the definition is expansive enough to allow collection of the "records of everyone who used a particular Internet protocol address, records of everyone who stayed at a hotel in Las Vegas on a particular date, or records concerning a business corporation or other entity considered a 'person' under the law."[78] The issue was sufficiently important that the USA Freedom Act required the declassification review of decisions to specifically consider cases involving "any novel or significant construction or interpretation of the term 'specific selection

76. USA FREEDOM Act of 2015, sec. 107, § 1861(k)(4)(A)(i)(II). The same rule applies to pen registers and trap and trace devices and national security letters.

77. *In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], at 3 (FISA Ct. Dec. 31, 2015).

78. Jennifer Granick, *Sen. Leahy's Latest NSA Bill: The Good, The Bad, and The Ugly*, JUST SEC. (July 29, 2014), https://www.justsecurity.org/13378/sen-leahys-latest-nsa-bill-good-bad-ugly/ [https://perma.cc/6KXL-NLT6] (discussing an earlier version of the bill, which shares the same language as the USA Freedom Act of 2015). *See also* Neema Singh Guliani, *It's Congress' Turn: What Meaningful Surveillance Reform Looks Like*, ACLU: NEWS & COMMENTARY (May 11, 2015), https://www.aclu.org/blog/national-security/privacy-and-surveillance/its-congress-turn-what-meaningful-surveillance [https://perma.cc/SX5P-EYPP]; Elizabeth Goitein, *How the Second Circuit's Decision Changes the Legislative Game*, LAWFARE (May 8, 2015), https://www.lawfareblog.com/how-second-circuits-decision-changes-legislative-game [https://perma.cc/H67H-JTWL].

term.'"[79] Indeed, the decision was declassified four months after issuance, suggesting that—in the view of the Director of National Intelligence and the Attorney General—the case involved a "significant construction or interpretation" of "specific selection term" making it all the more difficult to understand why the FISC did not appoint an amicus.[80]

Judge Hogan also did not consider appointing an amicus with respect to another important issue raised by the application: how far beyond the initial target could the government's acquisition of call records extend? In addition to obtaining the call records of an individual it believed was linked to a foreign terror group, the NSA also acquired records relating to people far removed from the target. The FISC had authorized "contact chaining" whereby analysts could "retrieve not only the numbers directly in contact with the seed number (the 'first hop'), but also numbers in contact with all first hop numbers (the 'second hop'), as well as all numbers in contact with all second hop numbers (the 'third hop')."[81] The Privacy and Civil Liberties Oversight Board's report on the Section 215 program estimated that, assuming an average person was in contact with about 75 other numbers over a five year period, the NSA could use an initial seed number to review the calling history of over 400,000 people.[82] The PCLOB also reported that according to the NSA, the program used 300 numbers as seeds to query its database in 2012. Based on those 300 seeds, a three-hop analysis could allow the agency to acquire the full calling records of an estimated 1.5

79. USA FREEDOM Act of 2015, sec. 402(a), § 1872(a).

80. *Id.*

81. PCLOB SECTION 215 REPORT, *supra* note 42, at 9, 44–45. *See, e.g.*, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 06-05 (FISA Ct. May 24, 2006), https://assets.documentcloud.org/documents/785206/pub-may-24-2006-order-from-fisc.pdf [https://perma.cc/3TAT-QEDR]; *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-80, at 6 (FISA Ct. July 19, 2013). *See also* Memorandum of Law in Support of Application for Certain Tangible Things for Investigations to Protect Against International Terrorism at 15, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. BR 06-05 (FISA Ct. May 23, 2006), https://www.clearinghouse.net/chDocs/public/NS-DC-0009-0004.pdf [https://perma.cc/AZM8-85Z4]; Memorandum for the Attorney General, from Kenneth L. Wainstein, Assistant Att'y Gen., at 2 (Nov. 20, 2007), http://www.guardian.co.uk/world/interactive/2013/jun/27/nsa-data-collection-justice-department [https://perma.cc/CSR6-TMD7]. R

82. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 29, 165. *See also* Jonathan Mayer, Patrick Mutchler, and John C. Mitchell, *Evaluating the Privacy Properties of Telephone Metadata*, 113 PROC. OF THE NAT'L ACAD. OF SCI. 5536 (2016). R

million telephone numbers.[83] The calling records of those 1.5 million numbers, could, in turn, give the NSA access to the records of telephone calls made between those numbers and all the numbers they contacted, an estimated 100 million additional numbers. In other words, contact chaining allows the government access to the phone records of millions of individuals who are not suspected of any wrongdoing.[84]

The USA Freedom Act modified this procedure in several significant ways: (1) the government had to identify a "specific selection term"—"a term that specifically identifies an individual, account, or personal device"—to identify the records it seeks; (2) a FISC judge had to determine that there was "reasonable articulable suspicion" that the selection term was in fact connected to a foreign terror group; and (3) the NSA could only look at records two "hops" removed from the original seed selector. Judge Hogan concluded, consistent with the FISC's prior decisions, that the USA Freedom Act only required him to decide whether there was reasonable articulable suspicion with respect to the original seed number and not numbers that were in second-degree contact (i.e., two hops removed).[85]

But the FISC did not consider potential issues about *how* the NSA designated the numbers that qualify as connected, which could have been raised by an amicus. The NSA's transparency report from 2016 shows that the agency exercises virtually unrestricted discretion in identifying this broader universe of records.[86] The process is initiated when the NSA sends the seed selector to phone carriers, which then send back a list of numbers that have been in direct contact with the seed (the first hop). The

83. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 165. R

84. *See id.*

85. *See In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], *supra* note 77, at 12–16; 50 U.S.C. 1861(c)(2)(F); Sharon Bradford Franklin, *Fulfilling the Promise of the USA Freedom Act: Time to Truly End Bulk Collection of Americans' Calling Records*, JUST SEC. (Mar. 28, 2019), https://www.justsecurity.org/63399/fulfilling-the-promise-of-the-usa-freedom-act-time-to-truly-end-bulk-collection-of-americans-calling-records/ [https://perma.cc/X3L4-77VP]. For earlier FISA Court findings that reasonable articulable suspicion is only needed for the original sees number, see, e.g., *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-80, *supra* note 81, at 11. R R

86. NSA CIVIL LIBERTIES AND PRIVACY OFFICE, TRANSPARENCY REPORT: THE USA FREEDOM ACT BUSINESS RECORDS FISA IMPLEMENTATION 5–6 (2016), https://www.nsa.gov/Portals/70/documents/about/civil-liberties/reports/UFA_Civil_Liberties_and_Privacy_Report.pdf [https://perma.cc/9Y9K-ZSFJ].

NSA decides which numbers have been in contact with this list of numbers using the information at its disposal and then submits a second list of selectors (second hop) to phone carriers to obtain their call records. As one expert pointed out, the discretion left to the agency to determine which records are connected

> makes the process of generating the list of one-hop selectors to be used by carriers as the basis for production of second-hop Call Detail Records effectively a black box under NSA's control. The first list of "specific selectors" will consist of phone numbers or other identifiers that the Foreign Intelligence Surveillance Court has verified are linked to a foreign power (or agent thereof) engaged in international terrorism. But the second list — the basis for production of those second-hop Call Detail Records — will be generated by NSA itself, using its massive array of internal databases and its own definition of what it means for two numbers (or other identifiers) to be in "direct contact."[87]

Both these issues seem important for the FISC to consider but were not raised in the case.

In the same decision though, the FISC did consider appointing amici on another issue: whether a provision of the USA Freedom Act requiring prompt destruction of records that did not contain foreign intelligence information conflicted with an already existing provision that authorized the retention of records that were reasonably believed to contain evidence of a crime. But the court thought this question was easily resolved by allowing the government to retain the information for a six-month period (renewable) prior to destruction and therefore the assistance of amici was not needed.[88] As noted earlier, the USA Freedom Act requirement for appointing amici is not triggered by the complexity or difficulty of an issue, but its novelty or significance.[89]

87. Julian Sanchez, *USA Freedom: The Rubber Meets the Road*, JUST SEC. (Jan. 15, 2016), https://www.justsecurity.org/28830/usa-freedom-rubber-meets-road/ [https://perma.cc/DML2-ZB3K]. *See also USA F-Redux: Chaining On "Session Identifying Information" That Is Not Call Detail Records*, EMPTYWHEEL (Apr. 28, 2015), https://www.emptywheel.net/2015/04/28/usa-f-redux-session-identifying-information-that-is-not-call-detail-records/ [https://perma.cc/E628-A5M9] (suggesting that for the "second hop," the NSA might use cell site location, cookies and permacookies, or other "session-identifying information" that would not normally fall under the definition of call detail records).

88. *See In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], *supra* note 77, at 23–24. R

89. *See supra* text accompanying notes 74–75. R

In sum, in its first decision applying the new system set up by the USA Freedom Act in the wake of heated public and Congressional debates, the FISC did not consider appointing an amicus on two novel and significant legal questions and found that it did not need an amicus on an issue that it conceded was novel.

Deeper problems with the call records program soon emerged. In June 2018, the NSA revealed that it had been regularly receiving call-detail records that exceeded the bounds of what had been authorized by the FISC under the USA Freedom Act reforms and announced that all call-detail records acquired since 2015 would be deleted.[90] These problems persisted even after the NSA announced in June 2018 that the "root cause of the problem" had been resolved.[91] In March 2019, the National Security Advisor to the House Minority Leader disclosed that the program had been halted for the previous six months due to the technical issues and raised doubts about whether the administration would restart the collection.[92] Ultimately, the NSA suspended the program in 2019[93] and the statutory authority for the program expired in March 2020.[94]

c. Section 702 Approval: 2016-2017

Amicus curiae were also surprisingly not appointed in the FISC's April 2017 approval of the government's annual request for authorization of its Section 702 surveillance program.[95] The review

90. Press Release, NSA, NSA Reports Data Deletion, Release No: PA-010-18 (June 28, 2018), https://www.nsa.gov/news-features/press-room/Article/1618691/nsa-reports-data-deletion/ [https://perma.cc/WZ5S-GRJX].

91. Letter from Ronald Newman, Nat'l Pol. Director, ACLU, and Neema Singh Guliani, Senior Legis. Couns., ACLU, to the Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and the Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary (June 25, 2019), https://www.aclu.org/letter/aclu-letter-house-judiciary-committee-regarding-section-215-call-detail-record-program [https://perma.cc/2EBR-XSGL].

92. *See* Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, *supra* note 6. R

93. Letter from Daniel Coats, Director of National Intelligence, to Senators Richard Burr, Lindsey Graham, Mark Warner, and Dianne Feinstein (Aug. 14, 2019), https://int.nyt.com/data/documenthelper/1640-odni-letter-to-congress-about/20bfc7d1223dba027e55/optimized/full.pdf [https://perma.cc/R56X-B3HP]; PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE GOVERNMENT'S USE OF THE CALL DETAIL RECORDS PROGRAM UNDER THE USA FREEDOM ACT at 1–3, 68–69 (Feb. 2020), https://www.pclob.gov/library/PCLOB%20USA%20Freedom%20Act%20Report%20(Unclassified).pdf [https://perma.cc/C49K-4JKQ].

94. Savage, *House Departs Without Vote to Extend Expired F.B.I. Spy Tools*, *supra* note 6. R

95. *See* [REDACTED] (FISA Ct. Apr. 26, 2017) [hereinafter April 2017 Opinion], https://assets.documentcloud.org/documents/3718776/2016-Cert-FISC-

related to the government's 2016 application and had been extended for several months because the NSA had failed to abide by court-imposed rules designed to protect Americans' privacy. In order to understand the significance of the FISC's failure to appoint amici in this case, some background about the long and troubled history of the program is necessary.

i. Legal Framework for Section 702

Under Section 702, the NSA collects private electronic communications (e.g., emails and phone calls) without a warrant. Although in general the Fourth Amendment requires a warrant before the government can tap an American's phone, the FISA Courts have held that there is an exception to the warrant requirement "when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[96] In these cases, the surveillance must pass muster under the Fourth Amendment's "reasonableness" requirement, which is assessed by balancing the government's interests in conducting the search with the privacy interests at stake.[97] Under this lower standard, in almost all cases decided by the FISA Courts, Americans' privacy interests are almost inevitably overwhelmed by the national security interests put forward by the government.[98]

Even though Section 702 surveillance is ostensibly targeted at foreigners overseas, it scoops up vast amounts of the communica-

Memo-Opin-Order-Apr-2017-1.pdf [https://perma.cc/3DDV-6VAG]. Each year, the FISA Courts review and approve the government's Section 702 certifications for the following year. However, the court approved the Section 702 certifications for 2016 in April 2017. This occurred because in 2016, the FISC refused to approve the government's Section 702 application until it addressed its ongoing compliance violations. Instead, the court extended the previous year's application for several months. [REDACTED] (FISA Ct. Oct. 26, 2016) [hereinafter October 2016 Order], https://assets.documentcloud.org/documents/3718779/2016-Certification-FISC-Extension-Order-Oct-26.pdf [https://perma.cc/D2G3-LD3B]. For more on the Section 702 certifications from 2016, see *infra* notes 120–129. For further discussion of the Section 702 program, see *infra* text accompanying notes 211–292. R R

96. *In re* Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. Aug. 22, 2008).

97. *Id.*

98. *See* Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 599–603 (2017). For a discussion of government assertions that this warrantless surveillance passes "reasonableness" standards, see Elizabeth Goitein, *Another Bite Out Of Katz: Foreign Intelligence Surveillance And The "Incidental Overhear" Doctrine*, 55 AM. CRIM. L. REV. 105, 107, 110–11 (2018).

tions of Americans who are on the receiving end of phone calls and emails from their friends and family overseas.[99] This collection is described by the NSA as "incidental," although part of the point of the program is to identify individuals in the U.S., and its impact on Americans' privacy is extensive.[100] To ameliorate the domestic impact of Section 702 surveillance, Congress has required the NSA to develop targeting procedures that limit its surveillance to foreigners overseas and for foreign intelligence purposes, as well as procedures to "minimize" the sharing, retention and use of information about Americans.[101] Both sets of procedures are presented annually to the FISC for approval along with certifications by the Attorney General and the Director of National Intelligence attesting that obtaining foreign intelligence information is a "significant purpose" of the collection.[102]

99. *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT at 6, 82–83, 87, 114–116 (2014) [hereinafter PCLOB 702 Report], https://www.pclob.gov/library/702-Report.pdf [https://perma.cc/DJZ8-FHCF].

100. *See* Allyson Scher, *Stop Calling It "Incidental" Collection of Americans' Emails: The Gov't's Renewed Surveillance Powers*, JUST SEC. (Jan. 22, 2018), https://www.justsecurity.org/51272/stop-calling-incidental-collection-americans-emails-govts-renewed-surveillance-powers/ [https://perma.cc/P6V5-RFWN] ("'[I]ncidental' collection has become so vast and significant that it appears to be an objective of Section 702. You can tell because when reformers wanted to shut off warrantless access to that data, proponents said it would kill or disable the program. From these revealing moments in the recent reauthorization debates, one can conclude that getting Americans' messages without a warrant is the point, or a significant point, of the program, and not a side effect."); Elizabeth Goitein, *The NSA's Backdoor Search Loophole*, BOSTON REV. (Nov. 14, 2013), http://www.bostonreview.net/blog/elizabeth-goitein-nsa-backdoor-search-loophole-freedom-act [https://perma.cc/EAG3-Z2GB] ("The NSA refers to this as 'incidental' collection, but there is nothing 'incidental' about it. As officials made clear during the debates leading up to the enactment of section 702, communications involving Americans were 'the most important to us.'"); *FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (statement of General Michael V. Hayden, Director, CIA), https://fas.org/irp/congress/2006_hr/072606hayden.html [https://perma.cc/6VF2-V78A] ("[T]here are no communications more important to the safety of the Homeland than those affiliated with al Qa'ida with one end in the United States. And so why should our laws make it more difficult to target the al Qa'ida communications that are most important to us—those entering or leaving the United States!").

101. 50 U.S.C. §§ 1881a(d)(1)(A), (e)(1).

102. 50 U.S.C. §§ 1881a(a), (h)(2)(v). These certifications, which are made by the Attorney General and the Director of National Intelligence, identify the categories of foreign intelligence information to be gathered; contain the targeting and minimization procedures that the agencies will follow; attest that the targeting and minimization procedures and additional guidelines adopted to en-

ii. Downstream and Upstream Collection

The NSA's Section 702 program encompasses at least two publicly-known parts: "Downstream," which collects communications to and from a target stored by companies such as Internet service and telecommunications providers; and "Upstream," which collects communications as they transit the Internet backbone by scanning Internet traffic looking for communications sent to and from a target as well as the communications of third parties that include the selectors used to track the target.[103] According to the NSA, these selectors are normally e-mail addresses or telephone numbers,[104] but the legal justification used by the agency is broad enough to encompass communications that merely include the target's name.[105] In other words, if the intelligence target was Osama bin

sure compliance are consistent with the Fourth Amendment; attest that a "significant purpose" of the program is to obtain foreign intelligence information; attest that the program uses a U.S. electronic communications service provider; and attest that the program complies with the limitations spelled out by the statute.

103. *See, e.g.,* PCLOB 702 Report, *supra* note 99, at 7, 33–41; NSA DIRECTOR OF CIVIL LIBERTIES AND PRIVACY OFFICE, NSA'S IMPLEMENTATION OF FOREIGN INTELLIGENCE SURVEILLANCE ACT SECTION 702, 5 (2014), https://www.nsa.gov/Portals/70/documents/about/civil-liberties/reports/nsa_report_on_section_702_program.pdf [https://perma.cc/X4UB-W5PY]; *Upstream vs. PRISM*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/pages/upstream-prism [https://perma.cc/6JSV-Q6K5]. R

104. *See* NATIONAL SECURITY AGENCY, UNITED STATES SIGNALS INTELLIGENCE DIRECTIVE SP0018: LEGAL COMPLIANCE AND U.S PERSONAS MINIMIZATION PROCEDURES § 9.14 (Jan. 25, 2011), https://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf [https://perma.cc/VN8N-3UPN] (defining "selection" as the "insertion of a REDACTED, telephone number, email address, REDACTED into a computer scan dictionary or manual scan guide for the purpose of identifying messages of interest and isolating them for further processing"). In 2011, the FISC approved minimization procedures for the NSA's Upstream program, such that "communications . . . that are to, from, or about a targeted selector . . . may be used and disseminated subject to the other applicable provisions of the NSA minimization procedures." *See also* [REDACTED], 2011 WL 10947772, at *6 (FISA Ct. Nov. 30, 2011); FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115118, §103(b)(1)(a), 132 Stat. 3, 10 (2018) (defining an "about" communication as "a communication that contains a reference to, but is not to or from, a target of an acquisition authorized under section 702(a) of the Foreign Intelligence Surveillance Act of 1978").

105. *See* NAT'L SEC. AGENCY, EXHIBIT A: PROCEDURES USED BY THE NATIONAL SECURITY AGENCY FOR TARGETING NON-UNITED STATES PERSONS REASONABLY BELIEVED TO BE LOCATED OUTSIDE THE UNITED STATES TO ACQUIRE FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED 1–2 (July 28, 2009), https://s3.amazonaws.com/s3.documentcloud.org/documents/716633/exhibit-a.pdf [https://perma.cc/4J9R-GTEU] (stating that the NSA may seek "to acquire com-

Laden, the NSA's legal position (although perhaps not its practice) would allow it to pick up not only communications to and from bin Laden but also every communication that mentioned him.[106]

Given the breadth of this claimed authority, the collection of communications about targets as part of the Upstream program—termed "abouts" collection —has long been one of the aspects of Section 702 surveillance that civil libertarians find most objectionable.[107] As the FISC itself conceded, it is "more likely than other forms of Section 702 collection to contain information of or concerning United States persons with no foreign intelligence value."[108]

Concerns about the Upstream program are exacerbated by certain aspects of the mechanics of the NSA's collection of internet communications. Information is transmitted over the Internet in packets of data, which can contain multiple communications—

munications about the target that are not to or from the target."); NAT'L SEC. AGENCY, EXHIBIT B: MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED, at §3(b)(4), (2009), https://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf [http://perma.cc/F226-ASQ3] ("As communication is reviewed, NSA analyst(s) will determine whether it is a domestic or foreign communication to, from, or about a target and is reasonably believed to contain foreign intelligence information or evidence of a crime."); *see also Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 2–3 (2017) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Section 702 and the Collection of International Telephone and Internet Content Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 159–161 (2015).

