# Vox Populi In Camera: Reforming the Foreign Intelligence Surveillance Act to Preserve Civil Liberties Through Adversarial Proceedings

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## I. INTRODUCTION

Nowadays, there are few things in American politics upon which progressives and conservatives agree. An even fewer number of subjects unite them against the federal bureaucracy. One such controversy, at present, concerns the Foreign Intelligence Surveillance Act ("FISA"). This Act has made strange bedfellows—bringing together members of the House Freedom Caucus and the American Civil Liberties Union, on one side, against the U.S. intelligence community, on the other.[1] As of writing, Congress is embroiled in a controversy over reauthorizing a key provision of the law, with reports indicating a lack of consensus to do so.[2]

The concern with FISA is regarding its apparent erosion of civil liberties. In 1978, Congress enacted FISA to provide the first statutory framework for gathering foreign intelligence inside and outside the United States.[3] Ordinarily, under Supreme Court precedent in *Katz v. United States*, the Fourth Amendment restrains the government from surveillance where a person has a reasonable expectation of privacy, except on issuance of a warrant by a federal court, based on probable cause.[4] *Katz*, however, noted an exception for cases involving national security, where normal proceedings are not always feasible.[5] The evidence of probable cause may be highly classified, and the facts may necessitate secrecy of proceedings to protect the sources and methods of surveillance.[6] FISA remedied this problem by creating a new court—the U.S. Foreign Intelligence Surveillance Court ("FISC")—which hears applications for such warrants, *in camera* and *ex parte* (i.e., a classified proceeding involving only the government pleading before the judge), and where the government may, under special procedures, request warrants for

1. *Warrantless Surveillance Under Section 702 of FISA*, ACLU (Sept. 28, 2023, 9:43 PM), https://www.aclu.org/issues/national-security/warrantless-surveillance-under-section-702-fisa [https://perma.cc/L7UM-X65E]; *Chairs of Progressive and Freedom Caucus Agree – The FBI Is Out of Control*, PROJECT FOR PRIV. AND SURVEILLANCE ACCOUNTABILITY (Feb. 16, 2023), https://www.protectprivacynow.org/news/chairs-of-progressive-and-freedom-caucus-agree-the-fbi-is-out-of-control [https://perma.cc/D7BR-SAET].

2. Arjun Singh, *Here's The Unfinished Work Congress Is Leaving Behind As It Breaks For Thanksgiving*, THE DAILY CALLER (Nov. 16, 2023, 8:24 PM), https://dailycaller.com/2023/11/16/unfinished-work-congress-thanksgiving/ [https://perma.cc/C27T-9GJC].

3. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-85(c)).

4. Katz v. United States, 389 U.S. 347, 358-59 (1967).

5. *Id.* at 358.

6. *Foreign Intelligence Surveillance Court (FISC)*, ELEC. PRIV. INFO. CTR. (Nov. 25, 2021, 10:17 AM), https://epic.org/foreign-intelligence-surveillance-court-fisc/ [https://perma.cc/P4E8-R7SM].

surveillance.[7] The arrangements under FISA, purportedly, balance national security with constitutional rights.[8]

Crucially, FISA applies to "foreign" intelligence. It limits the government to conducting surveillance of individuals and entities who are agents of a foreign power, terrorists, or saboteurs.[9] "U.S. persons"—or U.S. citizens, lawful permanent residents, associations of such persons, and companies incorporated in the United States and their data—as well as collections primarily taking place inside the United States are subject to strict "minimization" procedures to prevent U.S. persons' data from being collected and, if inadvertently collected, to prevent it from being used against them.[10] The size, scope, and permanence of the federal government's electronic surveillance programs, which collect massive amounts of data, invariably mean that some U.S. persons' data will be collected.[11] This makes both the minimization procedures under the FISA and the FISC's judicial oversight critical to protecting U.S. persons from unauthorized surveillance.[12]

Therein lies the basis for controversy. Critics have attacked FISA, specifically its Section 702, for its purported use to target U.S. persons using information gathered through FISA warrants. Progressive opponents, such as the Brennan Center for Justice, have claimed that FISA has been "routinely abused . . . to gain warrantless access to the communications of tens of thousands of protesters, racial justice activists, 19,000 donors to a congressional campaign, journalists, and members of the U.S. Congress."[13] Conservative opponents claim that FISA has been used to target conservative politicians, specifically Donald Trump during the 2016 presidential election.[14] Whether such information, once gathered, has been abused by the federal government to thwart the efforts of these groups is unclear, though the very existence of a constitutional rights violation against these groups is enough to merit aggrievement and injury.[15] Moreover, that these organizations may be

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7. FISA Ct. Rev. 7(j).