106. *See Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 2–3 (statement of Elizabeth Goitein). R

107. *See, e.g.*, PCLOB 702 Report, *supra* note 99, at 37; BRENNAN CTR. FOR JUST., ACLU, CDT ET AL., NATIONAL SECURITY SURVEILLANCE AND HUMAN RIGHTS IN A DIGITAL AGE, Joint Submission to the United Nations Twenty Second Session of the Universal Periodic Review Working Group Human Rights Council 6–9 (2015), https://cdt.org/files/2014/09/BCJ-ACCESS-ACLU-CDT-EFF-EPIC-HRW-PEN-Joint-UPR-Submission-United-States-Of-America-April-2015.pdf [https://perma.cc/43RN-H3MT]; *All About "About" Collection*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/pages/about-collection [https://perma.cc/X8ZB-UD3D]; Julian Sanchez, *All About "About" Collection*, JUST SEC. (Apr. 28, 2017), https://www.justsecurity.org/40384/ado-about/ [https://perma.cc/7FFE-GZBC]. R

108. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications [REDACTED], at 13 (FISA Ct. Oct. 18, 2018), https://www.intel.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf [https://perma.cc/6M3Z-UUP8].

called Multi-Communication Transactions (MCTs)— or single, discrete communications. Each MCT contains bits of various people's communications, which are joined back together when they reach their destination.[109] Thus, an email from an individual in New York to their friend in Los Angeles would likely be split up into a number of MCTs during transit and rejoined before reaching the intended recipient.[110] The Upstream program acquires MCTs, but according to the government, technical limitations prevent it from filtering MCTs to find just those communications that are to, from, or about the targeted selector.[111] When the NSA collects "abouts" MCTs—MCTs that included a reference to the selector somewhere in the transaction—the other communications in the MCT, including purely domestic communications that did not reference the selector and to which no target was a party, are swept up.[112]

iii. FISC Review of Upstream Collection

The FISC first learned of issues with MCTs in 2011, when Judge John D. Bates conducted the annual review of the NSA's Section 702 programs. In a decision issued in October 2011, he found that the NSA's targeting and minimization procedures did not sufficiently protect American's communications, emphasizing the capture of purely domestic communications.[113] He concluded that the procedures submitted by the NSA were statutorily and constitutionally deficient and directed the agency to correct the deficiencies by submitting amended procedures within 30 days or else cease Upstream collection.[114] The government subsequently submitted amended NSA procedures that included a sequestration regime for different kinds of MCTs, which the FISC approved.[115]

The same October 2011 decision involved another highly contentious aspect of Section 702 collection, "backdoor searches," which involve intelligence agencies searching for information about Americans in the large pool of information collected without a war-

109. PCLOB 702 Report, *supra* note 99, at 39–41, 125. R

110. *See id*. at 125.

111. *See* [REDACTED], 2011 WL 10945618, at *31 (FISA Ct. Oct. 3, 2011) [hereinafter October 2011 Opinion]; *see also* PCLOB 702 Report, *supra* note 99, at 39–41. R

112. October 2011 Opinion, *supra* note 111, at 42–43; PCLOB 702 Report, *supra* note 99, at 7, 40, 143–44. R R

113. *See* October 2011 Opinion, *supra* note 111, at 78–80. R

114. *See id*.; [REDACTED], 2011 WL 10945618, at *30 (FISA Ct. Oct. 3, 2011).

115. *See* [REDACTED], 2011 WL 10947772, at *6 (FISA Ct. Nov. 30, 2011); April 2017 Opinion, *supra* note 95, at 17–18. R

rant under Section 702.[116] Civil liberties advocates and members of Congress have argued that these searches are a "backdoor" allowing the government to circumvent the requirements of the Fourth Amendment.[117] Judge Bates permitted the NSA and Central Intelligence Agency (CIA) to conduct backdoor searches on Section 702 data, but given the issues with the collection of MCTs and particularly "abouts" MCTs, he restricted those searches to non-Upstream sources.[118] These rules brought the NSA and CIA's backdoor search authorities in line with those of the FBI, in place since at least 2009, which are discussed later in this Article.[119]

These issues again came before the court after the passage of the USA Freedom Act when the government submitted its 2016 authorization request for the Section 702 program. The FISC learned for the first time that the NSA had been systematically violating the rules on segregating, storing, retaining, and accessing communications obtained through Upstream collection, most notably by searching information collected via Upstream "abouts" collection using improper queries using U.S. person identifiers.[120] The rules

116. Goitein, *supra* note 100; *Warrantless Surveillance Under Section 702 of FISA*, ACLU, https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrantless-surveillance-under-section-702-fisa [https://perma.cc/Q4AR-DXJV]. R

117. Berman, *supra* note 98, at 629–32; David Ruiz, *58 Human Rights and Civil Liberties Organizations Demand an End to the Backdoor Search Loophole*, ELECTRONIC FRONTIER FOUND. (Oct. 6, 2017), https://www.eff.org/deeplinks/2017/10/coalition-58-human-rights-and-civil-liberties-organizations-demands-end-backdoor [https://perma.cc/F38M-8UGV]; Ron Wyden, *Responding to the Myths About Reforming FISA's Section 702*, JUST SEC. (Dec. 4, 2017), https://www.justsecurity.org/47543/responding-myths-reforming-fisas-section-702/ [https://perma.cc/7T8C-XMZF]; Press Release, Congresswoman Zoe Lofgren, Bipartisan Coalition Introduces USA RIGHTS Act to Reform Secretive Warrantless Spy Program (Oct. 24, 2017), https://lofgren.house.gov/media/press-releases/bipartisan-coalition-introduces-usa-rights-act-reform-secretive-warrantless-spy [https://perma.cc/PPE2-4ANZ]; Goitein, *supra* note 100; Neema Singh Guliani, *Congress Just Passed a Terrible Surveillance Law. Now What?*, ACLU (Jan. 18, 2018), https://www.aclu.org/blog/national-security/privacy-and-surveillance/congress-just-passed-terrible-surveillance-law-now [https://perma.cc/T6M4-FX8C]; Elizabeth Goitein, *Americans' Privacy at Stake as Second Circuit Hears Hasbajrami FISA Case*, JUST SEC. (Aug. 24, 2018), https://www.justsecurity.org/60439/americans-privacy-stake-circuit-hears-hasbajrami-fisa-case/ [https://perma.cc/JV9P-MD3J]. R

118. *See* October 2011 Opinion, *supra* note 111, at 22–23, 25, 66 n.60. This decision reversed earlier prohibitions on such searches in the agencies' minimization procedures. *See* ERIC HOLDER, MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702, AS AMENDED § 3(b)(5) (July 29, 2009). R

119. *See infra* text accompanying notes 231–233 and *infra* note 232. R

120. *See* April 2017 Opinion, *supra* note 95, at 4, 19. R

at issue had been crafted in response to Judge Bates' 2011 ruling finding constitutional deficiencies in the agency's handling of Upstream data, so the violations showed that the program had been operating unconstitutionally for years.[121]

FISC Judge Rosemary M. Collyer reprimanded the government for "serious Fourth Amendment issue[s]" and institutional "lack of candor" for its years-long failure to disclose the scope of non-compliance.[122] She refused to approve the government's Section 702 application until it addressed ongoing issues, but she did not reject the application. Instead, she allowed the program to continue—extending the previous year's Section 702 authorization past the November 2016 expiration date by several months—to allow the government more time to bring itself into compliance rather than deny the government's application for reauthorization of the program.[123]

Despite the seriousness of the issues raised by the NSA's failures, and the extended time to review the certifications, Judge Collyer did not consider whether an amicus should be appointed to weigh in on the novel and significant legal issues raised for the FISC in deciding on the appropriate response to the government's noncompliance.

The certifications came before Judge Collyer again in April 2017, by which time the government had proposed remedying the issues identified the previous year by simply ending "abouts" collection as part of the Upstream program. However, it wanted to expand its backdoor search authority to Upstream collection.[124] The judge found that ending "abouts" collection would eliminate the acquisition of "the more problematic forms of MCTs," such as those that contain a reference to a selector but were mainly or entirely domestic communications between non-targets located within the U.S.[125] At the same time, she acknowledged that even without "abouts" collection, the NSA will continue to collect domestic communications in MCTs.[126] But she found that the prohibition on using U.S. person identifiers to query Upstream data was no longer necessary to comport with the statute or with the Fourth Amendment because eliminating "abouts" collection "should substantially

121. *See id*. at 81.

122. *Id*. at 19 (quoting October 26, 2016 Transcript at 5–6).

123. *See id.* at 19–20; October 2016 Order, at 1.

124. *See* April 2017 Opinion, *supra* note 95, at 23. R

125. *Id*. at 29.

126. *Id*. at 27.

reduce the acquisition of nonpertinent information concerning U.S. persons."[127]

The decision to allow the NSA to use U.S. person query terms to search Upstream data, including wholly domestic communications, seems like the type of case where the USA Freedom Act's novel/significant criteria for tapping an amicus were met, but no amicus was appointed.[128] Nor did the judge, as required under the USA Freedom Act, issue "a finding that such an appointment is not appropriate."[129]

As the discussion above illustrates, even with respect to a chronically troubled program that presented a host of novel and significant issues of law impacting Americans' privacy, the FISC did not consider whether an amicus should be appointed.

2. Individual Surveillance Orders under Title I of FISA

The public record also indicates that the courts have not appointed an amicus in any case involving surveillance targeted at particular individuals or entities under Title I of FISA, even though these too presumably can raise novel and significant issues of law.[130] For example, in 2014—before the USA Freedom Act was passed—it was reported that the government had obtained FISA orders authorizing surveillance of five Muslim American men, including the head of the largest Muslim civil rights organization in the U.S. and a candidate for political office who had held a top-secret security clearance and served in the Department of Homeland Security under President George W. Bush.[131] It is possible that the NSA had cause to believe that these men were agents of foreign powers, but their profiles clearly raise significant questions about whether FISA authorities were being used to target political activities protected by the First Amendment. It is not known whether similar cases have come before the courts since the amicus provision was enacted.

127. *Id*. at 23, 58 n.48.

128. *See id*. at 28–29, 95.

129. *Id*. *See also*, *The Problems With Rosemary Collyer's Shitty Upstream 702 Opinion*, EMPTYWHEEL (May 30, 2017), https://www.emptywheel.net/2017/05/30/the-problems-with-rosemary-collyers-shitty-upstream-702-opinion/ [https://perma.cc/D3RD-B5QE].

130. For a discussion of the standards for obtaining this type of FISA surveillance order, see *supra* text accompanying notes 13-15. R

131. Glenn Greenwald and Murtaza Hussain, *Meet The Muslim-American Leaders The FBI And NSA Have Been Spying On*, INTERCEPT (July 9, 2014), https://theintercept.com/2014/07/09/under-surveillance/ [https://perma.cc/7XYX-ABSV].

Serious problems relating to individual FISA surveillance orders emerged as a result of the DOJ Inspector General's review of the FBI's Russia investigation, released in December 2019.[132] These problems relate primarily to glaring deficiencies in the Bureau's presentation of the factual predicates for the FISA surveillance orders issued (and renewed) with respect to Carter Page (Page warrant), a former Trump campaign official.[133] The DOJ now admits that, on account of "material misstatements and omissions," at least two of the four orders to surveil Page were not supported by probable cause to believe that Page was acting as an agent of a foreign power.[134] While the reported problems in the Page applications may not necessarily raise novel or significant issues of law, they point to the need for more robust oversight of this process.

Shortly after the issuance of the Inspector General's report, Judge Collyer, the presiding judge of the FISC, issued an order

132. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION (2019).

133. *See id.* at ii. The Carter Page FISA surveillance order is at the center of a political firestorm. The FBI, in making the case to judges that Page might be a Russian agent, had used some claims drawn from a Democratic-funded dossier compiled by Christopher Steele, a former British intelligence agent, spurring Republican concerns that the surveillance was for political rather than national security reasons. The controversy about these FISA applications first arose in February 2018 when a memorandum written by House Intelligence Committee Chairman Rep. Devin Nunes was released, accusing, with little evidence, the FISA Court and DOJ of enabling the surveillance of Page for political reasons. The main complaint in the Nunes memo was that FBI's applications whitewashed the Steele dossier, a source of information in the FISA applications, by not "disclos[ing] or referenc[ing] the role of the DNC, Clinton campaign, or any party/campaign in funding Steele's efforts, even though the political origins of the Steele dossier were then known to senior and FBI officials." Aaron Blake, *The Full Nunes Memo, Annotated*, WASH. POST (Feb. 2, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/02/02/the-full-nunes-memo-annotated/ [https://perma.cc/UFV9-7BV8]. *See also* Julian Sanchez, *The Crossfire Hurricane Report's Inconvenient Findings*, JUST SEC. (Dec. 11, 2019), https://www.justsecurity.org/67691/the-crossfire-hurricane-reports-inconvenient-findings/ [https://perma.cc/K6DC-W8DW]; Bob Bauer and Jack Goldsmith, *The FBI Needs to Be Reformed*, ATLANTIC (Dec. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/12/fisa-process-broken/603688/ [https://perma.cc/WJV5-N2F8].

134. Order Regarding the Handling and Disposition of Information, *In re* Carter W. Page, Nos. 16-1182, 17-52, 17-375, 17-679, at 1 (FISA Ct. Jan. 7, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Declassifed%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf [https://perma.cc/6BV3-35UX] ("The Court understands the government to have concluded, in view of the material misstatements and omissions, that the Court's authorizations in Docket Numbers 17-375 and 17-679 were not valid.").

which set out the instances in which FBI agents had misled the National Security Division of the Department of Justice, which presents surveillance applications to the court. The FISC found that:

> The FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor [required of the government in ex parte proceedings]. The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable. The FISC expects the government to provide complete and accurate information in every filing with the Court. Without it, the FISC cannot properly ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis.[135]

The court ordered the government to inform it, no later than January 10, 2020 of "what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application."[136]

Complying with Judge Collyer's order, Attorney General Christopher A. Wray submitted a list of 12 steps that the FBI intended to take to ensure the accuracy of information submitted to the FISC, including measures aimed at ensuring that the court was apprised of information that undercut the government's assertions such as concerns about the veracity or reliability of a source.[137] The list included expanding verification forms and checklists that agents must complete to capture mitigating information, as well as enhanced training and auditing.[138]

To assist the court in assessing the government's response, the FISC appointed David S. Kris, an amicus from the pool and the

135. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 3–4 (FISA Ct. Dec. 17, 2019), https://www.fisc.uscourts.gov/sites/default/files/MIsc%2019%2002%20191217.pdf [https://perma.cc/WN3B-4WKX].

136. *Id.*

137. Response to the Court's Order Dated December 17, 2019, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 2–4 (FISA Ct. Jan. 10, 2020), https://assets.documentcloud.org/documents/6616955/Misc-19-02-Response-to-the-Court-s-Order-Dated.pdf [https://perma.cc/NRF8-SWRW].

138. *Id.*

former Assistant Attorney General for the National Security Division of the DOJ.[139] Kris was appointed under the general amicus provision of the USA Freedom Act, which authorizes the court to "appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate."[140]

In his January 15, 2020 filing with the court, Kris argued that the changes made by the FBI, while pointing in the right direction, did "not go far enough to provide the Court with the necessary assurance of accuracy, and therefore must be expanded and improved."[141] He suggested three key improvements. First, the FBI field agent running the investigation for which surveillance was sought should sign the affidavit submitted to the court, not a supervisor at FBI Headquarters in Washington.[142] This would change the Bureau's system for making an application for FISA surveillance which relies on multiple layers of review and instead place responsibility on field agents closer to the underlying investigation who would in principle be more likely to identify factual mistakes and significant omissions in the documents prepared by the investigating agent. Second, the government should brief the FISA Courts on any disciplinary reviews of personnel involved in submitting surveillance applications.[143] Third, the Justice Department should undertake a greater number of audits to ensure accuracy, completeness, and compliance with the FBI's procedures, particularly in cases involving U.S. persons, certain definitions of "agent of a foreign power," or sensitive investigative matters.[144]

The government agreed to the first recommendation but demurred with respect to the second and third.[145] FISC Presiding

139. Order Appointing an Amicus Curiae, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02 (FISA Ct. Jan. 10, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20Appointing%20Amicus%20Curiae%20200110.pdf [https://perma.cc/G9FE-7JK7].

140. *Id.*; USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(B).

141. Letter Brief for David Kris as Amicus Curiae at 3, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02 (FISA Ct. Jan. 15, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2019%2002%20Amicus%20Curiae%20letter%20brief%20January%2015%202020%20200115.pdf [https://perma.cc/96EA-N9BY].

142. *Id.* at 8.

143. *Id.* at 14.

144. *Id.* at 12.

145. Response to the Amicus's Letter Brief Dated January 15, 2020, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 9, 13, 16 (FISA Ct. Jan. 31, 2020), https://www.fisc.uscourts.gov/sites/default/files/

Judge James E. Boasberg split the difference. In his March 2020 order, he directed that all applications brought on behalf of the FBI must include an attestation by the FBI field agent that "all information that might reasonably call into question the accuracy of the information or reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested probable cause findings" had been disclosed to supervisors.[146]

Judge Boasberg also ordered that misconduct relating to the handling of FISA be reported to the court and that DOJ and FBI personnel under disciplinary review relating to FISA be barred from involvement in surveillance applications to the FISC.[147] But he did not require additional accuracy reviews, instead ordering the DOJ to report on its current practices regarding accuracy reviews and the results of such reviews.[148]

The FISC's refusal to require further accuracy reviews is surprising because the court relies heavily on the information presented by the FBI in support of surveillance applications. Not only are these applications reviewed in a secret, ex parte process with no opposition, they also are almost never tested in regular court proceedings.[149] In fact, systemic issues relating to the accuracy of DOJ submissions had already arisen in 2000, when the Department reported to the FISC that it had submitted over 75 surveillance applications containing significant errors.[150] The following year, the DOJ adopted procedures to prevent a recurrence of these mistakes. Named after their drafter, a senior FBI lawyer,

FISC%2019%2002%20Response%20to%20the%20Amicus%27s%20Letter%20Brief%20Dated%20January%2015%202020%20200203.pdf [https://perma.cc/KGE6-ZJBE]. While the government agreed to a narrow expansion of its audits to include additional reviews to assess the completeness of facts included in FISA applications, the government did not respond to the amicus's suggestion to increase the overall number of the DOJ's audits of applications. *Id.* at 13.

146. Corrected Opinion and Order, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 13, 19 (FISA Ct. Mar. 4, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Corrected%20Opinion%20and%20Order%20JEB%20200305.pdf [https://perma.cc/MYK8-5T9G]. This Opinion and Order, issued on March 5, 2020, corrected an Opinion and Order that had been issued on March 4, 2020.

147. *Id.* at 18.

148. *Id.* at 16.

149. *See, e.g.*, GOITEIN & PATEL, WHAT WENT WRONG WITH THE FISA COURT, *supra* note 20, at 18. R

150. *See In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 620–21; Senators Patrick Leahy, Charles Grassley and Arlen Specter, *FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures* 22 (February 2002), https://www.hsdl.org/?view&did=439999 [https://perma.cc/8CAF-66CZ].

the so-called "Woods Procedures" require that the basis of every factual assertion in a FISC surveillance applications is documented in a "Woods File."[151] The multiple deficiencies in the Carter Page surveillance application triggered a broader audit of surveillance applications by the DOJ's Inspector General. The review of a sample of 29 applications for U.S.-person targets found that Woods Files were missing for four and the others were rife with errors and inadequate support for facts.[152]

Judge Boasberg asked the DOJ to provide information about these applications and instructed them to assess whether the misstatements and omissions in them invalidated the surveillance orders that had been based on them.[153] According to the government, the FBI's review of 14 of the 29 applications audited by the Inspector General identified "[o]nly sixty-four errors," only one of which was material.[154] In its view, none of these errors invali-

151. Michael J. Woods, *Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy, Electronic Communication from Office of the General Counsel to all Field Offices* (Apr. 5, 2001), https://fas.org/irp/agency/doj/fisa/woods.pdf [https://perma.cc/UQF9-YVHQ]. Michael J. Woods served as head of the FBI Office of General Counsel's National Security Law Unit. *See also* Response to the Court's Corrected Opinion and Order Dated March 5, 2020 and Update to the Government's January 10, 2020 Response, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 4–7 (FISA Ct. Apr. 3, 2020), https://www.justice.gov/nsd/page/file/1267686/download [https://perma.cc/DW3T-CY6N].

152. Management Advisory Memorandum from Michael E. Horowitz, Inspector Gen., to Christopher Wray, Director, FBI, regarding the Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Application Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (Mar. 30, 2020), https://oig.justice.gov/reports/2020/a20047.pdf [https://perma.cc/BFA3-67XB]. Four out of the sample of 29 FISA applications were missing Woods Files, and for three of those four, the Inspector General could not determine whether a Woods File ever existed. In all the remaining 25 applications, the Inspector General "identified apparent errors or inadequately supported facts," with an average of 20 issues per application reviewed, and a high of about 65 issues in one application. *Id.* at 7.

153. Order, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 2–4 (FISA Ct. Apr. 3, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf [https://perma.cc/PK5R-7FAU]. Judge Boasberg also ordered the government to report every two months on the progress of efforts to ensure proper maintenance of Woods Files and to describe how the government would use the results of accuracy reviews to identify patterns or trends so that the FBI can enhance training to improve compliance with the Woods Procedures and ensure accuracy of FISA applications. *Id.* at 4.

154. Declaration of Dana Boente, General Counsel, Federal Bureau of Investigation, In Support of the Government's Supplemental Response to the Court's Order Dated April 3, 2020, *In re* Accuracy Concerns Regarding FBI Matters Sub-

dated any authorizations granted by the FISC.[155] The DOJ also commenced its own accuracy review, which it reported to the court had covered thirty 2019 applications and found two with material errors and omissions but claimed that these did not undermine the surveillance applications.[156] As of this writing, it is not known what—if any—further action the FISC has or will take.

These repeated and significant compliance issues illustrate the need for stronger oversight of Title I surveillance, including involving amici in some cases. The systemic deficiencies in the handling of Title I surveillance, which affords greater protections to targets and is more closely overseen by the FISA Courts than broad surveillance programs affecting tens of millions of people under Section 702, suggests that there are likely even deeper problems with those programs than the serious ones that have already come to light.

3. The Amicus Pool

In evaluating the impact of the amicus provision, it is also worth noting that three out of the five attorneys in the current amici pool designated by the FISA Courts are former high-level government lawyers who dealt with national security issues, which may indicate a reluctance on the part of the judges to hear from civil liberties advocates. The pool includes Amy Jeffress, who served as Chief of the National Security Section in the US Attorney's Office for the District of Columbia and as Counselor to Attorney General

mitted to the FISC, No. Misc. 19-02, at 2, 25 (FISA Ct. June 15, 2020), https://www.justice.gov/nsd/page/file/1287351/download [https://perma.cc/DX9Z-SWKR].The government explained that the FBI's findings differed from the results of the Inspector General's audit because the latter was "focused solely on whether the [Woods files] for the twenty-nine FISA applications contained support for each of the factual assertions in those applications." *Id.* at 4. By contrast, the government claimed the FBI "was able to resolve many of the [Inspector General's] concerns or potential issues by identifying documentation that supported the factual assertion" located in additional sources, including investigative case files and other files and databases otherwise available to the FBI. Supplemental Response to the Court's Order Dated April 3, 2020, and Motion for Extension of Time, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 8 (FISA Ct. June 15, 2020), https://www.justice.gov/nsd/page/file/1287351/download [https://perma.cc/DX9Z-SWKR].

155. Supplemental Response to the Court's Order Dated April 3, 2020, and Motion for Extension of Time, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, *supra* note 154, at 9. R

156. Response to the Court's Corrected Opinion and Order Dated March 5, 2020 and Update to the Government's January 10, 2020 Response, *supra* note 151, at 45. R

Eric Holder on National Security and International Matters;[157] Jonathan G. Cedarbaum, the former Acting Assistant Attorney General in charge of the Department of Justice's Office of Legal Counsel, who handled the surveillance docket for the office;[158] and David S. Kris, the former Assistant Attorney General for the National Security Division of the Department of Justice.[159]

In addition, two of the three technical experts designated as amici by the courts in October 2018 have strong connections to the intelligence community.[160] One of these experts, Robert T. Lee, previously served as a government witness in *Wikimedia v. NSA*, a case challenging the constitutionality of the NSA's mass interception and searching of Americans' international Internet communications.[161] Another technical amicus, Ben Johnson, a former NSA computer scientist, was appointed to serve in two cases, one in 2018 and one in 2019, though no information is publicly available about either matter.[162]

The selection of Kris in particular became a flashpoint when he was appointed to assist the FISC in evaluating the procedures developed by the FBI in the wake of the DOJ Inspector General's uncovering of serious misrepresentations in the Carter Page surveillance applications and has generated intense criticism from the

157. *Former Justice Department Prosecutor and National Security Official Amy Jeffress Joins Arnold & Porter*, ARNOLD & PORTER (Apr. 16, 2014), https://www.arnoldporter.com/en/perspectives/news/2014/04/former-justice-department-prosecutor-and-nationa [https://perma.cc/ZX4K-D8MS]; *Amy Jeffress*, GLOBAL INVESTIGATIONS REVIEW, https://globalinvestigationsreview.com/author/profile/1016746/amy-jeffress [https://perma.cc/5M9W-G46M].

158. *Jonathan G. Cedarbaum*, WILMERHALE, https://www.wilmerhale.com/en/people/jonathan-cedarbaum [https://perma.cc/5T7A-HLHL].

159. *David Kris*, NATIONAL SECURITY INSTITUTE, https://nationalsecurity.gmu.edu/david-kris/ [https://perma.cc/S3UP-VTLN]. The other two members of the pool are Marc Zwillinger and Laura Donohue. *See infra* text accompanying notes 195–207 and 293–320. R

160. *Amici Curiae*, FOREIGN INTELLIGENCE SURVEILLANCE COURT, https://www.fisc.uscourts.gov/amici-curiae [https://perma.cc/K64T-3CA5].

161. Declaration of Robert T. Lee, Wikimedia Found. v. NSA, 143 F. Supp. 3d 344 (D. Md. 2015) (No. 15-cv-00662-TSE).

162. *Ben Johnson*, LA CYBER LAB, https://www.lacyberlab.org/summit_speakers/ben-johnson/ [https://perma.cc/PY4M-NRC9]; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2018, at 4 (Apr. 25, 2019) [hereinafter 2018 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2018_0.pdf [https://perma.cc/8NE8-NB85]; 2019 FISC ANNUAL REPORT, *supra* note 58, at 4. The annual reports do not specify whether Johnson was appointed under the novel/significant amicus provision or the general provision. R

President and his allies in Congress. President Trump tweeted, "You can't make this up! David Kris, a highly controversial former DOJ official, was just appointed by the FISA Court to oversee reforms to the FBI's surveillance procedures. Zero credibility. THE SWAMP!"[163] On January 16, 2020, Rep. Jim Jordan (R-OH), the ranking member of the House Committee on Oversight and Reform, and Rep. Mark Meadows (R-NC), the ranking member of the Subcommittee on Government Operations, wrote to FISC Presiding Judge Boasberg protesting the selection of Kris. They argued that he was "too personally invested on the side of the FBI to ensure it effectuates meaningful reform,"[164] pointing to his previous defense of the FBI's electronic surveillance practices, including with respect to the Page warrant at the center of the DOJ Inspector General's report, and that he had publicly expressed the view that the FBI's errors were not the result of political bias, a conclusion with which Jordan and Meadows emphatically disagreed.[165]

The sharp criticism of Kris was clearly part of the highly partisan conflict about FBI surveillance of the Trump campaign and the investigation of Russian interference in the 2016 election. But it does underscore the need for the FISC to tread carefully in choosing amici. Although one of the country's foremost experts on NSA surveillance, Kris served as a senior Department of Justice lawyer at the time when key NSA programs were approved, defended them in Congressional hearings, and presented the government's position in cases before both the FISC and the FISCR.[166] According to

163. Donald J. Trump, TWITTER (Jan. 12, 2020, 1:41 PM), https://twitter.com/realDonaldTrump/status/1216429943925723139?s=20 [https://perma.cc/M8DL-RQ5K].

164. Letter from Jim Jordan, Ranking Member, Comm. on Oversight and Reform, and Mark Meadows, Ranking Member, Subcomm. on Gov't Operations, to James E. Boasberg, Presiding Judge, U.S. Foreign Intelligence Surveillance Court 2 (Jan. 16, 2020), https://www.scribd.com/document/443200862/Republican-FISC-Letter [https://perma.cc/42X4-BPQ5].

165. *Id.* These criticisms were echoed in a Wall Street Journal editorial, which went so far as to call for the dissolution of the FISA Court. Editorial Board, Editorial, *Another FISA Fiasco*, WALL ST. J. (Jan. 13, 2020), https://www.wsj.com/articles/another-fisa-fiasco-11578958028 [https://perma.cc/B54B-D466].

166. *See In re* Sealed Case, 310 F.3d at 719; *In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 613 (FISA Ct. May 17, 2002), *abrogated by In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002). *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process, Before S. Comm. on the Judiciary* (Sept. 10, 2002) (statement of Associate Deputy Att'y Gen. David S. Kris), https://fas.org/irp/congress/2002_hr/091002kris.html [https://perma.cc/26DN-KJWH]; *Implementation of the USA PATRIOT Act: Section 218—Foreign Intelligence Information ("The Wall"): Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. (Apr. 28, 2005) (written

his professional biography, Kris also "currently advises two elements of the U.S. Intelligence Community."[167]

We do not suggest that the individuals appointed by the courts, or former government lawyers more broadly, have not or would not serve well as amici. Nonetheless, their background suggests that they likely have the baseline assumption—not shared by many civil liberties advocates and now seemingly some members of Congress—that all or most of foreign surveillance under FISA complies with the Constitution. There may be practical reasons for appointing former government lawyers (e.g., security clearances[168] and their understanding of how the agencies work) as amici. But the FISA Courts should work to overcome them or risk creating the impression that they are reluctant to hear voices from outside the national security establishment.

Overall, as the discussion above demonstrates, even without knowing the full extent of the FISA Courts' docket, there is enough information in the public record to suggest that the courts, or at least certain judges, may be somewhat reluctant to involve amici, particularly those who challenge fundamental aspects of the legality of foreign intelligence surveillance.[169]

---

testimony of David S. Kris), https://web.archive.org/web/20050523231125/http://judiciary.house.gov/media/pdfs/kris042805.pdf [https://perma.cc/48P2-P5VJ]; *USA PATRIOT Act: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2005) (written testimony of David S. Kris), https://fas.org/irp/congress/2005_hr/052405kris.pdf [https://perma.cc/WB8R-QEA7].

167. *See, e.g.*, *David Kris,* NATIONAL SECURITY INSTITUTE, *supra* note 159; *Biographies of Committee Members*, *in* NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, DECRYPTING THE ENCRYPTION DEBATE: A FRAMEWORK FOR DECISION MAKERS 81 (The National Academies Press 2018). R

168. Anyone designated to the amici pool must be "eligible for access to classified information necessary to participate in matters before the courts," which likely weights the pool towards government lawyers who have already been granted such clearances. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(3)(B). In other contexts, however, the government has had to grant security clearances to private lawyers. Terrorism cases and Guantanamo are examples where attorneys have received security clearances. *See, e.g.*, Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantánamo Bay*, N.Y. TIMES, May 30, 2005, at A10; Noor Zafar, *My Visit With One of the Forgotten Prisoners of Guantánamo*, MOTHER JONES (July 14, 2017), https://www.motherjones.com/politics/2017/07/my-visit-with-one-of-the-forgotten-prisoners-of-guantanamo [https://perma.cc/93XA-D6AV]; THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux, Jonathan Hafetz, eds. NYU Press, 2009).

169. FISC CT. R. P. 11. Only one filing pursuant to Rule 11 is publicly available, which is part of the government's application to continue bulk acquisition of call detail records under Section 215 during the 180-day period before the USA Freedom Act took effect. *See* Memorandum of Law, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible

The FISA Courts' apparent reluctance to engage amici may change over time, as judges assess the usefulness of their submissions and arguments and adapt to the new system. Moreover, because judges only serve on the FISA Courts for seven years, the courts will soon be made up of judges who have only been on the courts since amicus participation has been mandated by law, and a new slate of judges may be more receptive to a broader range of viewpoints.[170]

B. Protecting Privacy and Individual Liberties

Since the USA Freedom Act became law in 2015, the FISA Courts have released 45 decisions[171] and ten people are known to have been appointed to serve as amicus curiae in a total of 13 cases.[172] Court decisions are publicly available for nine of the cases

Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562 (FISA Ct. June 2, 2015). Kenneth T. Cuccinelli was appointed amicus in the case. For more on this case, see *supra* text accompanying notes 180–186. R

170. Many of the judges who were on the FISA Courts in June 2015 when the USA Freedom Act became law, including those who opposed involving amici in FISA proceedings, have or will soon rotate off the court. Three out of the 11 FISC judges who were serving in June 2015 are still currently on the court. After May 18, 2022, none of those 11 judges will still be serving on the FISC. By January 2021, none of the three FISCR judges who were on the court in 2015 will still be serving.

171. *See FISC/FISCR Opinions*, *supra* note 47. R

172. The number of reported appointments (17) is somewhat higher than the number of cases (13) because four of the appointments were for continuations of the same matter (e.g., an appeal or remand). The 2015 annual report on the FISA Courts, mandated by the USA Freedom Act, indicates that three amici—Preston Burton, Kenneth T. Cuccinelli II, and Amy Jeffress—were appointed under the law's general amicus provision on four occasions in 2015. FOREIGN INTELLIGENCE SURVEILLANCE COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2015, 4 (Apr. 2016) [hereinafter 2015 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2015.pdf [https://perma.cc/9SPR-T3FN]. These first post-USA Freedom Act amici were appointed under the general amicus provision—even though the court recognized that the cases presented novel or significant interpretations—because the amicus pool, from which amici must be drawn for appointments under the novel/significant amicus provision, had yet to be designated. *See infra* notes 182 and 213; R
In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562 (appointing Kenneth T. Cuccinelli as amicus); Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, at 2–3 (FISA Ct. Sept. 17, 2015); Order Appointing an Amicus Curiae, [REDACTED] (FISA Ct. Aug. 13, 2015), https://www.dni.gov/files/documents/icotr/51117/Doc%204%20%E2%80%93%20Aug.%202015%20FISC%20Order%20Appointing%20an%20Amicus%20Curiae.pdf [https://perma.cc/R36B-R6R2]. The amicus

pool was constituted on November 25, 2015. *Amici Curiae*, FOREIGN INTELLIGENCE SURVEILLANCE COURT, *supra* note 160; *see also infra* text accompanying notes 180–191 and 213–235. In 2016, Marc Zwillinger, a member of the amicus pool, was appointed to serve as amicus curiae. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2016, 4 (Apr. 20, 2017) [hereinafter 2016 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/ao_foreign_int_surveillance_court_annual_report_2016_final.pdf [https://perma.cc/A35K-FJNV]. The provision under which Zwillinger was appointed is unspecified. However, seeing as the FISCR determined that the case presented a significant interpretation of law, Zwillinger was likely appointed under the novel/significant amicus provision. IC ON THE RECORD, *Release of FISC Question of Law & FISCR Opinion* (Aug. 22, 2016), https://icontherecord.tumblr.com/post/149331352323/release-of-fisc-question-of-law-fiscr-opinion [https://perma.cc/68Z6-M6EX]. In 2017, no individual was appointed to serve as amicus curiae by the FISA courts. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2017 (Apr. 25, 2018) [hereinafter 2017 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/ao_foreign_int_surveillance_court_annual_report_2017.pdf [https://perma.cc/4HGE-PYG5]. In 2018, Laura Donohue, Amy Jeffress, Jonathan Cedarbaum, and John Cella were each appointed on two occasions, and Ben Johnson was appointed on one occasion. 2018 FISC ANNUAL REPORT, *supra* note 162, at 4. There is no publicly available information about Johnson's appointment. Jeffress, Cedarbaum, and Cella were each appointed to the FISC and FISCR in cases concerning the 2018 Section 702 certifications, but the provisions under which each amicus was appointed is not explicitly specified. However, seeing as the FISC identified "novel or significant interpretations of law," Jeffress and Cedarbaum were likely appointed under the novel/significant provision and Cella, who is not a member of the amicus pool, was appointed under the general amicus provision. *See* Order, [REDACTED], at 2 (FISA Ct. Apr. 5, 2018), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Order_05Apr18.pdf [https://perma.cc/J7E4-XYYA]. Laura Donohue was appointed to serve in the FISC and FISCR in cases concerning public access to FISA Court documents. Her appointment in the FISC was under the novel/significant amicus provision, and her appointment in the FISCR was unspecified. *See* Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (May 1, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinions%20and%20Orders.pdf [https://perma.cc/29YS-F23J]. In 2019, David Kris and Ben Johnson were each appointed as amici, though court documents related to those appointments are not publicly available. 2019 FISC ANNUAL REPORT, *supra* note 58, at 4. In January 2020, David Kris was appointed under the general amicus provision to assist the Court in assessing the government's submission on its plans to ensure accuracy in FBI applications. *See* Order Appointing an Amicus Curiae, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, *supra* note 139.

R R R R R

where amici were appointed.[173] A total of 11 amicus briefs (covering six of these cases) are publicly available.[174]

While this record is far from complete, it provides a basis for assessing—at least on a provisional basis—whether the hope of many reformers that adding an amicus to proceedings in the FISA Courts would lead to decisions where the courts did not so readily accede to the government's surveillance requests and became more protective of individual rights. The record thus far suggests that these types of changes are hard to come by. A large portion of the cases coming before the FISA Courts involve issues on which they have already ruled, sometimes on many occasions, and it seems difficult to convince judges that they were wrong the first time around. The judges treat foreign intelligence matters as fundamentally different from the cases typically considered by the federal courts and generally reject amici's arguments based on case law outside the FISA system. For the most part, the FISA Courts seem disinclined to give much weight to civil liberties risks until presented with actual evidence of abuse. Such information is generally in the hands of the government, however, and barring exceptional circumstances such as the Carter Page surveillance orders, the government must faithfully report those issues in order for them to come to light.

Amici themselves seem to have different conceptions of their roles, with some making maximal civil liberties arguments while others taking a more incremental approach. This may be attributable to a particular amici's background (as noted earlier, several have served in high-level government positions and may bring baseline assumptions about the legitimacy and legality of the government's foreign intelligence surveillance programs) but also could reflect a strategic calculation about the best way to improve the

173. *See supra* text accompanying notes 139–148 and *infra* text accompanying notes 180–320. The 2015 annual report disclosed that amici were appointed on four occasions that year, but only three of those cases are publicly available, which may mean that although the Court determined that the appointment of an amicus was appropriate, the Director of National Intelligence and the Attorney General decided not to make any part of the case publicly available. 2015 FISC ANNUAL REPORT, *supra* note 172, at 4. Similarly, in 2018, amici were appointed on nine occasions in a total of five FISC and FISCR cases, though court decisions are only publicly available thus far for four of those cases. 2018 FISC ANNUAL REPORT, *supra* note 162, at 4. R R R R

174. The publicly available amicus briefs were submitted to the FISC in 2015 by Amy Jeffress, Preston Burton, Kenneth T. Cuccinelli, to the FISCR and FISC in 2018 by Laura Donohue, and to the FISC in 2020 by David Kris. *See supra* text accompanying notes 139–148, and *infra* text accompanying notes 180–191, 213–235, and 293–320. In February 2018, the Reporters Committee for the Freedom of the Press submitted an amicus brief to the FISCR. *See infra* note 301. R R R

FISA system. In some cases, amici may be limited in the arguments that they can make because the court circumscribed their mandate to particular issues. And it is sometimes difficult to get a full picture of the arguments made by amici because about half of their briefs are not publicly available and, for those cases, their views can only be gleaned when they are mentioned in declassified court decisions, which themselves are redacted.

Finally, in an interesting twist, in a handful of cases the government has withdrawn or modified surveillance applications when informed by the FISC that it was considering appointing an amicus. While not much is known about these cases, they illustrate one of the less obvious ways in which amici impact the FISA system.

1. Transition to the USA Freedom Act

In addition to promoting amicus participation, the USA Freedom Act substantially reformed Section 215 of the Patriot Act. To recap, that law, which was passed shortly after the 9/11 attacks and had been interpreted by the FISC to allow the government to accumulate a database of information about Americans' phone calls on the theory that because call records *could* reveal individuals linked to such an investigation, all Americans' phone records could be considered relevant.[175]

In May 2015, in the first case where the Section 215 bulk collection program was subjected to adversarial challenge, the Second Circuit Court of Appeals rejected this theory of relevance in a landmark decision, *ACLU v. Clapper*. The court explained that:

> something is "relevant" or not in relation to a particular subject . . . . § 215 does not permit an investigative demand for any

175. *See supra* text accompanying notes 21–23 and 67–70; Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], *supra* note 22, at 22; Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], No. BR 14-96 (FISA Ct. June 19, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf [https://perma.cc/RJ5T-GZNF] (authorizing collection of bulk telephone metadata under Section 215). While the program had been approved by the FISA Courts since 2006, the court only publicly set out its rationale in 2013 after the Snowden disclosures. *See* ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 1 (2013), https://www.documentcloud.org/documents/750211-administration-white-paper-section-215.html [https://perma.cc/9826-RTRP]; Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], *supra* note 22, at 20–22; PCLOB SECTION 215 REPORT, *supra* note 42, at 55–56. R R R R

> information relevant to fighting the war on terror, or anything relevant to whatever the government might want to know. It permits demands for documents "relevant to an authorized investigation."[176]

As the Second Circuit read the Patriot Act, it did not permit bulk collection of the type that had been authorized by the FISA Courts.[177] This view was in line with the views of many in Congress, including Rep. James F. Sensenbrenner Jr. (R.-WI), one of the principal architects of the Patriot Act.[178]

Shortly after the Second Circuit's ruling, the USA Freedom Act became law and prohibited the government from collecting phone records in bulk without any suspicion. Instead, the government had to get an order from the FISC to access phone records and was only allowed to obtain records up to the second hop.[179]

In June 2015, the FISC considered the government's request to continue the bulk acquisition of call detail records under Section 215 of the Patriot Act during the 180-day period before the USA Freedom Act took effect and banned such collection.[180] The government's request was filed just days after the passage of the law and at a time when the pool of amici had not yet been selected. However, Kenneth T. Cuccinelli, II, former Attorney General of Virginia, had filed a motion to intervene in the case on behalf of Freedom Works, Inc., a libertarian group, or alternatively to be appointed as amicus curiae pursuant to the newly enacted provisions of the USA Freedom Act.[181] Judge Michael W. Mosman dis-

176. Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 815 (2d Cir. 2015).

177. *Id.*

178. *Oversight of the Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Rep. James Sensenbrenner); James Sensenbrenner, *How Secrecy Erodes Democracy*, POLITICO (July 22, 2013), http://politi.co/1baupnm [https://perma.cc/A8B8-XNKX].

179. USA FREEDOM Act of 2015, sec. 501(c)(2), § 1861(c)(2)(F)). For a discussion of hops, see *supra* text accompanying notes 81–87. R

180. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562.

181. Motion in Opposition to Government's Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act §215, Misc. 15-01 (FISA Ct. June 5, 2015). Cuccinelli served as Attorney General of Virginia from 2010 to 2014. He was appointed to serve as Acting Director of the U.S. Citizenship and Immigration Services in June 2019 and to serve as Acting Deputy Secretary of the Department of Homeland Security in November 2019. *Kenneth T. (Ken) Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 30, 2019, https://www.uscis.gov/about-us/leadership/kenneth-t-ken-cuccinelli-senior-official-per-

missed the motion to intervene, but granted Cuccinelli's request to appear as amicus under the general amicus provision.[182]

Based on the Second Circuit's decision in *ACLU v. Clapper*,[183] Cuccinelli argued in his brief that bulk collection was not authorized by Section 215 of the Patriot Act and that storing and searching that information violated the Fourth Amendment.[184] Judge Mosman rejected Cuccinelli's arguments and the Second Circuit's decision in *ACLU v. Clapper*, which he ruled was not binding on the FISC and was superseded by the intervening enactment of the USA Freedom Act. He reasoned that:

> Congress could have prohibited bulk data collection under Title V of FISA effective immediately upon enactment of the USA Freedom Act, as it did under Title IV. Instead, after lengthy public debate, and with crystal clear knowledge of the fact of ongoing bulk collection of call detail records . . . it chose to allow a 180-day transitional period.[185]
>
> He therefore approved the continued collection of bulk telephone metadata under Section 215 for 180 days.[186]

Preston Burton, a white collar defense attorney at the firm of Buckley Sandler, was appointed amicus in another case dealing

---

forming-duties-director-us-citizenship-and-immigration-services-director-vacant [https://perma.cc/KK4F-YZGE].

182. The Court determined that the government's application "presents a novel or significant interpretation of the law," triggering the appointment of an amicus under Section 401(i)(2)(A) of the USA Freedom Act. However, that provision requires that the appointed amicus be in the designated pool of at least five amici, which had not yet been selected. For that reason, the amicus was appointed under Section 401(i)(2)(B), which does not require that an amicus be part of the pool. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562, at *4.

183. Am. Civil Liberties Union v. Clapper, 785 F.3d 787 (2d Cir. 2015).

184. Motion in Opposition to Government's Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act §215, Misc. 15-01, *supra* note 181, at 7, 40. R

185. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562, at *4.

186. This is the longest known FISA Court order authorizing bulk metadata collection. The court orders authorizing the Section 215 program traditionally have a 90-day duration, after which the government would need to apply for renewal for another 90 days. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 23–24, 114 n.441. R

with the transition, also under the general amicus provision.[187] On August 27, 2015, the government filed a request with the FISC to allow it to retain and use metadata that it had previously collected under Section 215 for three months after the 180-day transition. According to the government, the extension was needed for two purposes, which it described as "non-analytic", to "verify the completeness and accuracy of call detail records" obtained under the new collection process mandated by the USA Freedom Act, and to comply with preservation orders in litigation challenging the program.[188] In his amicus brief, Burton took the position that the provisions and legislative history of the USA Freedom Act could not be read to require destruction of the database immediately at the end of the 180-day transition period. Nonetheless, he argued, the FISC had the authority to ask questions about how the data was being stored, its security, who had access to it, and what exactly was involved in the government's plan to make "non-analytic" use of the data.[189] On the government's argument that ongoing litigation required preservation of the database, Burton highlighted the government's intransigence in the lawsuits challenging the program, asking the court to consider why the government had not been able to reach a stipulation with the plaintiffs on preservation and "whether it is appropriate for the government to retain billions of irrelevant call detail records involving millions of people based on . . . the government's stubborn procedural challenges."[190] The FISC opinion did not engage with Burton's arguments and simply authorized the retention of previously collected metadata for both liti-

187. Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, *supra* note 172. R

188. Response of the United States to the Memorandum of Law by Amicus Curiae at 1, 12, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99 (FISA Ct. Nov. 6, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Response%20of%20the%20United%20States%20to%20the%20Memorandum%20of%20Law%20by%20Amicus%20Curiae.pdf [https://perma.cc/N2G4-DY6E].

189. Memorandum of Law by Amicus Curiae Regarding Government's August 27, 2015 Application to Retain and Use Certain Telephony Metadata after November 28, 2015 at 28, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99 (FISA Ct. Oct. 29, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Memorandum%20of%20Law%20by%20Amicus%20Curiae_0.pdf [https://perma.cc/Z7ZJ-WBVX].

190. *Id.* at 27.

gation and technical purposes for three months past the transition period.[191]

It seems that these early post-USA Freedom Act amici had barely any impact on the FISC's decisions, a trend that continued in a later case concerning the NSA's use of its pen register authority discussed next.

2. Pen Register Authority

In April 2016, the FISCR accepted a certified question from the FISC regarding the government's use of a pen register, a device that records the digits entered when initiating a phone call. Pen registers had long been permitted without a warrant based on the U.S. Supreme Court's decisions in pair of 1970s cases, *U.S. v. Miller* and *Smith v. Maryland*, which established the "third-party doctrine"— i.e., that individuals do not have a reasonable expectation of privacy in information voluntarily provided to a third party, such as the digits dialed in a phone call, so this information falls outside the Fourth Amendment's warrant requirement.[192] This type of information (often called "metadata") has become increasingly important because government agencies can accumulate records in quantities unimaginable in the 1970s and analyze them in ways that are enormously revealing of individuals' private lives.[193] It has also become more difficult to distinguish clearly between metadata (which generally does not require a warrant) and content (which generally does require a warrant).[194]

191. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things [REDACTED], No. BR 15-99, at 8–9 (FISA Ct. Nov. 24, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Opinion%20and%20Order.pdf [https://perma.cc/VG27-88RM].

192. United States v. Miller, 425 U.S. 435, 443 (1976); Smith v. Maryland, 442 U.S. 735 (1979).

193. The third-party doctrine has come under increasing pressure in recent years as courts grapple with the implications of surveillance technologies that use seemingly public information in ways that intrude on privacy. As Justice Sonia Sotomayor noted in her concurring opinion in *United States v. Jones,* which examined the scope of the government's authority to engage in long-term warrantless GPS tracking, the accumulation of such a "precise, comprehensive record of a person's public movements" exposes "a wealth of detail about [that person's] familial, political, professional, religious, and sexual associations," such that it violates a reasonable expectation of privacy and should therefore be considered a search. United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

194. *Id.*; Riley v. California, 134 S.Ct. 2473, 2488 (2014) (observing that the government's argument that "a search of all data is 'materially indistinguishable'

In this case, the FISCR appointed an amicus from the newly designated amicus pool, Marc Zwillinger—a privacy and data security lawyer who is the only private attorney known to have appeared before the FISCR prior to the USA Freedom Act.[195] At issue was whether Title IV of FISA, which authorized the use of pen registers to collect metadata, extended to "post-cut-through digits"—i.e., the digits entered after a call is established, such as passcodes, extensions, bank account information, or credit card numbers.[196] The collection of post-cut-through digits had been authorized by the FISC since 2006 on the basis that there were no technical means by which the government could isolate only dialing information, although the court generally prohibited the government from making affirmative investigative use of post-cut-through digits other than dialing information.[197]

The FISCR decided to revisit the issue because in the "parallel setting of criminal investigations," federal courts had uniformly held that post-cut-through digits could not be regarded as metadata, and therefore did not fall within the scope of the third-party doctrine.[198]

---

from searches of" physical containers such as wallets is "like saying that a ride on horseback is materially indistinguishable from a flight to the moon"). *See also* Steven M. Bellovin et al., *It's Too Complicated: How The Internet Upends Katz, Smith, and Electronic Surveillance Law*, 30 HARV. J.L. & TECH. 1, 52–91 (2016); Chris Conley, *Non-Content is Not Non-Sensitive: Moving Beyond the Content/Non-Content Distinction*, 54 SANTA CLARA L. REV. 821 (2015); Joseph D. Mornin, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 999–1006 (2014).

195. Zwillinger previously appeared before the FISCR when he represented Yahoo in 2008 in its challenge to directives under the Protect America Act, the precursor to the FISA Amendments Act. *Marc Zwillinger*, ZWILLGEN PLLC, https://www.zwillgen.com/crb_team/marc-zwillinger/ [https://perma.cc/TAP7-AXVQ]; Cyrus Farivar, *America's Super-secret Court Names Five Lawyers as Public Advocates*, ARS TECHNICA (Nov. 28, 2015), https://arstechnica.com/tech-policy/2015/11/americas-super-secret-court-names-five-lawyers-as-public-advocates/ [https://perma.cc/25Y3-3TQU].

196. *In re* Certified Question of Law, No. 16-01, 858 F.3d 591 (FISA Ct. Rev. Apr. 14, 2016); Certification of Question of Law to the Foreign Intelligence Surveillance Court, In [REDACTED] A U.S. Person, No. PR/TT 2016 [REDACTED] (FISA Ct. Feb. 12, 2016).

197. *In re* Certified Question of Law, No. 16-01, 858 F.3d at 594. Since at least 2006, FISC judges have issued pen register/trap and-trace orders under 50 U.S.C. § 1842 that have authorized the acquisition of all post-cut-through digits, permitting the use of digits that constitute dialing information and generally prohibiting the use of those digits that do not constitute dialing information. *See* Order, [REDACTED], (FISA Ct. 2006), https://www.documentcloud.org/documents/4060813-EFF-FOIA-Sep-25-Doc-10.html [https://perma.cc/PV6L-YTLG].

198. *In re* Certified Question of Law, No. 16-01, 858 F.3d at 595. *See also* Smith v. Maryland, 442 U.S. 735, 745–46 (1979). The FISC certified this question to the

While Zwillinger's brief is not available, the FISCR's opinion indicates that he argued that *all* post-cut-through digits—dialing information as well as passcodes and account numbers dialed—constituted "content information" requiring a probable cause warrant.[199] The definition of pen registers in FISA ends with a clause which reads: "provided, however, that such information shall not include the contents of any communication."[200] Zwillinger argued that this definition "plainly forecloses the conclusion that a pen register may lawfully intercept content under any circumstances."[201]

The FISCR rejected this argument, finding that secondary dialing information did not constitute "content information," and that the collection of other post-cut-through digits was incidental to the collection of dialing information, which was both contemplated by the statute and reasonable under the Fourth Amendment.[202] It countered Zwillinger's statutory argument by relying on the pen register provision in Title 18 of the U.S. Code governing the use of such devices in criminal investigations which, although not directly applicable to FISA, suggested that Congress anticipated that these devices would inevitably pick up some content information and therefore only required the NSA to use "reasonably available technology" to minimize the collection of content.[203] The court buttressed this argument by citing to the legislative history of the FISA pen register provision, which it found showed that Congress was aware that "the government's ability to avoid the collection of content information was subject to the limitations of 'reasonably availa-

FISCR because it found that further consideration of "the weight of contrary authority" from federal courts on the issue of post-cut-through digits would "serve the interests of justice" and present a "significant interpretation of the law." Certification of Question of Law to the Foreign Intelligence Surveillance Court, In [REDACTED] A U.S. Person, *supra* note 196, at 12-13. The FISC did not attempt to resolve the question itself, however. The government submitted its request of pen register authorization on January 21, 2016, just one day before the prior authorization was set to expire. *Id.* Given the short time frame, the FISC approved the government's request to continue to acquire post-cut-through digits, and found the appointment of an amicus under Section 401(i)(2)(a) of the USA Freedom Act inappropriate as there would have been insufficient time for the "formulation and presentation of an amicus's views, and consideration of those views by the Court." *Id.* R

199. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 597 n.6.

200. 18 U.S.C. § 3127(3).

201. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 599.

202. *Id.* at 593, 604–605.

203. *Id.* at 599–600. *See also* 18 U.S.C. § 3121 (2018).

ble technology.'"[204] Turning to potential Fourth Amendment constraints, the FISCR noted that it had previously held that there is a special needs exception to the warrant requirement for foreign intelligence investigations, which "virtually controls this case."[205] Since a warrant was not required, the court conducted a reasonableness inquiry, which concluded that the government's heavy national security interest clearly outweighed the small privacy intrusion at issue, especially in light of the court's supervision of the surveillance and its prohibition on the use of content information for investigative purposes.[206]

In sum, Zwillinger's direct challenge to the court's interpretation of post-cut-through digits was unsuccessful in moving the court away from its past precedent on the singular nature and objectives of foreign intelligence investigations, which, according to the court, "would be seriously hampered by the requirement of a warrant."[207] As discussed in the next section, when Amy Jeffress was appointed to serve as amicus for the reauthorization of Section 702, she took a different, mostly incremental approach. Over the course of several years, and with the revelation of obvious abuse of authorities by the FBI in accessing Section 702 data, she was successful in convincing the FISC to require changes to the FBI's rules that the FISA Courts have described as "modest."[208]

3. Section 702 Collection and FBI Searches of Section 702 Information

Section 702 of the FISA Amendments Act authorizes the government to collect private electronic communications (e.g., emails and phone calls) without a warrant. By 2011, the NSA's Section 702 programs acquired more than 250 million Internet communications each year; the total number is almost certainly higher if you add in telephone communications and has undoubtedly grown substantially in the intervening years.[209] Even at the 2011 rate, the agency's authority to retain Section 702 data for at least five years means that government databases contain at least 1.25 billion communications obtained from Section 702 programs at any one

204. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 599, 602–604, 610.

205. *Id.* at 607. *See also In re* Directives, 551 F.3d at 1011–12.

206. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 598.

207. *Id.* at 606 (quoting *In re* Directives, 551 F.3d at 1011).

208. *See infra* note 255. R

209. October 2011 Opinion, *supra* note 111, at 29; PCLOB 702 Report, *supra* note 99, at 116 ("By 2011 . . . the government was annually acquiring over 250 million Internet communications, in addition to telephone conversations. The current number is significantly higher."). R R

time.[210] The FISC's yearly reauthorizations of the Section 702 program provide a window into the dynamics between the courts, the government, and amici, and the struggle to impose even minimal restrictions on this sprawling surveillance program.

Since 2015, Amy Jeffress, who worked as a federal prosecutor for 20 years, including as Chief of the National Security Section in the D.C. U.S. Attorney's Office and as Counselor to Attorney General Eric Holder on National Security and International Matters,[211] has been appointed amici in three major publicly available decisions of the FISA Courts about the scope and parameters of Section 702 surveillance. In her first appearance before the FISC in 2015, Jeffress stated that she did not intend to serve "as a privacy and civil liberties advocate, broadly speaking," but rather understood her role as an "advisor" to the court "to evaluate the program and to determine whether there were any aspects of the certifications and the procedures submitted to the Court that did not comply with the statutory and constitutional requirements . . . with respect to the two specific issues that the Court noted in the order."[212] Indeed, as discussed below, it appears that Jeffress has not made the most expansive civil liberties arguments but has instead adopted a more incremental approach which has—over time—met with some success.

a. 2015 Decision

In August 2015, the FISC appointed Jeffress as amicus for the government's annual request for authorization of its certifications and procedures for the Section 702 surveillance program for the upcoming year.[213] Members of Congress and civil liberties advo-

210. *Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 4–5 (statement of Elizabeth Goitein). R

211. *See* ARNOLD & PORTER, *supra* note 157. R

212. Transcript of Proceedings Held Before the Honorable Thomas F. Hogan at 5, [REDACTED] (FISA Ct. Oct. 20, 2015) [hereinafter Transcript of Proceedings before Judge Hogan], https://www.dni.gov/files/documents/icotr/51117/Doc%2010%20%E2%80%93%20Oct.%202015%20FISC%20Hearing%20Transcript.pdf [https://perma.cc/W92N-QYWQ].

213. The FISC determined "that this matter is likely to present one or more novel or significant interpretations of the law, which would require the Court to consider appointment of an amicus curiae." Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications [REDACTED] at 5 (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [https://perma.cc/R6WL-VJF6]. Since the amicus pool had not yet been designated, Jeffress was appointed under Section 401(i)(2)(B) of the USA Freedom Act. Order Appointing an Amicus Curiae, [REDACTED], *supra* note 172. *See also* Brief for Amicus Curiae at 1–2, R

cates have long raised serious concerns about the FBI procedures that were part of the authorization request, which allowed the Bureau to search for information about Americans in the large pool of information collected without a warrant under Section 702, arguing that these searches were a "backdoor" for avoiding the requirements of the Fourth Amendment.[214] Indeed, many members of Congress introduced—and garnered considerable support, although not passage—for bills to either end backdoor searches by cutting funding or to require a warrant for these searches.[215]

In her brief and in oral argument, Jeffress fully set out the concerns raised by backdoor searches and the FBI's "virtually unrestricted" querying of Section 702 information, which "strays well beyond the foreign intelligence purpose of the Section 702 program."[216] But her proposal for fixing the deficiency fell short of the stronger protections of a warrant requirement suggested by civil liberties advocates and scholars.[217] Instead, she recommended that

[REDACTED] (FISA Ct. Oct. 15, 2015) [hereinafter Jeffress Amicus Brief], https://www.dni.gov/files/documents/icotr/51117/Doc%208%20%E2%80%93%20Oct.%202015%20Brief%20of%20Amicus%20Curiae.pdf [https://perma.cc/F3FJ-HBF5].

214. *See supra* note 117. R

215. In both 2014 and 2015, a majority of the House approved amendments to the Defense Appropriations bill to cut funding for backdoor searches by the NSA, CIA, and FBI, which were stripped out in the omnibus spending bills at the end of the year. Dep't Def. Appropriations Act, H. Amend. 935 to H.R. 4870, 113th Cong., 160 CONG. REC. H5514 (June 19, 2014); Dep't Def. Appropriations Act, H. Amend. 503 to H.R. 2685, 114th Cong., 161 CONG. REC. H4130 (June 10, 2015); Steven Nelson, *NSA Reform That Passed House Reportedly Cut From 'CRomnibus,'* US NEWS (Dec. 4, 2014), https://www.usnews.com/news/articles/2014/12/04/nsa-reform-that-passed-house-reportedly-chopped-in-leaders-cromnibus-deal [https://perma.cc/6S2D-482L]; Cory Bennett, *House Defeats Privacy Measure in Wake of Orlando Shootings*, POLITICO (June 16, 2016, 1:05PM), https://www.politico.com/story/2016/06/house-encryption-amendment-blocked-224444 [https://perma.cc/5DQ3-725Q]. Rep. Zoe Lofgren and Rep. Thomas Massie co-sponsored a similar amendment in 2016, which also failed to pass. *Id.* And in October 2017, a bipartisan group of House Judiciary Committee members introduced the USA Liberty Act, which would have required the FBI to obtain a warrant in order to access the content of any queried Section 702 data. USA Liberty Act of 2017, H.R. 3989, 115th Cong. (2017). The bill was reported out of the House Judiciary Committee, but did not receive a vote in the House. David Ruiz, *House Judiciary Committee Forced Into Difficult Compromise On Surveillance Reform*, ELECTRONIC FRONTIER FOUNDATION (Nov. 9, 2017), https://www.eff.org/deeplinks/2017/11/house-judiciary-committee-forced-difficult-compromise-surveillance-reform [https://perma.cc/HK4Y-FMH6].

216. Jeffress Amicus Brief, *supra* note 213, at 19. R

217. *See e.g.*, Orin Kerr, *The Fourth Amendment and Querying the 702 Database for Evidence of Crimes*, WASHINGTON POST (Oct. 20, 2017), https://

the Bureau be required to adopt procedures similar to those in place at the NSA and CIA, which require a written statement explaining why a search using a U.S. person identifier was likely to return foreign intelligence information.[218]

In support of her proposal, Jeffress argued that this requirement was necessary because while the collection of information under Section 702 satisfies the Fourth Amendment's reasonableness requirement, the FBI's subsequent queries of Section 702 data must be "treated as a separate action subject to the Fourth Amendment reasonableness test."[219] The principle articulated by Jeffress is potentially far-reaching. Civil liberties advocates and some legal scholars have supported the approach of separating the initial collection from the querying of Section 702 information, arguing that the latter is a separate Fourth Amendment event far removed from the foreign intelligence purpose of the collection and thus requires a warrant.[220] Two members of the Privacy and Civil Liberties Over-

www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/20/the-fourth-amendment-and-querying-the-702-database-for-evidence-of-crimes/ [https://perma.cc/HJ87-5CUS]; Elizabeth Goitein, *Americans' Privacy at Stake as Second Circuit Hears Hasbajrami FISA Case*, JUST SEC. (Aug. 24, 2018), https://www.justsecurity.org/60439/americans-privacy-stake-circuit-hears-hasbajrami-fisa-case/ [https://perma.cc/3KR5-TTU3].

218. Transcript of Proceedings before Judge Hogan, *supra* note 212, at 8; Jeffress Amicus Brief, *supra* note 213, at 11–13. *See* Loretta Lynch, Exhibit B: Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, § 3(b)(5), [REDACTED], No. [REDACTED] (FISA Ct. July 15, 2015) ("Any use of United States person identifiers as terms to identify and select communications must first be approved in accordance with NSA procedures, which must require a statement of facts establishing that the use of any such identifier as a selection term is reasonably likely to return foreign intelligence information, as defined in FISA."); Loretta Lynch, Exhibit E: Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, § 4, [REDACTED], No. [REDACTED] (FISA Ct. July 15, 2015) ("Any United States person identity used to query the content of communications must be accompanied by a statement of facts showing that the use of any such identity as a query term is reasonably likely to return foreign intelligence information, as defined in FISA."). R R

219. Transcript of Proceedings before Judge Hogan, *supra* note 212, at 6. *See also* Jeffress Amicus Brief, *supra* note 213, at 24–5. R R

220. Prominent Fourth Amendment scholar Orin Kerr has explained: "[T]he mere copying of data without human observation is a seizure but not a search . . . . If the data has been copied but not searched, querying it is a search . . . the query through the raw 702 database requires its own Fourth Amendment justification." Kerr, *supra* note 217. *See also* Berman, *supra* note 98, at 623–626 n.218 (discussing R

sight Board have also taken this position.[221] Jeffress did not, however, argue for a warrant but rather that documentation was necessary to meet the Fourth Amendment's reasonableness requirement for querying.

The FISC was unwilling to accept even the more limited version of the argument articulated by Jeffress and instead continued to rely on the approach adopted in a 2008 FISCR decision that "the proper analytical approach to Fourth Amendment reasonableness involves 'balanc[ing] the interests at stake' under the 'totality of the circumstances' presented."[222] The court also did not adopt amici's recommendation that FBI personnel be required to record their foreign intelligence rationale for searches of Section 702 information on the grounds that FISA does not require searches of Section 702 information to have any foreign intelligence-related purpose.[223] The court noted that the statutory requirements for mini-

how "seizing or copying digital storage devices and then searching its contents later is routine," and merely imposing post-collection use rules for investigators to follow when searching through that content is insufficient. Instead, "we must recognize those uses themselves as searches entitled to their own independent Fourth Amendment analysis, regardless of how the underlying information was collected."); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 240–41 (2015) (discussing "a distinction between [the] search of such information [in Section 702 databases] and the seizure of the data in the first place," and concluding that "it is difficult to deny that the query of a database comprised of non-publicly available information (obtained without the targets' consent), to try to find evidence of criminal activity, constitutes a search in the most basic sense of the term. Even though the government might have legally obtained the information at the front end, it could not search the information for evidence of criminal activity absent a warrant, supported by probable cause.").

221. David Medine and Patricia M. Wald, *Reform Surveillance, Don't End It*, WALL ST. J. (Oct. 29, 2017), https://www.wsj.com/articles/reform-surveillance-dont-end-it-1509301958 [https://perma.cc/6AVQ-WAQH].

222. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 41 (quoting *In re* Directives 551 F.3d at 20). The court defined such a "totality of circumstances" analysis as "requir[ing] the Court to weigh the degree to which the government's implementation of the applicable targeting and minimization procedures, viewed as whole, serves its important national security interests against the degree of intrusion on Fourth Amendment-protected interests." *Id.* at 41. R

223. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 31-33; 50 U.S.C. § 1801(h)(1)-(3). The statutory requirement for minimization procedures in Title I of FISA was applied to Section 702 upon the passage of the 2008 FISA Amendments Act. *See* 50 U.S.C. § 1881a(e)(1) ("The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h)"). R

mization procedures expressly "allow for the retention and dissemination of information that is evidence of a crime,"[224] and that it would be a "strained reading" of the statute to allow such retention and dissemination but prohibit querying that information to identify evidence of crimes.[225] The court added that FBI queries that are designed to find evidence of crimes unrelated to foreign intelligence "rarely, if ever" elicit Section 702-acquired foreign intelligence information.[226] For these rare instances, however, the court found that "the foreign intelligence value of the information obtained could be substantial."[227] Thus, in evaluating the overall reasonableness of the program, the court weighed the government's "highest order of magnitude"[228] national security interests against individual privacy interests, which the court found were adequately protected by the FBI's procedures limiting the use and retention of Americans' incidentally collected information.[229] The FISC approved the procedures as presented.[230]

As commentators have pointed out, the ruling rested on the possibility that supposedly rare non-foreign intelligence related queries by the FBI would turn up such critical foreign intelligence information that the government had an overriding national security interest in having the option to access the information.[231] But the result was perhaps unsurprising given that the FISC had approved these FBI querying practices since at least 2009.[232] Jeffress

224. 50 U.S.C. § 1801(h)(1)-(3).

225. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 32-33. R

226. *Id*. at 44.

227. *Id*. at 42. The FISC cited the government's failure to identify and appropriately distribute information that could have been used to disrupt the 9/11 attacks as proof of the FBI's need to be able to search Section 702 data for even non-foreign intelligence-related crimes. *Id.*

228. *Id*. at 37 (quoting *In re* Directives, 551 F.3d at 1012).

229. Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 41-44. R

230. *Id*. at 38–39, 44.

231. *Id*. at 42; Transcript of Proceedings before Judge Hogan, *supra* note 212, at 25-26; *see also* Elizabeth Goitein, *The FBI's Warrantless Surveillance Back Door Just Opened a Little Wider*, JUST SEC. (Apr. 21, 2016), https://www.justsecurity.org/30699/fbis-warrantless-surveillance-door-opened-wider/ [https://perma.cc/SK4W-GG6Z]; Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without a Warrant*, N.Y. TIMES, (Apr. 19, 2016), https://nyti.ms/20VEBGm [https://perma.cc/576W-DEG2]. R

232. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 26–27, 27 n.24, 27–28 n.25 (queries of Section 702-acquired data reasonably designed to find and extract foreign intelligence information and evidence of a crime "have been explicitly permitted by the FBI Min- R

had argued that these earlier decisions did not control the application because of new information available to the FISC and intervening legal developments, but was not able to convince the court to take a different view.[233]

The FISC did, however, require the Bureau to report to the court each instance in which FBI personnel receive and review Section 702 acquired information concerning a U.S. person in response to a query that is not designed to find and extract foreign intelligence information.[234] This requirement turned out to be critical when the court considered amici's arguments in the government's 2018 application for Section 702, as discussed below.[235]

b. 2018 Decision

Jeffress was appointed to serve as amicus in 2018 in another annual Section 702 application,[236] alongside John Cella, an associate at her law firm and a former judge advocate in the United States Navy Judge Advocate General's Corps[237] and Jonathan Cedarbaum,

imization Procedures since 2009 . . . regardless of whether the querying term includes information concerning a United States person"). The FBI's "Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act," which allowed for backdoor searches, were approved by the Attorney General on October 22, 2008 and by the FISC on April 7, 2009. U.S. DEP'T OF JUSTICE, STANDARD MINIMIZATION PROCEDURES FOR FBI ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH CONDUCTED UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (Oct. 22, 2008); Memorandum Opinion and Order, [REDACTED] (FISA Ct. Apr. 7, 2009), https://www.dni.gov/files/documents/icotr/702/Bates%20549-579.pdf [https://perma.cc/EV64-5K3C]; *See FBI's Back Door Searches: Explicit Permission . . . And Before That*, EMPTY WHEEL (Apr. 20, 2016), https://www.emptywheel.net/2016/04/20/fbis-back-door-searches-explicit-permission-and-before-that/ [https://perma.cc/46XP-32CR]. The FISC approved NSA and CIA authority to conduct backdoor searches in October 2011. October 2011 Opinion, *supra* note 111, at 22–23, 25. *See supra* text accompanying notes 116–119. An earlier decision by the FISCR, holding that FISA surveillance need not be limited exclusively to foreign intelligence purposes, opened the door to its use for law enforcement purposes. *In re* Sealed Case No. 02-001, 310 F.3d. 717, 731 (FISA Ct. Rev. 2002) (per curiam). R R

233. Jeffress Amicus Brief, *supra* note 213, at 22–23. R

234. The FISC noted that it was not prepared to find a constitutional deficiency based on a hypothetical problem but was imposing the requirement "to reassure itself that [the government's] risk assessment is valid." Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 44. R

235. *See infra* text accompanying notes 239–254. R

236. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4. R

237. *John Cella*, ARNOLD & PORTER (Apr. 16, 2014), https://www.arnoldporter.com/en/people/c/cella-john [https://perma.cc/N5NE-LB4S].

the former Acting Assistant Attorney General in charge of the Department of Justice's Office of Legal Counsel.[238] The case addressed several important issues and shows both the potential positive impact of amici and the limits to their influence.

i. Backdoor Searches

In the 2018 case, the FISC—presented with incontrovertible evidence that the FBI was in fact abusing its authority to search Section 702 data—finally acted to constrain the Bureau.

The decision revealed that the FBI runs millions of queries using identifiers associated with Americans against databases which contain Section 702 data along with other information.[239] It also showed that the Bureau had systemically failed to comply with the requirement that its searches of Section 702 data must be reasonably likely to return foreign intelligence information or evidence of a crime, fundamental conditions for allowing these searches in the first place. Between 2017 and 2018, the FBI conducted at least 78,475 queries using identifiers that did not meet this requirement.[240] These included a March 2017 search, undertaken against

As Cella is not part of the amicus pool, he was appointed under the less restrictive portion of the USA Freedom Act amicus provision, Section 401(i)(2)(B).

238. *Elected Member: Jonathan G. Cedarbaum*, AMERICAN LAW INSTITUTE, https://www.ali.org/members/member/212657/ [https://perma.cc/73V4-A9Q8] (last visited Feb. 20, 2020).

239. In 2017, the FBI undertook over 3 million queries on a single system. While these covered both U.S. persons and non-U.S. persons, "given the FBI's domestic focus it seems likely that a significant percentage . . . involve U.S.-person query terms." Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 65–66. R

240. *See id*. at 68–69. This disclosure of so many non-compliant queries was in part surprising because the government had, in other contexts, indicated that the FBI rarely reviewed Section 702-acquired information concerning a U.S. person in response to non-foreign intelligence related queries. According to the Office of the Director of National Intelligence's (ODNI) annual Statistical Transparency Report, between 2016 and 2019, the FBI reviewed non-foreign intelligence information on eight occasions. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING THE USE OF NATIONAL SECURITY AUTHORITIES CALENDAR YEAR 2019, 17 (Apr. 30, 2020). Six of those eight instances occurred in December 2018 and were not disclosed until April 2020, after a DOJ audit in 2019. *Id*. Whereas the reporting requirement stemming from the FISC's 2015 decision approving Section 702 certifications required the reporting of all instances in which FBI personnel reviewed Section 702-acquired information concerning a U.S. person in response to a query that was not designed to find and extract foreign intelligence information, it appears that the ODNI has been using a narrow interpretation to determine which compliance incidents to report to the public, only disclosing the number of instances in which FBI personnel received and reviewed "Section 702-acquired information that the FBI identified as concerning a U.S.

the advice of the Bureau's general counsel, using 70,000 identifiers "associated with" people who had access to FBI facilities and systems, and numerous instances of queries aimed at gathering information about potential informants.[241] Moreover, as the FISC pointed out, these instances did not reflect the full extent of the problem because the Justice Department's audits are so limited that improper queries could easily escape notice.[242]

As reported by the FISC, amici again argued that the FBI's queries of raw Section 702 data should be treated as "a separate Fourth Amendment event subject to its own reasonableness analysis," pointing to new statutory language and recent trends in case law.[243] This position was supported by the reasoning of the Supreme Court in a pair of decisions that did not involve foreign intelligence surveillance, but distinguished between an initial lawful seizure and subsequent search.[244] Subsequent to the proceedings relating to

person in response to a query *that was designed to return evidence of a crime unrelated to foreign intelligence.*" *Id.* Accordingly, it appears that the ODNI only reported queries that had no relevance to the broadly defined term "foreign intelligence information" but *were* designed to return evidence of a crime. *See also* Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 78. This narrower category of queries that the ODNI discloses in its report is the same subset of backdoor searches that the FISA Amendments Reauthorization Act identified as requiring a warrant before the FBI could review any contents of communications. FISA Amendments Reauthorization Act of 2017 §101(f)(2)(a). R

241. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 68–69. R

242. The FISC identified several oversight issues that contribute to the FBI's continued non-compliance including the prolonged periods between oversight visits for some FBI field offices, the lack of documentation for overseers to review, and the small number of queries reviewed by overseers. For those reasons, the court observed that "it appears entirely possible that further querying violations involving large numbers of U.S.-person query terms have escaped the attention of overseers and have not been reported to the Court." *Id.* at 74. *See also* Elizabeth Goitein, *The FISA Court's Section 702 Opinions, Part II: Improper Queries and Echoes of "Bulk Collection,"* JUST SEC. (Oct. 16, 2019), https://www.justsecurity.org/66605/the-fisa-courts-section-702-opinions-part-ii-improper-queries-and-echoes-of-bulk-collection/ [https://perma.cc/LN9H-7LXD].

243. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 85. Amici noted that the 2018 FISA Amendments Reauthorization Act mandated that Section 702 querying procedures comport with the Fourth Amendment, and that Section 702(f)(2) requires the FBI in some narrow circumstances to get a FISC order before examining the results of a Section 702 search. *See id.* R

244. Riley v. California, 573 U.S. 373, 386 (2014) (holding that police needed a warrant to access the contents of a cell phone, even when the officer lawfully seized the phone in a search incident to arrest); Carpenter v. United States, 138 S.Ct. 2206, 2217 (2018) (holding that a warrant was required to acquire cell-site records, even though, under the third-party doctrine, a cellphone user would not

the government's 2018 Section 702 certifications, the Second Circuit Court of Appeals issued a decision that directly supports amici's position in the foreign intelligence context. Evidence derived from Section 702 surveillance had been used to obtain a terrorism conviction against Agron Hasbajrami, enabling him to mount a rare challenge to the warrantless surveillance and collection of his communications.[245] The lower court held that the targeting and minimization procedures in place sufficiently protected the privacy interests of U.S. persons allowing the government to freely query lawfully acquired Section 702 information without further Fourth Amendment inquiry.[246] The Second Circuit reversed. It found that querying stored data constitutes a separate Fourth Amendment event, requiring a separate Fourth Amendment analysis, which "provides a backstop to protect the privacy interests of United States persons and ensure that they are not being improperly targeted."[247]

The FISC resisted treating querying as a separate Fourth Amendment event but arrived at the same conclusion as amici under the FISA Courts' traditional "totality-of-circumstances" test. Judge Boasberg concluded that the FBI's procedures, as implemented, violated both Section 702 and the applicable Fourth

have an expectation of privacy in such information.). *See also* ACLU v. Clapper, 785 F.3d 787, 801 (2d Cir. 2015) (distinguishing between acquisition and retention in finding that storing data in a database constitutes a seizure); Kyllo v. United States, 533 U.S. 27, 35 (2001) (finding that a search occurred not where the government used heat-sensing technology, but when they observed the data emanating from that technology); United States v. Carey, 172 F.3d 1268, 1272–74 (10th Cir. 1999) (allowing the government to seize the entire hard drive but limiting the government's subsequent access to that data).

245. United States v. Hasbajrami, 945 F.3d 641, 647–49 (2d Cir. 2019).

246. *Id.* at 669; *see also* Memorandum Denying Motion to Suppress, United States v. Hasbajrami, No. 11-CR-623 (JG), 2016 WL 1029500, at *14 (E.D.N.Y. Mar. 8, 2016) (order denying motion to suppress the fruits of Section 702 surveillance).

247. United States v. Hasbajrami, 945 F.3d at 672. *Cf.* United States v. Muhtorov, 187 F. Supp. 3d 1240, 1256–57 (D. Colo. 2015) (holding that there is no reasonable expectation of privacy in information the government has already collected); United States v. Mohamud, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at *26 (D. Or. June 24, 2014), aff'd, 843 F.3d 420 (9th Cir. 2016) (holding that subsequent querying of Section 702-acquired data, without obtaining an additional search warrant, would also be constitutional, though it was "a very close question"); *cf.* United States v. Mohamud, 843 F.3d 420 (9th Cir. 2016) (holding that a foreigner overseas has "no Fourth Amendment right" and therefore no warrant is required to collect a foreign target's communications, regardless of whether Americans in contact with the target are "incidentally" monitored).

Amendment reasonableness standard.[248] Nonetheless, by choosing this path, the FISC foreclosed the possibility of a warrant requirement for FBI searches of Section 702 information.[249] Moreover, as discussed below, a separate Fourth Amendment analysis of querying procedures could have had an impact on the FBI's practice of conducting batch queries, potentially leading to their invalidation.

According to the FISC decision, amici once again proposed as a remedy that FBI personnel be required to document in writing their justifications for believing that each search of Section 702 data using U.S.-person identifiers is reasonably likely to return foreign intelligence information or evidence of a crime before reviewing Section 702 acquired content information resulting from such queries.[250] This time, the court agreed.[251] The opinion indicates that amici had initially proposed a somewhat broader restriction: that FBI personnel justify their searches *before* they run queries.[252] This would have placed a bigger burden on the Bureau because the number of queries that return information is far smaller than the number of queries run by the FBI. But it would also have been more privacy-protective because FBI agents would not be able to view the highly revealing metadata associated with their queries without writing down their justifications.[253] Judge Boasberg's decision states that amici noted at the September 28, 2018 argument that the narrower post-querying documentation requirement "would be adequate," but he did not explain the considerations that led to this accommodation.[254]

The documentation requirement is unlikely to fully address the problems identified by the FISC. Both the FISC, and the FISCR, which addressed the issue on appeal as discussed further below, concluded that it would facilitate oversight by providing a record for DOJ personnel reviewing the FBI's querying practices and moti-

248. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 80, 92. R

249. *See supra* text accompanying notes 219-235. R

250. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92. The procedures used by the CIA, NSA, and NCTC already include such a documentation requirement. R

251. *Id.* at 96–97.

252. *Id.* at 92.

253. *In re* DNI/AG 702(h) Certifications [REDACTED], No. [REDACTED], 41 (FISA Ct. Rev. July 12, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISCR_Opinion_12Jul19.pdf [https://perma.cc/RY2H-9KFU].

254. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92. R

vate FBI personnel to think more carefully about the applicable standard so that they would be discouraged from running unnecessary queries.[255] At the same time, both courts went out of their way to emphasize that the requirement was "minimal" and "modest," with the FISCR describing it as a "ministerial procedure," which would require FBI personnel to explain their reasoning "perhaps in no more than a single sentence or by making a check-mark next to one of several pre-written options."[256] If the documentation requirement does turn out to be as minimal as the FISCR suggested, it is difficult to see how it would add appreciably to oversight or encourage FBI agents to think carefully about their queries rather than simply turning into a box checking exercise. It certainly would not address other issues identified by the FISC, such as the lack of understanding among FBI personnel about the standard for Section 702 queries, the long spans of time between audits and small sample size of FBI Section 702 queries audited, and the Bureau's encouragement of its personnel to make "maximal use of such queries, even at the earliest investigative stages."[257]

In sum, while the documentation requirement is certainly an improvement, it hardly addresses the host of issues raised by the FBI's backdoor searches. While Jeffress was able to persuade the court to accept her recommendation, she did not trigger any serious reconsideration of the FISA Court's entrenched views on backdoor searches, which the FBI's record clearly warrants.

ii. Batch Queries

The record before Judge Boasberg also revealed a previously unknown FBI practice: "categorical batch queries," i.e., searches of Section 702 data using multiple query terms at once, some of which may not be reasonably likely to return foreign intelligence information.[258]

255. *In re* DNI/AG 702(h) Certifications, at 41; Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92. The FISC noted that oversight of the FBI's querying practices is deficient in part because "the documentation available to [oversight personnel from the DOJ National Security Division's Office of Intelligence] lacks basic information that would assist in identifying problematic queries." *Id.* at 74. **R**

256. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 95, 97; *In re* DNI/AG 702(h) Certifications, at 42. **R**

257. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 72–75. *See also* Goitein, *The FISA Court's Section 702 Opinions, Part II*, *supra* note 242. **R** **R**

258. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 79–82. **R**

It is not known how long the FBI has used batch queries. However, in 2018, the FBI promulgated supplemental procedures to address the illegal querying of Section 702 databases described above, most of which were batch queries.[259] These procedures, which were submitted to the FISC, allow batch queries—i.e., "an aggregation of individual queries"—to meet this standard even if an individual query within that batch would not.[260]

By using batch queries, the FBI can circumvent the requirements imposed by the FISC. As our colleague and FISA expert Liza Goitein has explained:

> [F]or instance, if the FBI has information that an employee at a particular company is planning illegal actions, but the FBI has no knowledge of who the employee is, the Bureau would be justified (the government argues) in running queries for *every employee at that company*. This is presumably the theory on which the FBI ran the massive numbers of queries . . . [including] 70,000 queries on individuals with access to FBI systems and facilities.[261]

At the same time, batch queries can also be used for as few as two persons.[262] This suggests that if the FBI narrows down a group of American associates or an American family for whom a query of just one of its members may yield foreign intelligence information, but the FBI is not sure which person it is, the Bureau could make up a batch by searching for information on all members, even if individually, the searches would fail to meet the querying standard. The rationale here is similar to that underlying the government's accumulation of a database of Americans' telephone records, which was ended by the USA Freedom Act.[263]

Unfortunately, Judge Boasberg did not take any particular action relating to batch queries, other than to suggest that they appeared to conflict with the FBI's own procedures, which require that "[e]ach query" that FBI agents perform on Section 702 data "must be reasonably likely to retrieve foreign intelligence information . . . or evidence of a crime."[264] The judge's refusal to treat

259. *Id.* at 7, 82.

260. *Id.* at 78.

261. Goitein, *The FISA Court's Section 702 Opinions, Part II*, *supra* note 242. R

262. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 80. R

263. *See supra* text accompanying notes 67–70, 81–84, and 175–179. R

264. *See* WILLIAM P. BARR, EXHIBIT I: QUERYING PROCEDURES USED BY THE FEDERAL BUREAU OF INVESTIGATION IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE

querying as a separate Fourth Amendment event—as advocated by amici—may have had some impact on the court's failure to address batch queries. A separate Fourth Amendment analysis of this type of querying would have required the FISC to reckon with difficult questions about whether this practice complied with the Fourth Amendment. It is, however, difficult to judge where amici stood on this issue because their briefs for the 2018 case are not publicly available.

Unfortunately, under the current statutory regime, amici are not permitted to either appeal Judge Boasberg's decision or even bring these issues to the attention of the FISCR.

iii. Tracking Queries of Americans' Information

Judge Boasberg also considered the related issue of whether the FBI was complying with the 2018 FISA Amendments Reauthorization Act requirement that a "record is kept of each United States person query term used for a query."[265] Such tracking would reveal the extent to which the Bureau was targeting Americans for warrantless searches, a key concern with respect to backdoor searches.[266] Instead, the FBI had been keeping a record of *all* Section 702 queries, essentially hiding its usage of U.S.-person query terms.[267] While the text of the statute is quite clear, the government argued that Section 112 of the law, which directed the Inspector General of the DOJ to report to Congress on operational, technical, or policy impediments for the FBI to count U.S. person queries, showed that Congress recognized "the limitations of FBI systems' technical record-keeping function" and "did not intend to impose any new obligation on the FBI to differentiate queries based on United States person status."[268] Amici, on the other hand, maintained that Congress did not accept the current FBI practice, but rather imposed new recordkeeping requirements while at the same time directing the Inspector General to scrutinize how the FBI im-

SURVEILLANCE ACT OF 1978, AS AMENDED (Aug. 6, 2019) [hereinafter FBI 2019 Querying Procedures] at 3.

265. FISA Amendments Reauthorization Act of 2017 §101(f)(1)(b).

266. *See supra* text accompanying notes 239–257. R

267. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 53. R

268. FISA Amendments Reauthorization Act of 2017 § 112(b)(8); Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 55–56. The government argued that Section 702(f)(1)(B) "does not include any other terms, such as 'separately' or 'segregated,' specifying that United States person query terms must be retained apart from other queries." *Id.* at 53. R

plements them.[269] Judge Boasberg found that amici had "the better of the exchange."[270] The court held that the FBI's procedure "misse[d] the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information," and ordered the FBI to correct this deficiency.[271]

iv. "Abouts" Collection

As discussed previously, under Section 702, the NSA collects electronic communications in two ways: "Downstream," by acquiring stored communications held by the companies that process these communications such as internet service providers, and "Upstream" by obtaining communications straight from the Internet backbone.[272] The NSA looks for electronic communications to, from, or about targeted selectors, and the breadth of "abouts" collection has made it one of the most controversial parts of Section 702 collection.[273] In April 2017, the FISC found that the NSA's technical and legal problems with "abouts" collection were even more pervasive than previously disclosed, and that the agency was not in compliance with the rules imposed by the court.[274] In response, the NSA announced later that month that it would no longer conduct this type of surveillance because it could not meet FISC-imposed privacy protections, although it subsequently indicated that it wanted to keep open the option of restarting the program at a future date.[275] When Congress reauthorized Section 702 in 2018, it explicitly authorized "abouts" collection, but imposed, with narrow exceptions, a requirement of congressional notification and a 30-day congressional-review period before the government could restart the program.[276]

269. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 56. R

270. *Id.*

271. *Id.* at 53, 114.

272. *See supra* text accompanying notes 103–112. R

273. *See supra* text accompanying notes 103–112. R

274. *See supra* text accompanying notes 120–129. R

275. Press Release, Nat'l Sec. Agency, *supra* note 6. Two months later, however, in response to a question from the Senate Select Committee on Intelligence about the ending of "abouts" collection, NSA Admiral Michael Rogers stated that "if we can work that technical solution in a way it generates greater reliability, I would potentially come back to the Department of Justice and the court to recommend that we reinstitute it." *Open Hearing on FISA Legislation*, S. Select Comm. on Intelligence, 115th Cong. 46 (2017). R

276. FISA Amendments Reauthorization Act of 2017 § 103.

"Abouts" collection was understood to be something that the NSA undertook only as part of its Upstream programs.[277] However, a heavily-redacted portion of the FISC decision suggests that the NSA is now engaged in a new form of Downstream collection which bears resemblance to "abouts" collection.[278] The FISC decision reflects Judge Boasberg's agreement with amici that the notice requirement for "abouts" collection imposed by Congress in 2018 applied also to Downstream programs. Though the legislative history could be read to suggest that Congress intended the statutory limitation on "abouts" collection to apply only to the Upstream program, amici argued that this was simply because Congress did not know about the form of Downstream acquisition at issue in the case when the law was passed.[279] Indeed, as Judge Boasberg noted, the text of the provision "does not distinguish between upstream and downstream collection or otherwise refer to how acquisition is conducted," and thus he found "no absurdity in applying the abouts limitation, by its terms, to downstream collection."[280]

Based on the FISC opinion, it appears that amici also argued that at least some of the acquisitions in the government's Section 702 certifications constitute "abouts" collection and do not comport with the notice requirement.[281] The FISC disagreed, taking the view that the government's acquisition of communications at issue did not constitute "abouts" collection, but was in fact "limited to acquisitions of communications to or from targets" and that the NSA had safeguards to avoid the "intentional acquisition of abouts communication."[282]

While heavy redactions make this section of the opinion difficult to parse, amici's recommendations for greater transparency

277. *See, e.g.*, PCLOB 702 Report, *supra* note 99, at 84 ("Collection of 'about' communications occurs only in upstream collection, not in PRISM."); NSA, PRISM/US-984XN Overview, IC OFF THE RECORD (Apr. 2013), https://nsa.gov1.info/dni/prism.html [https://perma.cc/VBF2-SWHC]; Classified Decl. of Miriam P., National Security Agency *Ex Parte*, *In Camera* Submission ¶ 12-13, Jewel. v. NSA, No. 4:08-cv-4873-JSW (Nov. 7, 2014) ("unlike 702 PRISM collection. 702 Upstream is a valuable source of 'abouts' collection in which the targeted identifier (e.g., an e-mail address) is contained in the content of the communication. . . . 'Abouts' communications are a valuable source of foreign intelligence information that cannot be obtained through other FISA collection techniques currently used, including PRISM collection."). R

278. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 18–45. R

279. *See id.* at 29–30.

280. *Id.* at 30.

281. *See id.* at 43–44.

282. *Id.* at 18–19.

surrounding "abouts" collection suggest that their concerns likely centered on the selectors the government uses to identify the communications to be collected.[283] Amici proposed that the government "be required to report on how it will comply with the abouts limitation when it tasks any new type of selector to upstream collection."[284] They also seem to have proposed similar requirements for Downstream collection, though that section of the opinion is too redacted to get a full sense of the scope of the amici's suggestions.[285] Civil liberties advocates have long been concerned the selectors used by the NSA were too broad to ensure that only communications to and from intended targets are swept up.[286] For

283. *See id*. at 28, 44, 137.

284. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 28. R

285. *See id*. at 44 (in the highly-redacted section of the opinion concerning Downstream collection, the FISC noted that "amici suggest that the government should be required to provide more information with regard to [REDACTED] obtained under Section 702. See, e.g., Amici Brief at 37; Amici Reply at 2-3. The Court agrees with amici that a fuller accounting of [REDACTED] acquired pursuant to Section 702 will inform future assessments of whether particular acquisitions may be subject to the abouts limitation and are otherwise properly authorized."). Further, it seems that the disagreement over whether the "abouts" limitation applies was at least in part a disagreement over what, under the FISA Amendments Reauthorization Act, "acquisitions under Section 702 can and do include." Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 31–32, 137. R

286. *See, e.g.*, Mark Rumold, *What It Means to Be An NSA "Target": New Information Shows Why We Need Immediate FISA Amendments Act Reform*, ELEC. FRONTIER FOUND. (Aug. 8, 2013), https://www.eff.org/deeplinks/2013/07/what-it-means-be-target-or-why-we-once-again-stopped-believing-government-and-once [https://perma.cc/D5Q9-JGXC]; CENTER FOR DEMOCRACY AND DEMOCRACY, COMMENTS TO THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD REGARDING REFORMS TO SURVEILLANCE CONDUCTED PURSUANT TO SECTION 702 OF FISA, 6-8 (2014); Julian Sanchez, *All The Pieces Matter: Bulk(y) Collection Under §702*, JUST SEC. (July 25, 2014), https://www.justsecurity.org/13227/pieces-matter-bulky-collection-%C2%A7702/ [https://perma.cc/V35Z-RDHJ]; Ashley Gorski and Patrick C. Toomey, *Unprecedented and Unlawful: The NSA's "Upstream" Surveillance*, JUST SEC. (Sept. 19, 2016), https://www.justsecurity.org/33044/unprecedented-unlawful-nsas-upstream-surveillance/ [https://perma.cc/9JA5-G85B]; *Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 2–3 (statement of Elizabeth Goitein); Elizabeth Goitein, *The FISA Court's 702 Opinions, Part I: A History of Non-Compliance Repeats Itself*, JUST SEC. (Oct. 15, 2019), https://www.justsecurity.org/66595/the-fisa-courts-702-opinions-part-i-a-history-of-non-compliance-repeats-itself/ [https://perma.cc/8DH2-3LTP]. Following the release of the October 2018 FISC decision on the Section 702 certifications, a coalition of civil society groups warned that the government may be engaging in a new form of "abouts" collection that Congress did not authorize. Letter from Access Now, et. al., to House Judiciary and Intelligence Committees (Oct. 17, 2019), https:// R

example, if the government used IP addresses rather than email addresses as selectors, it would sweep up communications far removed from individual targets.

In sum, while Judge Boasberg was willing to recognize that the "abouts" label could *theoretically* apply to Downstream acquisitions, he was seemingly unwilling to apply the label to whatever new type of collection the NSA has started. Indeed, a finding that the NSA was engaged in abouts collection when it had publicly declared that it had stopped doing so would have been highly significant because it would have triggered the Congressional notice requirement,[287] ignited public debate and, given the highly intrusive nature of this type of surveillance, potentially required the FISC to weigh additional safeguards.

Judge Boasberg did, however, adopt two of amici's recommendations: the government was required to explain to the court why its new program would only acquire communications to and from a target; and to report on the methods it used to "monitor compliance with the abouts limitation . . . and [to] report on the results of such monitoring."[288] As with the backdoor queries discussed above, this reporting requirement could provide information that would support amici's position the next time that Section 702 certifications and procedures are submitted to the FISC for approval.

c. 2019 Appeal

The government appealed the FISC's conclusions that: (1) the FBI was required to keep records "in a manner that differentiates between query terms related to United States persons and those related to non-United States persons" and (2) that the FBI's procedures for searching Section 702 data violated both FISA and the Fourth Amendment.[289] The same three amici were appointed by the FISCR. The appellate court agreed with the FISC that the FBI was required to keep track of searches of Section 702 data relating to Americans.[290] Because this conclusion required the Bureau to revamp its procedures, the FISCR declined to reach the second issue raised by the government. It did, however, provide some guidance to the government as it revised its querying procedures,

www.aclu.org/letter/coalition-letter-urging-reforms-section-702-fisa [https://perma.cc/PH6X-XKYW].

287. FISA Amendments Reauthorization Act of 2017 § 103(b).

288. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 137. R

289. *In re* DNI/AG 702(h) Certifications, at 4.

290. *Id.* at 19.

including endorsing the remedy proposed by amici and adopted by the FISC—that FBI personnel document in writing their justification for running a query using a U.S. person query term before examining the contents of Section 702 information returned by such queries.[291] Shortly thereafter, the FBI submitted and the FISC approved amended Querying Procedures incorporating the documentation requirement.[292]

Amici, however, could not appeal the very significant issues on which Judge Boasberg disagreed with them: whether querying constitutes a separate Fourth Amendment event requiring separate analysis by the court, which could have led to additional restrictions on the FBI's ability to sift through warrantlessly-acquired information (such as by conducting batch queries); and whether the NSA's new collection program constituted "abouts" collection requiring Congressional notification and potentially additional safeguards. As a result, the decision of a single judge impacting the privacy of millions of Americans remains the final word on these issues.

4. Public Right of Access to Decisions of the FISA Courts

Another amicus from the pool, Laura Donohue, a professor at Georgetown Law School and Director of its Center on National Security and the Law and its Center on Privacy and Technology,[293] was appointed on two occasions, once in the FISC and once in the FISCR, to address questions regarding the public's right of access to court decisions.

a. 2017 FISC Decisions

The issue was raised as part of a longstanding effort by the ACLU and Yale's Media Freedom and Information Access Clinic to obtain access to four previously released, highly redacted FISC opinions concerning the legal basis for bulk data collection.[294] The

291. *Id.* at 41.

292. FBI 2019 Querying Procedures, *supra* note 264; Memorandum Opinion and Order, [REDACTED], [REDACTED] 9 (FISA Ct. Sept. 4, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opinion_04Sep19.pdf [https://perma.cc/RS2W-228Y]. R

293. *Laura Donohue*, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/laura-donohue/ [https://perma.cc/3DAX-LXLB].

294. The four decisions at issue are: Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], No. BR 13-109, *supra* note 22; *In re* Application of the FBI for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-158 (FISA Ct. Oct. 11, 2013), https://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf R

ACLU and the Yale clinic filed a Notice of Supplemental Authority in support of their motion asking the FISA to review the redactions in light of the public's First Amendment right of access. They argued that the provisions of the USA Freedom Act requiring a declassification review[295] demonstrated "Congress's judgement that significant FISC opinions should be published to the greatest extent possible, and that public access to FISC opinions supports the proper functioning of the court," strengthening their claim asserting a First Amendment right of access to these decisions.[296] In January 2017, the FISC ruled that the ACLU and the clinic lacked standing because there is no such right of access.[297] That decision created an intra-court split with a 2013 FISC decision finding that

[https://perma.cc/9QDK-BH6N]; Opinion and Order, [REDACTED], No. PR/TT [REDACTED] (FISA Ct. [REDACTED]), https://www.odni.gov/files/documents/1118/CLEANEDPRTT%201.pdf [https://perma.cc/6XNV-CDR4]; Memorandum Opinion, [REDACTED], No. PR/TT [REDACTED], (FISA Ct. [REDACTED]), https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf [https://perma.cc/3J43-8VFK].

295. USA FREEDOM Act of 2015, sec. 402(a), § 1872. The DNI and AG are required to conduct declassification reviews of the FISA Courts' decisions, orders, and opinions that include "significant construction[s] or interpretation[s] of any provision of law" unless they determine "that a waiver of such requirement is necessary to protect the national security of the United States or properly classified intelligence sources or methods." *Id.* § 1872(c)(1). If the DNI and AG make such a determination, they must publish an unclassified statement "summarizing the significant construction or interpretation of any provision of law." *Id.* § 1872(c)(2)(A).

296. Notice of Supplemental Authority at 2, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Dec. 4, 2015), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Notice%20of%20Supplemental%20Authority_0.pdf [https://perma.cc/578K-PG8C]. *See also* Motion, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Nov. 7, 2013), https://www.clearinghouse.net/chDocs/public/NS-DC-0026-0001.pdf [https://perma.cc/3W4Z-L3C6]. The Reporters Committee for Freedom of the Press and a group of 25 media organizations filed a motion for leave to file an amicus brief in this case in November 2013, which was granted. *See* Brief for the Reporters Committee for Freedom of the Press and 25 Media Organizations as Amici Curiae, *supra* note 46. R

297. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 427591, at *23 (FISA Ct. Jan. 25, 2017), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf [https://perma.cc/LA3E-8DYJ].

the same plaintiffs had standing to assert their right of access claim.[298]

The FISC *sua sponte* granted en banc review. In November 2017, sitting en banc for the first time in its history, the majority of the FISC found that the plaintiffs did have standing to proceed.[299] Ten of the eleven FISC judges subsequently agreed that the question of standing should be certified to the FISCR for its review.[300]

b. 2018 FISCR Decision

In January 2018, the FISCR accepted the certified question and appointed Donohue as amicus.[301] Donohue made several arguments in support of the movants' standing to seek access to judicial records. She explained why the court's potential failure to find standing mattered, using the example of Snowden's revelations about bulk collection of phone records under Section 215:

298. *Cf. In re* Orders of this Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Sept. 13, 2013), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-2.pdf [https://perma.cc/6RFT-PVUB].

299. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf [https://perma.cc/65G9-LBFY].

300. Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Jan. 5, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013%2008%20Certification%20Order%20with%20Attached%20En%20Banc%20Decision.pdf [https://perma.cc/PN4K-L6VH].

301. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456, at *2 (FISA Ct. Rev. Jan. 9, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20WCB%20Order%20180109_0.pdf [https://perma.cc/3FEN-2URA]; In February 2018, the Reporters Committee for the Freedom of the Press filed a motion for leave to file an amicus brief in this FISCR case, which was granted. *See* Motion of the Reporters Committee for Freedom of the Press for Leave to File Brief as Amicus Curiae Supporting Movants, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20Motion%20of%20the%20Reporters%20Committee%20for%20Freedom%20of%20the%20Press%20for%20Leave%20to%20File.pdf [https://perma.cc/RS82-VN7E]. *See also* [Proposed] Brief for The Reporters Committee For Freedom of the Press as Amicus Curiae Supporting Movants, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 26, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Brief%20of%20Amicus%20Curiae%20The%20Reporters%20Committee%20for%20Freedom%20of%20the%20Press%20in%20Support%20of%20Movants_0.pdf [https://perma.cc/Y5S4-F9EZ].

> For years, the telephony metadata program operated in secret. When it became public, it generated a backlash in all three branches. On August 12, 2013, President Obama responded to the outcry by constituting a Review Group. The group sharply criticized the telephony metadata program and recommended its immediate cessation . . . . In the courts, the Second Circuit referred to the government's interpretation of Section 215 as "unprecedented and unwarranted," holding the program unlawful. *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) . . . . Congress, for its part, held hearings and passed a new law, outlawing bulk collection under section 215 *and* PR/TT. The fact that FISC already knew about the program mattered little. It was public access and the disapproval of the People, that drove reform.[302]

On the threshold issue of standing, the government argued that the motion should be dismissed for lack of standing as movants failed to make the necessary "colorable claim" of legal injury.[303] In response, Donohue pointed out that movants did not only seek access to any set of particular, sensitive facts but rather to judicial opinions that have the force of law, so whether a claim to any factual information "ultimately proves non-colorable" was irrelevant to standing.[304] Instead, she argued that standing depended on the fact that the information sought involves "constitutional and statutory analysis, impact[s] rights, and reveal[s] government misbehavior—all matters of law."[305] Accordingly, because the right of access to "matters of law" such as judicial records is a "legally- and judicially-cognizable interest," Donohue argued, the movants had standing

302. Brief for Laura K. Donohue as Amicus Curiae at 27–29, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Amicus%20Brief.pdf [https://perma.cc/EES2-5CGL].

303. United States' Reply Brief at 2, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20United%20States%27%20Reply%20Brief.pdf [https://perma.cc/JTM8-BZYP].

304. Reply Brief for Laura K. Donohue as Amicus Curiae at 14–15, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20Reply%20Brief%20of%20Amicus%20Curiae.pdf [https://perma.cc/SZ2U-4HMJ]; Brief for Laura K. Donohue, *supra* note 302, at 2–3, 27. R

305. Brief for Laura K. Donohue, *supra* note 302, at 9; Reply Brief for Laura K. Donohue, *supra* note 304, at 14–15. R R

and the right to be heard on the scope of their First Amendment rights.[306] When the FISCR addressed the government's argument on whether movants met the colorable claim standard, the court implicitly adopted Donohue's position, stating that "the courts have generally focused not on the merits of the party's claim, but on whether the claim is of the type that is cognizable by a court."[307]

The FISCR ultimately agreed with Donohue on the standing issue, finding that "the movants have standing to seek disclosure of the classified portions of the opinions at issue."[308] The court reached this conclusion by determining that denial of access to the FISC opinions is a "legally protected interest that is concrete, particularized, and actual," and therefore satisfied the requirements for standing.[309]

While the court did not specifically refer to Donohue's arguments in its decision, its ruling can be viewed as an example where the presence of amici had an impact. In fact, when the case was remanded back to the FISC, the court appointed Donohue as amicus again for the subject-matter jurisdiction and merits portions of the case.[310]

c. 2020 FISC Decision

On remand, Judge Collyer agreed with amicus Donohue that, contrary to the government's position, the FISC had subject matter over the motion.[311] But she denied the ACLU and Yale clinic's motion for a declassification review of redacted FISC opinions.[312]

306. Reply Brief for Laura K. Donohue, *supra* note 304, at 2, 14–15. R

307. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456, at *6 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf [https://perma.cc/JTM8-BZYP].

308. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, 2018 WL 2709456, at *1.

309. *Id.* at *4.

310. Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 172. R

311. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, at 4 (FISA Ct. Feb. 11, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2008%20Opinion%20RMC%20200211.pdf [https://perma.cc/9TDQ-FT5K]. Judge Collyer found subject matter jurisdiction based on the FISC's "continuing obligation to maintain the records of those proceedings" sought by movants, including "those portions of the requested opinions that are still classified and not available to the public." *Id.* at 10–11.

312. *Id.* at 4.

In evaluating the movants' claim that the public had a First Amendment right to view the records of the FISA Courts, Judge Collyer applied the "experience-and-logic" test articulated in *Press-Enterprise Co. v. Superior Court* (1986). The crux of the test is whether a record or proceeding has "historically been open to the press and general public," and "whether public access plays a significant positive role" in the judicial process.[313] Amicus Donohue had argued that in applying this test, the FISC should look broadly at the FISA Courts' record, common law practices, and comparable practices in other courts.[314] The court disagreed, finding that such a broad assessment "would lose focus on the distinctive characteristics of FISC opinions and proceedings,"[315] and instead focused narrowly on FISC opinions.[316]

Amicus Donohue submitted a chart cataloguing previously released FISC cases to demonstrate that the FISA Courts have become more open.[317] Judge Collyer drew the opposite conclusion from the chart: that the recent uptick in releases in recent years was the exception, not the rule, and there was "no history of openness" in the court's first 30 years.[318]

On the issue of whether public access plays a significant positive role in the judicial process, Donohue argued for the release of FISC opinions based on "their overwhelming importance for constitutional doctrine, their direct impact on citizens' rights, [and] their revelation of government failure to comply with the law."[319] Judge

313. *Id.* at 10–11 (citing *In re* Certification of Questions of Law to FISCR, 2018 WL 2709456 at *3 (quoting *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8 (1986))).

314. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, at 47 (FISA Ct. Aug. 2, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply%20Brief%20of%20Amicus%20Curiae%20180802.pdf [https://perma.cc/KV26-AFAC].

315. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 311, at 16. R

316. *Id.* at 18.

317. Brief for Laura K. Donohue as Amicus Curiae App. at 1–17, *supra* note 47. The chart was originally submitted to the FISCR in 2018 and referenced extensively by Judge Collyer. *See also* Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 50. R

318. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 19, 22.

319. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 63.

Collyer, however, determined that this interest was outweighed by the concern that releasing classified documents could damage national security and "chill the government's interaction with the Court," undermining the FISA Court's oversight.[320] The court declined to direct a second declassification review, and dismissed the motion.

While Judge Collyer's substantial engagement with Donohue's arguments is a step forward, her vision of the FISC as a fundamentally secretive court, which almost reflexively defers to claims of national security over transparency, is discouraging. It suggests deep-seated resistance to efforts to make the FISA system more open and respectful of Americans' rights and liberties. And, as discussed below, the appellate court was unwilling to intervene.

d. 2020 Appeal

The ACLU and the Yale clinic asked the FISCR to review the FISC's ruling.[321] They argued that the appellate court had the authority to entertain their petition because it was authorized to review the denial of any application, and their motion qualified as an "application" within the ordinary meaning of the term.[322] The FISCR dismissed the petition for lack of jurisdiction.[323] The court concluded that the "application" it was authorized to review re-

320. *In re* Motion for Release of Court Records, 526 F. Supp. 2d at 496.

321. Petition for Review or in the Alternative for a Writ of Mandamus, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Mar. 11, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Petition%20for%20Review%20or%20in%20the%20Alternative%20for%20a%20Writ%20of%20Mandamus%20200311.pdf [https://perma.cc/PPP4-3TD8]. The FISCR ordered movants to show why the FISCR has authority to entertain their petition. Order to Show Cause, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Mar. 13, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Order%20to%20Show%20Cause%20PJ%20JAC%20200313.pdf [https://perma.cc/F2C4-39SN].

322. Movants' Response to the Court's Order to Show Cause at 1, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Apr. 17, 2020), https://www.fisc.uscourts.gov/sites/default/files/Movants%27%20Response%20to%20the%20Court%27s%20Order%20to%20Show%20Cause%20200417.pdf [https://perma.cc/KRL6-8FLG]. Movants also argued that the issue of whether the FISCR's jurisdiction extended to their application concerned "a novel or significant interpretation of the law," requiring the court to appoint an amicus curiae. *Id.* at 2 n.1; *see also* 50 U.S.C. § 1803(b).

323. *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Apr. 24,

ferred more narrowly "to an application made by the Government ex parte and in camera for foreign intelligence surveillance."[324] The FISCR understood its jurisdiction as limited by FISA and not extending to constitutional questions, such as the First Amendment claim at issue.[325] The court also declined to appoint an amicus because the novel/significant amicus provision only governs the court's consideration of an "application for an order or review," not a motion.[326] The court's position was a departure from its record of appointing amici to provide critical privacy and civil liberties perspectives in other cases. For example, in a previous proceeding in the same case, the FISC named Donohue as amicus under the novel/significant provision even though there was no "application" at issue, an appointment that the FISCR characterized as "inadvertent."[327] But the FISCR had appointed amicus Marc Zwillinger to assist in its consideration of a certified question regarding pen registers because, even though the matter at issue was not an "application," the court determined that the question presented a "significant interpretation of law."[328] The FISC had also, on at least three occasions, appointed amici for the purpose of providing civil liberties perspectives under the general amicus provision (which does not require a connection with an "application").[329]

2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Opinion%20200424.pdf [https://perma.cc/H4TK-7NTG].

324. *Id.* at 13.

325. *Id.* at 12.

326. *Id.* at 16; 50 U.S.C. § 1803(2)(A).

327. *See supra* discussion accompanying notes 301–320. The FISCR acknowledged that the FISC had appointed Donohue under the novel/significant amicus provision in 2018, but argued that Donohue's appointment by the FISC under that provision rather than under the general amicus provision was "likely inadvertent" and "does not undermine our foregoing analysis of the text and structure of the FISA." *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 323, at 17 n.53; Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 172. R R R

328. IC On The Record, *Release of FISC Question of Law & FISCR Opinion*, *supra* note 172 ("Upon receiving the certified question of law, the FISCR appointed an amicus curiae, pursuant to 50 U.S.C. Section 1803(i), to assist the FISCR in consideration of what it deemed a significant interpretation of the law."). The provision under which Zwillinger was appointed is unspecified. *See infra* discussion accompanying notes 192–207. R R

329. *See infra* discussion accompanying notes 180–191 and 213–234. These three appointments occurred under the general amicus provision because the amicus pool had not yet been designated. R

These cases suggest that there has been some flexibility in the FISA Courts' approach, and the FISCR may have decided to pull back from this approach and revert to a strict reading of the statute. It is difficult to know, however, whether the decision portends a trend or is restricted to the facts of this long-running case.

5. Withdrawals and Modifications

While amici have thus far had only a limited impact on the FISA Courts' decisions, the *prospect* of amicus involvement seems to have played a role in discouraging the government from seeking authorization for some surveillance. According to the FISA Courts' annual reports, in a total of six instances between 2017 and 2019 where the government was informed that the courts were considering appointing an amicus curiae to address novel or significant issues, the government withdrew or revised those applications to omit "novel or significant" issues rather than submit them to the scrutiny of an amicus.[330] In 2018, the government also belatedly reported that it had withdrawn or modified "a similarly small number" of applications in 2015 and 2016.[331] It is not known whether these applications involved programmatic surveillance or applications for individual surveillance orders or whether the government submitted revised applications at a later point in time.

It is difficult to know whether these withdrawals and modifications are a net positive for civil liberties. They may effectively reduce surveillance, but the government's ability to modify and resubmit the applications undercuts that benefit. Indeed, the government's ability to withdraw or modify FISA applications highlights the way in which the court cooperates with the government to create acceptable surveillance applications, which is quite different from arms-length proceedings in regular courts, and insulates the government from constraining precedent.[332] Well before Snowden

330. 2017 FISC ANNUAL REPORT, *supra* note 172, at 4–5; 2018 FISC ANNUAL REPORT, *supra* note 162, at 5; 2019 FISC ANNUAL REPORT, *supra* note 58, at 4–5; *In 2017, the Government Withdrew Three FISA Collection Requests Rather than Face an Amicus Review*, EMPTYWHEEL (Apr. 26, 2018), https://www.emptywheel.net/2018/04/26/in-2017-the-government-withdrew-three-fisa-collection-requests-rather-than-face-an-amicus-review/ [https://perma.cc/T3WP-D5PC]. R R

331. 2017 FISC ANNUAL REPORT, *supra* note 172, at 4–5. R

332. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 14, 35, 214, 247 (1st ed. 2003) (noting that, in the American legal tradition, adversarial proceedings are a central facet of ensuring government accountability and maintaining a check on government authority). *See also* LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 139 (2016) (noting that the envisioned role of a FISA Court judge was "to enter an

burst onto the scene, critics argued that the FISC was a rubber stamp: from its founding in 1979 to 2012, it rejected just 11 out of more than 33,900 surveillance requests by the government.[333] The court's defenders responded that these numbers did not reflect that fact that in many instances, the court had required the government to revise its surveillance applications.[334] But the back-and-forth between the Department of Justice staff who file FISA applications and the staff serving the FISC judges (as described in a letter from the court's presiding judge to Senator Patrick Leahy) is equally troublesome because it suggests that the Department of Justice and the FISA Courts collaborate to create acceptable surveillance applications.[335] Not only is this a far cry from how courts normally work, it also means that the government has the ability to avoid decisions that go against its position, leaving the FISA Courts' jurisprudence devoid of any articulation of what surveillance activities the law does *not* permit.

It is unclear whether the addition of amici has disrupted this practice.[336] The annual report of the FISA Courts required by the

order as requested or to modify it accordingly," not to deny government applications.). In contrast to other courts, central issues associated with the FISA Courts "ste[m] from the design and evolution of the FISC . . . . In particular, the court's deference to the executive and the absence of either technology experts or adversarial counsel have weakened the rigor of the court's review . . . the success rate for applications under traditional FISA is 'unparalleled in any other American court.'"). *Id.* at 139. DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 139–40 (2016) (comparing the American adversarial legal tradition to the typically non-adversarial nature of FISC proceedings).

333. Evan Perez, *Secret Court's Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013, 7:11 PM), https://www.wsj.com/articles/SB10001424127887324904004578535670310514616 [https://perma.cc/WJZ8-WLLQ].

334. *See*, *e.g.*, Letter from Reggie B. Walton, Presiding Judge, U.S. Foreign Intelligence Surveillance Ct., to the Hon. Patrick Leahy, Chairman, Comm. On the Judiciary, U.S. Senate (July 29, 2013), http://fas.org/irp/news/2013/07/fisc-leahy.pdf [https://perma.cc/89AM-NV5D]; Dina Temple-Raston, *FISA Court Appears to Be Rubber Stamp for Government Requests*, NPR (June 13, 2013) https://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests [https://perma.cc/5JHN-R48V].

335. Greg Nojeim, *Letter Outlines Extensive Collaboration Between FISA Court and DOJ*, CTR. FOR DEMOCRACY & TECH. (July 31, 2013), https://cdt.org/blog/letter-outlines-extensive-collaboration-between-fisa-court-and-doj/ [https://perma.cc/AKM2-SRJJ]; Letter from Walton to Leahy, *supra* note 334. R

336. It may appear that the FISC's rejection rate is going up. According to the FISA Courts' own reports, which only started in 2015 as required by the USA Freedom Act, there were more applications rejected in 2017 than all the earlier years of the courts' functioning starting in 1979 to 2015 combined. However, as the annual reports from prior to the USA Freedom Act were issued by the Department of

USA Freedom Act indicates that out of 1,614 applications in 2017, the court denied only 26 in full but modified 391.[337] For 2018 the court reported that out of 1,318 FISA applications, the court denied only 30 in full but modified 261.[338] Similarly, in 2019, the court reported that out of 1,010 FISA applications, the court denied only 20 in full but modified 264.[339] However, the origin of the modifications—i.e., whether they resulted from negotiations between staff and the DOJ, the judges' demands, or amici recommendations—is not known.

IV.
CONCLUSION AND RECOMMENDATIONS

As the above analysis shows, the impact of amici on the decisions of the FISA Courts has been limited. There appears to be a lingering reluctance on the part of some judges to appoint amici, which is reflected in two publicly available decisions where FISC judges have decided that, even though the case they were considering involved novel or significant interpretation of law, they simply did not need assistance from amici.[340] In addition, based on publicly available decisions, we have identified two instances which appear to meet the statutory requirements for appointing amici where the FISA Courts did not even consider doing so.[341] And the courts appear not to have appointed amici in any requests for individual surveillance applications under Title I of FISA, which may also raise important civil liberties questions.[342]

The current amicus pool is weighted towards former high-level government national security attorneys and technical experts. While these individuals have sterling qualifications and reputations, they also have had long careers defending, and in some cases developing, surveillance programs. This experience undoubtedly gives them valuable insights into the operation of government programs,

Justice (DOJ) and there are significant methodological differences between the FISA Courts' and the DOJ's reports, it is difficult to compare the earlier DOJ rejection rates to the more recent ones released by the FISA Courts. *See* 2017 FISC ANNUAL REPORT, *supra* note 172, at 4. *Cf.* U.S. DEP'T. OF JUSTICE, ANNUAL FOREIGN INTELLIGENCE SURVEILLANCE ACT REPORT TO CONGRESS (Apr. 30, 2018), https://www.justice.gov/nsd/nsd-foia-library/2017fisa/download [https://perma.cc/47PV-RGXS]. R

337. 2017 FISC ANNUAL REPORT, *supra* note 172, at 3. R
338. 2018 FISC ANNUAL REPORT, *supra* note 162, at 3. R
339. 2019 FISC ANNUAL REPORT, *supra* note 58, at 3. R
340. *See supra* text accompanying notes 67–75 and 88–89. R
341. *See supra* text accompanying notes 76–87 and 120–129. R
342. OFF. OF THE INSPECTOR GEN., *supra* note 132. R

but also feeds into the perception that the FISA Courts are reluctant to let civil liberties advocates into their long-insulated and secretive world.

Reformers who hoped that the inclusion of amici would result in more rights-respecting decisions from the FISA Courts will likely be disappointed. The influence of amici's views on the courts is apparent only in two sets of cases. The first set involved the 2015 and 2018 annual approvals of the Section 702 program, and in particular, the rules governing the FBI's searches of this warrantlessly-collected information.[343] Amici's argument for requiring the Bureau to document the foreign intelligence rationale for such searches, first raised in 2015, was eventually adopted by the FISC in 2018 in the face of flagrant FBI abuses of this controversial search authority. This remedy, while certainly a step in the right direction, is hardly a full response to the issues that the FISC itself had identified with FBI backdoor searches, which it had described as a violation of both the statute and the Fourth Amendment. Both the FISC and FISCR are likely correct in describing the recommendation as no more than a modest procedural hurdle, but its impact will only be known when (and if) information about its implementation becomes public.[344] The FISC did side with amici that clear statutory language required the Bureau to keep track of the number of Americans it searched for in Section 702 databases. Again, this is a step forward, but given the clear text of the provision at issue and its well-known history, a contrary conclusion would have been difficult to justify.

The second set of cases in which the amicus may have made a difference relates to the public's right of access to the opinions of the FISA Courts, where the FISCR in 2018 agreed with amicus Laura Donohue's position on the threshold issue of standing, although it did not explicitly adopt or reference her arguments.[345] When the case was remanded to the FISC, Judge Collyer engaged extensively with Donohue's arguments. While she agreed with Donohue's jurisdictional arguments, she disagreed sharply with her on substance. Donohue had argued that the FISA Courts were moving towards greater transparency by releasing more opinions, which serve a vital public function by "address[ing] weighty and important matters of constitutional and statutory law, which daily impact citi-

343. *See supra* text accompanying notes 211–292. R

344. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 95; *In re* DNI/AG 702(h) Certifications, at 42. R

345. *See supra* text accompanying notes 293–310. R

zens' rights."[346] Judge Collyer, however, fell back on the FISC's even longer history of secrecy and the risk of inadvertently releasing national security information as reflecting the court's essentially secret nature. She therefore denied the movants' claimed First Amendment right of public access.[347] The FISCR too refused to take up their appeal, taking the position that it did not relate to a pending "application" before the courts and fell outside the FISCR's jurisdiction.[348]

The presence of amici does seem to have led the FISA Courts to explicitly address civil liberties and transparency arguments. For the most part though, the courts have remained committed to their foundational decisions on statutory construction and constitutional parameters that validated expansive NSA surveillance programs. In the realm of foreign intelligence surveillance, the imperative of national security continues to weigh heavily and privacy concerns lightly, if at all, even when the persons impacted are Americans.

At the same time, the amicus provisions are nested within a broader set of efforts to increase transparency and confidence in the work of the FISA Courts. Their decisions are being declassified at a rate unimaginable in the years before the Snowden revelations, giving the policymakers and the public some insight into the operations of both the NSA and the courts, and allowing the type of robust analysis and critique typically accompanying the rulings issued by other courts. The NSA's retrenchment on two major programs that it previously claimed were absolutely essential to national security—"abouts" collection under Section 702 and bulk collection under Section 215[349]—may be attributable in part to the increased scrutiny of the agency's activities after Snowden, by the FISA Courts, Congress, and the public.

These positive trends should be built upon, especially since there is a risk that the public's window into NSA surveillance programs will narrow as the agency moves away from the programs disclosed by Snowden to newer ventures. The controversy surrounding the surveillance of Carter Page has triggered renewed interest in reforming FISA, including by re-imagining the role and authorities of amici. The Safeguarding Americans' Private Records Act (SAPRA), introduced by Sen. Ron Wyden (D-OR) and Rep. Zoe

346. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 52.

347. *See supra* text accompanying notes 311–320. R

348. *See supra* text accompanying notes 321–329. R

349. *See supra* text accompanying notes 90–92. R

Lofgren (D-CA) in January 2020 would give amici access to every opinion, transcript, pleading or other document of the FISC and FISCR.[350] With this information, amici would be able and are authorized to "raise any issue with the Court at any time," "whether or not such input was formally requested by the court."[351] Another option, proposed by Rep. Chris Stewart (R-UT), which would require an amicus "to assist such court in the consideration of any initial application for an order that seeks to target an identifiable United States person pursuant to sections 104, 303, 703, or 704" of FISA.[352]

Many of these ideas, including several of the recommendations that we developed in the course of our research, are reflected in the USA Freedom Reauthorization Act of 2020.[353] The House version of this law, which was adopted on a bipartisan basis in March 2020, included a handful of improvements. The Senate version of the bill, which was adopted overwhelmingly in May 2020, went much further in expanding the role and access of amici in FISA proceedings.[354]

350. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(4)(c) (2020) (Amici appointed by the FISA Courts "shall have access to unredacted copies of each opinion, order, transcript, pleading, or other document of the Court and the Court of Review.").

351. *Id.* § 301(a)(1)-(3). Similarly, the amendment to the USA Freedom Reauthorization Act of 2020 that was introduced in the Senate by Senators Mike Lee (R-Utah) and Patrick Leahy (D-Vt.) would empower amici to "raise any issue with the court at any time, regardless of whether the court has requested assistance on that issue. S. Amend. 1584 to H.R. 6172, § 302 (b)(1)(e), 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020).

352. FISA Improvements Act of 2019, H.R. 5396, 116th Cong. § 2(a)(1)(c) (2019). Section 104 (50 U.S.C. § 1804) and Section 303 (50 U.S.C. § 1823) concern FISC orders authorizing electronic surveillances and physical searches, respectively, to gather foreign intelligence information. Section 703 (50 U.S.C. § 1881b) allows the FISC to authorize an application for the collection of electronic communications of a U.S. person located outside the U.S. when the collection is conducted inside the U.S. Section 704 (50 U.S.C. § 1881c) provides additional protection for electronic communication collection activities directed against U.S. persons located outside of the U.S., including that the government must obtain an order from the FISC in situations where the U.S. person target has "a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes." 50 U.S.C. § 1881c(a)(2) (2008).

353. Some of these recommendations were summarized by the authors in a post for *Just Security* in February 2020. Faiza Patel and Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, JUST SEC. (Feb. 26, 2020), https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici/ [https://perma.cc/P4RJ-489V].

354. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(a) (2020); S. Amend. 1584 to H.R. 6172, 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020).

This version has been met by resistance on the part of the Department of Justice, which argues that it would give amici access to too much information in FBI files and court records and "would put at risk our productive relationships with foreign partners and their willingness to share information with us."[355] President Trump, who remains convinced that his campaign was illegally targeted for surveillance under FISA, has threatened to veto the reauthorization bill altogether.[356] Nonetheless, for the amici to add value to the proceedings of the FISA courts, reforms must be undertaken—by Congress or the FISA Courts—along the lines set out below.

Recommendation: Increase amicus participation in FISA Court proceedings

Congress should broaden the range of situations meriting the appointment of amici in five ways.

First, the NSA is continually developing new technologies and programs and their impact on privacy and civil liberties should be subject to amicus input. These initiatives may raise novel or significant interpretations of law but could also be treated by the courts as applications of existing precedent, putting them outside the scope of the USA Freedom Act's amicus provision. Accordingly, Congress should mandate amicus participation where the FISA Courts are being asked to approve new technologies or programs and new applications of existing technologies.

Second, there may be instances in which the FISA Courts are asked to consider issues that may not fall precisely under standards focused on novelty or significance, but nonetheless have serious civil liberties implications.[357] For example, as far as the public re-

355. Betsy Woodruff Swan, *Trump officials detail opposition to federal surveillance bill*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-officials-fisa-bill-285387 [https://perma.cc/N2CR-VK8B]; Press Release, Statement by Assistant Attorney General Stephen E. Boyd on the House of Representative's Consideration of Legislation to Reauthorize the U.S.A. Freedom Act (May 27, 2020), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-stephen-e-boyd-house-representative-s-consideration [https://perma.cc/HS9G-ZFXP] ("Although that legislation was approved with a large, bipartisan House majority, the Senate thereafter made significant changes that the Department opposed because they would unacceptably impair our ability to pursue terrorists and spies."). *See also* Steven T. Dennis, *Senate Backs Revival of Lapsed Surveillance Authorities*, BLOOMBERG (May 14, 2020), https://www.bloomberg.com/news/articles/2020-05-14/senate-backs-revival-of-lapsed-surveillance-authorities [https://perma.cc/6D36-55DL].

356. Donald J. Trump, TWITTER (May 27, 2020, 6:16 PM), https://twitter.com/realDonaldTrump/status/1265768877427851265?s=20 [https://perma.cc/7TJ9-ZFSA].

357. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 189. R

cord reflects, the courts have not appointed amici in any case involving a FISA Title I order. 2014 media reports that FISA surveillance orders had been issued for the communications of Muslim American leaders suggest that these concerns raise civil liberties issues.[358] More recently, President Trump and his supporters have argued that the surveillance of Carter Page was political motivated. And although the DOJ Inspector General did not find evidence of political bias in that investigation, he documented serious flaws in the handling of the case,[359] and the DOJ conceded that at least two of the Page surveillance orders did not meet the legal standard.[360] This is not an isolated instance. The Inspector General's review of additional files uncovered errors and a failure to follow internal rules in a number of applications submitted to the FISC.[361] To address these types of concerns, Congress should strengthen the role of amici in Title I proceedings by mandating the appointment of amici for individual surveillance applications that involve political or religious activities.[362]

There is strong bipartisan support in Congress for such an expansion. The House version of the USA Freedom Reauthorization Act of 2020, which passed by a bipartisan vote of 278-136, would require an amicus appointment in any case that presents "exceptional concerns about the protection of the rights of a United States person under the first amendment to the Constitution," unless the court finds such an appointment inappropriate.[363] The Senate version further expands the situations where amicus should be appointed to include: any case that presents or involves a sensitive

358. Greenwald & Hussain, *supra* note 131. R

359. *See supra* text accompanying notes 132–142; *see also supra* note 133. R

360. Order Regarding the Handling and Disposition of Information, *In Re* Carter W. Page, A U.S. Person, *supra* note 134. R

361. *See* Management Advisory Memorandum from Horowitz to Wray, regarding the Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Application Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons, *supra* note 152. R

362. The bill introduced by Sen. Ron Wyden (D-OR) and Rep. Zoe Lofgren (D-CA) also identifies targeting based on these types of factors as a potential problem and requires the DOJ Inspector General to submit a report to Congressional committees on the use of "activities and expression protected by the first amendment to the Constitution of the United States" and "[r]ace, ethnicity, national origin, religious affiliation, and such other protected classes as the Inspector General considers appropriate" in applications for orders under Section 215 and "investigations for which such orders are sought." The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 112(b) (2020).

363. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(a) (2020).

investigative matter, including those involving the activities of domestic public officials, political candidates, or their staffers; domestic religious or political organizations, or individuals prominent in such organizations; or the domestic news media.[364]

Third, Congress should mandate amicus participation in the FISA Courts' reviews of the government's requests for authorizations relating to programmatic surveillance, i.e., for Section 702, the Section 215 call records program if it is restarted, and any future form of programmatic surveillance.[365] These programs affect at least thousands of Americans and the public record shows they present significant and repeated compliance problems. For example, the FISC's decisions discussed above show how the FBI has misused its Section 702 backdoor search authority,[366] as well as the repeated failure of the NSA to comply with court-imposed rules for Upstream "abouts" collection which eventually led to the discontinuation of the program.[367] Similarly, the government has misused the Section 215 call detail records program. In 2009, the DOJ disclosed to the FISC that the NSA had been automatically querying an "alert list" of about 18,000 phone numbers against its phone records database, even though about ninety percent of the numbers on the list did not meet the FISC-mandated standard of "reasonable, articulable suspicion" of being associated with terrorism.[368] And in 2018, the NSA reported that it had acquired records not authorized by the FISC, eventually suspending the program.[369] The evidence shows that these programs require the ongoing check that an amicus provides.[370] The Senate's version of the

364. S. Amend. 1584 to H.R. 6172, §§ 302 (a)(1)-(2). Like the House version and the current novel/significant amicus provision, the Senate version allows to the court to avoid appointing an amicus if it issues a finding that such appointment is inappropriate.

365. *Reauthorizing the USA Freedom Act of 2015: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 28–29 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice).

366. *See supra* text accompanying notes 213–257. R

367. *See supra* text accompanying notes 120–129. R

368. *See* Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, *In re* Production of Tangible Things from [REDACTED], No. BR 08-13 (FISA Ct. Jan. 28, 2009), https://www.eff.org/sites/default/files/filenode/br_08-13_alert_list_order_1-28-09_final_redacted1.ex_-_ocr_0.pdf [https://perma.cc/NNG4-JDUL]; PCLOB SECTION 215 REPORT, *supra* note 42, at 47–48. R

369. *See supra* text accompanying notes 90–92. R

370. Another option, as proposed in SAPRA, is to require the FISA Courts to "randomly select an amicus curiae" from the amicus pool to assist with each Section 702 certification. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(b)(1)(d) (2020).

USA Freedom Reauthorization Act of 2020 includes this mandate, requiring the FISA Courts to appoint an amicus whenever a case "presents a request for reauthorization of programmatic surveillance, unless the court issues a finding that such appointment is not appropriate."[371]

Fourth, Congress should expand the mandatory amicus appointment provision beyond "application[s] for an order or review."[372] As demonstrated in the recent denial of the ACLU and Yale clinic's petition for review in the public right of access case, the FISCR has defined "application" in the amicus provision narrowly to refer solely "to an application made by the Government *ex parte* and *in camera* for foreign intelligence surveillance."[373] The benefit of an amicus's privacy and civil liberties expertise should not be limited to the court's consideration of applications. Publicly available documents show that amici have provided critical expertise in situations not involving an application by the government, such as the above-mentioned motion involving the public's right to access court records and the FISCR's consideration of questions related to the use of pen registers and to movants' standing to seek access to judicial records.[374] The Senate version of the USA Freedom Reauthorization Act would address this issue by requiring amicus appointments in specified instances to assist "in the consideration of any application *or motion* for an order or review."[375] Congress should further strengthen this provision by clarifying that amici should assist in the consideration of certified questions as well.

Fifth, Congress should clarify that amici are permitted to provide the court with their views on any topic raised by the order or review for which they have been selected. This seems to have been the intention behind the provision, which provides that amici should be appointed "to assist in the consideration of any application for an order or review" that meets the standard of presenting a novel or significant interpretation. It does not limit amici to addressing *just* those novel or significant interpretations.[376] Nonetheless, at least in the Section 702 certification cases, amici were only appointed with respect to specific issues rather than the full set of

371. S. Amend. 1584 to H.R. 6172, § 302 (a)(1)(A).

372. 50 U.S.C. § 1803(i)(2)(A).

373. *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 323, at 13; *See supra* discussion accompanying notes 321–326. R R

374. *See supra* discussion accompanying notes 192–207 and 301–320. R

375. S. Amend. 1584 to H.R. 6172, § 302(a)(1) (emphasis added).

376. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(A).

issues before the FISC. During the FISC's review of the government's annual Section 702 certifications for 2018, the FISC appointed amici to address two questions relating to "abouts" collection.[377] But the case also raised the issue of whether the FBI's practice of conducting "batch queries" comports with Fourth Amendment and its statutory authority. Amici's views could have resulted in a more thorough analysis by the FISC of the serious legal issues raised by these queries.[378] The Senate version of the USA Freedom Reauthorization Act of 2020 addresses this as well, stating that the amicus "may seek leave to raise any novel or significant privacy or civil liberties issue relevant to the application or motion or other issue directly impacting the legality of the proposed electronic surveillance with the court, regardless of whether the court has requested assistance on that issue."[379]

The FISA Courts do not need to wait on Congress to increase amicus participation. They could broaden their interpretation of what constitutes a novel or significant legal issue requiring amicus participation, including in Title I cases. Moreover, the courts have always been free to appoint amici under their inherent authority, which was reiterated in the USA Freedom Act.[380] In the early days after the passage of the law, the FISC used this general amicus provision to appoint amici because the novel/significant provision required the selection of amici from a pool, which had not yet been designated.[381] They also used this provision to appoint John Cella as amicus to assist in the proceedings relating to 2018 Section 702 certifications.[382] Most recently, the FISC used this provision to appoint David Kris to assist in evaluating changes to FBI procedures after the Justice Department's Inspector General's report showed that the court was not being provided complete information.[383] The FISC and the FISCR should continue and expand their use of this mechanism but should widen the pool of individuals they con-

377. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4. R

378. *See supra* text accompanying notes 243–247. Since there is no reference to amici's views on batch queries in the FISC opinion and the issue was not among those on which they were asked to opine, we assume they did not weigh in on batch queries. However, amici's briefs are not publicly available, so it is impossible to know for certain whether they provided the FISC with any input on batch queries. R

379. S. Amend. 1584 to H.R. 6172, § 302(b)(1)(E).

380. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(B).

381. *Id.* §§ 1803(i)(1)-(2), § 401(i)(2); *see also supra* note 172. R

382. *See supra* note 237; *see also supra* text accompanying notes 236–288. R

383. *See supra* text accompanying notes 133–142. R

sider for these appointments to include more people who do not have a record of government service as discussed below.

Recommendation: Prioritize Privacy and Civil Liberties Interests

In the USA Freedom Act of 2015, Congress made it clear that amici appointed in cases involving novel or significant legal issues should advocate for individual privacy and civil liberties, while allowing for other types of arguments and expertise from amici that the FISA Courts would find useful.[384] The FISA Courts, however, have a mixed record of receptivity to civil liberties amici. Congress should require the FISA Courts to appoint at least one amicus with expertise in civil liberties in every case meriting the appointment of amici, a proposal included in the Senate version of the USA Freedom Reauthorization Act of 2020.[385] Another way of increasing civil liberties voices in FISA Court proceedings is to give groups and individuals not designated by the court sufficient notice that they can move to participate. SAPRA, the bill introduced by Sen. Wyden and Rep. Lofgren, for example, includes a provision that requires the FISA Courts to publish novel questions of law it is considering in order to obtain briefs from third parties.[386] Such publication must take place to the greatest extent practicable without "disclosing classified information, sources, or methods."[387] This type of publication would both increase transparency about the court's docket and allow a range of voices to provide their views to the courts.[388]

The FISA Courts themselves are well positioned to enhance the perception of their commitment to protecting civil liberties by recalibrating the amicus pool to include more individuals who have not served in national security positions in the government. Given that the amicus structure will be an ongoing feature of the courts'

384. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(4).

385. S. Amend. 1584 to H.R. 6172, § 302(a)(1)(A) (requiring the FISA Courts to appoint one or more individuals in particular circumstances, "not less than one of whom possesses privacy and civil liberties expertise, unless the court finds that such a qualification is inappropriate").

386. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(5) (2020). The bill also includes a provision requiring the of publication of certified questions of law for review by the FISCR. *Id.* § 301(c)(1).

387. *Id.*

388. The FISA Courts have already accepted briefs from third parties in some instances, including granting the Reporters Committee for the Freedom of the Press's motion for leave to file an amicus brief during the FISCR's review of the public right of access case. *See* Motion of the Reporters Committee for Freedom of the Press for Leave to File Brief as Amicus Curiae Supporting Movants, *supra* note 301. R

work, they have time to vet and appoint amici with civil liberties backgrounds who can obtain the security clearances necessary to allow them to participate in future cases. Defense counsel appearing before the Guantanamo military commissions, for example, provide a precedent for doing so.[389] The courts should also refrain from appointing individuals involved in approving or implementing a surveillance program or defending it before Congress or in judicial proceedings to serve as amicus in cases involving those programs. The FISCR Rules of Procedure already includes a rule to avoid conflicts of interest in amicus appointments, which could be expanded to cover these types of situations.[390]

Recommendation: Enhance the Effectiveness of Amici

For amici to be able to provide their critical perspective and participate in FISA Court proceedings to the fullest extent, Congress should ensure that amici have access to all necessary materials and provide a pathway for amici to appeal. These types of provisions were suggested during the reform debate that led to the passage of the USA Freedom Act, and versions also appear in SAPRA and both the House and Senate versions of the USA Freedom Reauthorization Act of 2020.

First, Congress should ensure that amici have available all relevant documents and information that would allow them to make the best arguments. The USA Freedom Act left it up to the appointing court to decide on an amicus' access on a case by case basis.[391] The documents made available to amici have only been publicly identified in two instances. The FISC order appointing Preston Burton as amicus curiae in the case concerning the retention of Section 215 data for litigation and technical purposes, notes that the court determined that the government's application (including exhibits and attachments) and the full, unredacted Primary Order in the docket were relevant to the duties of the amicus, and those materials were provided to him.[392] The FISC order ap-

389. *See* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 42–43, 141–42 (Mark P. Denbeaux et al. eds., 2009).

390. FISA CT. REV. R. 15(d).

391. Amici assigned to a case in the FISA Courts "shall have access to any legal precedent, application, certification, petition, motion, or such other materials *that the court determines are relevant* to the duties of the amicus curiae." USA FREEDOM Act of 2015, sec. 401, § 1803(i)(6)(A)(i) (emphasis added).

392. Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, *supra* note 172, at 4. Burton also noted in his amicus brief that he requested and received access to the unredacted, classified version of the Department of Justice Office of the Inspector General's May 2015 R

pointing Amy Jeffress as amicus in the 2015 Section 702 case listed the materials she received, which included the government's submissions and certifications, and relevant previous decisions of the FISA Courts.[393] Jeffress' amicus brief mentions that she also received the full report of the PCLOB on the Section 702 program.[394] She reported receiving a "briefing from Judge Hogan and the staff of the Foreign Intelligence Surveillance Court ("FISC") concerning the questions presented."[395] However, Jeffress also noted that she lacked access to the FBI's 2011 Minimization Procedures, which were relevant to her analysis of the court's precedent and the 2011 FISC decision approving the government's Section 702 application.[396] Since several amicus briefs are not publicly available, it is difficult to assess if other amici were hindered in their mandate by a lack of information.

Moreover, given the repeated compliance issues with Title I surveillance applications uncovered by the DOJ Inspector General, the supporting documentation underlying applications for electronic surveillance or physical search under FISA, including accuracy reviews and any exculpatory evidence, should be made available to both the FISA Court and amici appointed in those cases.

The Senate version of the USA Freedom Reauthorization Act of 2020 includes provisions requiring the government to provide the court and amici such supporting documentation. It also mandates that amici be provided access to a broad range of materials, including unredacted copies of each opinion, order, transcript, pleading, or other document, and any relevant legal precedent, including any such precedent that is cited by the government.[397] These provisions are a significant shift from the current law, which requires that amici be provided with materials only "to the extent consistent with the national security of the United States" and determined by the court to be "relevant to the duties of the amicus curiae."[398] The Department of Justice has opposed the Senate bill

report, *A Review of the FBI's Use of Section 215 Orders*. *See* Memorandum of Law by Amicus Curiae Regarding Government's August 27, 2015 Application to Retain and Use Certain Telephony Metadata after November 28, 2015, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], *supra* note 189, at 4 n.4. R

393. Order Appointing an Amicus Curiae, [REDACTED], *supra* note 172. R

394. Jeffress Amicus Brief, *supra* note 213, at 2–3. R

395. *Id*. at 2.

396. *Id*. at 22 n.6.

397. *See* S. Amend. 1584 to H.R. 6172, §§ 207(a), 302(c)(1).

398. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(6).

in part because of the lack of national security exception to the amicus's access to materials, arguing that it would jeopardize relationships with foreign partners.[399] This position suggests an unwarranted lack of trust in both the FISA Courts and amici who are cleared for access to classified information and could be construed as born of an impulse to hide problems of the sort that have recently come to light in the reviews triggered by the Carter Page surveillance applications.

Second, Congress should provide amici with a path to requesting appellate review from the FISCR. As the discussions above demonstrate, a single FISC judge is often charged with deciding cases that shape surveillance programs affecting the privacy of hundreds of millions of people around the world. If the government disagrees with the judge's decision, it can appeal, but amici have no way of even bringing the issue to the attention of the FISCR. As a result, "erroneous decisions against the government will be corrected, but erroneous decisions in the government's favor will remain on the books, undermining the integrity and quality of the case law."[400]

While standing concerns have often been cited as a reason for preventing a traditional right of appeal for amici,[401] they should not stand in the way of allowing amici to bring to the attention of the FISCR issues that it believes were wrongly decided by a FISC judge. The FISCR has in the past decided to consider issues that were not appealed by the government (the pen register case),[402] so there is a path for it to decide on taking up an issue raised by amici. Both the House and Senate versions of the USA Freedom Reauthorization Act of 2020 include a mechanism to ensure that amici have the ability to raise issues without triggering standing concerns.[403] Amici would be permitted to petition the FISC to cer-

399. Woodruff Swan, *Trump officials detail opposition to federal surveillance bill*, *supra* note 355; Press Release, Statement by Assistant Attorney General Stephen E. Boyd, *supra* note 355. R R

400. *Reauthorizing the USA Freedom Act of 2015*: *Hearing Before the* S. *Comm. on the Judiciary*, *supra* note 365, at 29 (statement of Elizabeth Goitein). R

401. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 26. R

402. *See supra* text accompanying notes 192–207. R

403. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(b)(2) (2020); Similarly, SAPRA's appeal provision would have allowed amici appointed under the novel/significant amicus provision to apply to the FISC to refer the matter for en banc review or to the FISCR as the court "considers appropriate" and would permit amici appointed to assist the FISCR can apply to the court to refer the decision to the Supreme Court for review as the court "considers appropriate." The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(2)(b) (2020).

tify a question of law to the FISCR, and if the petition is refused, the FISC "shall provide for the record a written statement of the reasons for such denial."[404] If a question is taken up by the FISCR following a petition, the bill requires the FISCR to appoint the amicus in its consideration of the question, unless the court issues a finding that such appointment is inappropriate.[405] A similar process would be available to amici to petition the FISCR to certify a question of law to the Supreme Court, but the FISCR would not be required to provide the reasons for any denial.[406]

Even absent Congressional action, the FISA Courts could act to improve amici's access to information by finding ways to permit sharing of information among amici. Amici tend to have a narrow window into the programs or issues for which they are appointed and cannot consider them in the context of the government's other programs, even those that are intimately related. Amici also operate mostly in isolation, unable to discuss the difficult issues they must address with colleagues, not even other amici who have security clearance. These issues could be addressed by appointing several amici for a single matter. Such appointments are permitted by Section 401 of the USA Freedom Act, upon application by amici,[407] and the FISC used this mechanism for the 2018 Section 702 certifications.[408] This is not a perfect solution because amici would have no window into other programs that might inform their assessment and arguments, but would nonetheless be helpful.

Recommendation: Increase Transparency

While transparency is one of the areas in which there has been progress, three changes would greatly improve the public's understanding of, and confidence in, the FISA Courts' work.

First, the lack of a complete docket makes it difficult for the public to assess the extent to which amici are involved in pending cases, especially given variations in the timing of declassification decisions (anywhere from same-day release to over twelve years delay).[409] It is telling that when the FISC recently evaluated its history

404. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(b)(2) (2020).

405. *Id.*

406. *Id.*

407. 50 U.S.C. §1803(i)(5) (2009).

408. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4; *supra* text accompanying notes 236–238. R

409. For instance, an opinion issued by FISC Judge Michael J. Davis was released on August 20, 2018, but its date of issuance is redacted. Judge Davis served on the FISC from 1999 to 2006, so the time period between issuance and release of this opinion was at least twelve years. Order and Opinion, [REDACTED], No. [RE-

of releasing court documents, it turned to a chart submitted to the court by amicus Laura Donohue cataloging released orders and opinions not the court's own website or records.[410] Congress should remedy this lacuna by requiring the courts to publish a redacted annual docket indicating their caseload and showing the cases in which amici have been appointed and by setting guidelines (or better yet, deadlines of the sort included in the 2020 reform bills[411]) for the declassification of decisions.[412] Alternatively, the courts could publish such a docket at their own initiative, consulting with the Department of Justice and other agencies as necessary on redactions.

Second, to further build public confidence in the FISA Courts, Congress should formalize the procedure for the declassification of amicus briefs. Thus far, of the 13 publicly known cases[413] following the USA Freedom Act in which amici have been appointed, briefs from only six have been declassified.[414] Without the briefs, the public is unaware of the full extent of the arguments put forward by amici and instead must rely on the courts' recap of the parts of

DACTED] (FISA Ct. [REDACTED]) (Davis, J.), https://www.dni.gov/files/documents/icotr/08202018/0820218_Document-5.pdf [https://perma.cc/M4QD-CR9K]; FOREIGN INTELLIGENCE SURVEILLANCE COURT, FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: CURRENT AND PAST MEMBERS (2013), https://assets.documentcloud.org/documents/727664/fisc-fiscr-members-1978-2013.pdf [https://perma.cc/WTK5-7JD8]. Our analysis of published data shows that about half of the decisions that have been declassified since the USA Freedom Act became law took over three years from the date of issuance to be released to the public. Decisions issued post-USA Freedom were released, on average, within three months of issuance. Note that the dates of issuance for several released decisions have been fully redacted. Those decisions were excluded from these calculations.

410. *See supra* text accompanying notes 311–320; *see also FISC/FISCR Opinions*, *supra* note 47. R R

411. For instance, the USA Freedom Reauthorization Act of 2020 would require declassification reviews to be completed within 180 days. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 301(a) (2020).

412. The USA Freedom Act does provide for more timely notification to Congress. The Attorney General is required to provide Congress with copies of FISA Court decisions, orders, opinion, etc. that include a "significant construction or interpretation of any provision of law" within 45 days after it is issued. In addition, every 6 months as part of a semi-annual report, the Attorney General is required to "submit to the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, and the Committees on the Judiciary of the House of Representatives and the Senate, in a manner consistent with the protection of the national security . . . copies of all decisions, orders, or opinions . . . that include significant construction or interpretation of the provisions of this chapter." 50 U.S.C. § 1871(c) (2009).

413. *See supra* note 58. R

414. *See supra* text accompanying notes 174. R

amici's briefs they consider in their decision-making. The procedure could be modeled on the one used for court decisions and orders,[415] but modified to take account of the fact that amici will likely only be appointed in a subset of cases which will almost certainly be of public interest. Thus, Congress should require the Director of National Intelligence, acting in consultation with the Attorney General, to expeditiously conduct declassification reviews of all amicus briefs submitted to the FISA Courts, with the aim of making these publicly available to the greatest extent possible. As with FISA Court decisions, the DNI should be permitted to withhold briefs if "necessary to protect the national security of the United States or properly classified intelligence sources or methods," but in that case they must publish an unclassified statement summarizing the legal arguments made by amici.

Third, Congress should mandate transparency around the interactions between the Department of Justice and the staff of the FISA Court. As discussed above, the extensive consultations between DOJ staff and the staff serving the FISC judges creates the perception that the court is assisting the government in crafting acceptable surveillance requests.[416]

* * * * *

The history of foreign intelligence surveillance in the U.S. illustrates how weak limits on surveillance and insufficient oversight lead to abuse. This Article details the impact of one aspect of the reform efforts relating to the NSA's surveillance programs—the USA Freedom Act's amicus provisions—which, for the first time, aimed to inject an explicitly civil liberties and privacy-minded perspective into the FISA Courts' processes. Based on our analysis, the involvement of amici in the FISA Courts has not yet led to any substantial constraints on surveillance, in part due to the judges' hesitance to appoint amici and deference to the government's national security arguments. While the positive influence of amici can be seen in a few FISA Court decisions, the statutory and institutional

415. USA FREEDOM Act of 2015, sec. 402(a). *See also supra* notes 48 and 295. R

416. *See supra* text accompanying notes 334–338. The bill proposed by Rep. Chris Stewart bill includes a requirement that the Attorney General maintain records of all written or oral communications between the DOJ and the FISA Courts. FISA Improvements Act of 2019, H.R. 5396, 116th Cong. § 2(d) (2019). Neither the House nor Senate versions of the USA Freedom Reauthorization Act of 2020 contain a provision for transparency regarding the interactions between the DOJ and the staff of the FISA Court. USA FREEDOM Reauthorization Act of 2020, H.R. 6172. R

limits on the impact of amici are significant. This Article proposes reforms for Congress and the FISA Courts themselves to maximize the potential for amici to effect change from within the FISA Court system. These changes will improve the functioning of amici in the FISA Courts and contribute to greater public confidence in a system that—despite recent progress in transparency—continues to operate in secret.