8. *The Foreign Intelligence Surveillance Act of 1978 (FISA)*, U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE (Mar. 27, 2021, 10:13 PM), https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286#vf4tzl [https://perma.cc/8N6A-CKEP].

9. 50 U.S.C. § 1801(e)(1).

10. *See id.* at § 1801(h); *see also* 50 U.S.C. § 1873(g)(4).

11. *See* William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1641 (2010).

12. *Id.* at 1635 (programmatic surveillance approved by the FISC, by statute, requires minimization procedures).

13. *Coalition Statement Urges Senator Schumer to Keep Reauthorization of Section 702 Out of Continuing Resolution*, BRENNAN CTR. FOR JUST. AT N.Y.U. L. SCH. (Nov. 13, 2023), https://www.brennancenter.org/our-work/research-reports/coalition-statement-urges-senator-schumer-keep-reauthorization-section [https://perma.cc/FRA4-BQUU].

14. *See* Karoun Demirjian, *G.O.P. Threatens Spy Agencies' Surveillance Tool*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/section-702-spying.html [https://perma.cc/5XV5-LVN5].

15. *See* 42 U.S.C. § 1983 ("Every person who . . . [causes] deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .").

surveilled by a government whose actions they oppose is considered to have a "chilling effect" on free speech.[16]

Nevertheless, since its enactment, FISA has been regarded as instrumental by the federal government in protecting the United States against security threats.[17] The intelligence community has warned of grave consequences for national security if the baby is thrown out with the bathwater and Section 702 is repealed.[18]

The opposition to FISA is not recent, and efforts have been made to address demands for greater protections of U.S. persons in the FISA process. Enacted in 2015, the USA FREEDOM Act included several reforms to FISA, among them the creation of a panel of amici curiae, who would brief the FISC with their expertise when a "novel or significant interpretation of the law" arose during a warrant application.[19] The FISA process would remain non-adversarial, but the amici would provide an independent voice on matters to inform the FISC's decision.[20]

The reform, while welcome, does not appear to have been sufficient—either to dampen criticism of FISA's programmatic surveillance programs or meaningfully prevent abuses of the system since 2015.[21] Adversarial hearings at the FISC, whereby special advocates with requisite security clearances appear before the court to oppose government warrant applications, have been proposed previously, though these proposals have never been adopted by Congress.[22] It is possible, however, to reconcile adversarial hearings with reforms to FISA in 2015 under the USA FREEDOM Act by empowering authorized amici curiae to intervene in FISA proceedings. A novel solution such as this one would rely on established legal processes of intervention in a proceeding, in this case for warrant applications, to allow an expanded panel of amici to participate and oppose the granting of a FISA warrant. Because the amici would have the discretion to intervene in warrant applications, the proposal is distinct from previous attempts that propose the creation of a new office to constantly oppose the government during FISC proceedings. The adversarial nature—placing their subject matter expertise in an adversarial position against government claims of necessity—is especially useful to

16. *Warrantless Surveillance Under Section 702 of FISA*, ACLU (Sept. 28, 2023, 9:43 PM), https://www.aclu.org/issues/national-security/warrantless-surveillance-under-section-702-fisa [https://perma.cc/L7UM-X65E].

17. Merrick Garland & Avril Haines, *Joint Letter from Attorney General Garland and Director of National Intelligence Haines to Congressional Leadership Regarding Reauthorization of Title VII of FISA*, U.S. DEP'T OF JUST. NAT'L SEC. DIV. (Feb. 28, 2023), https://www.justice.gov/media/1276406/dl?inline= [https://perma.cc/H338-6MU7].

18. *Id.*

19. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, 279 (2015) (codified as amended at 50 U.S.C. § 1803(i)) [hereinafter USA FREEDOM Act].

20. Chris Baumohl, *Reforming Section 702: Strengthening FISA Amici*, ELEC. PRIV. INFO. CTR. (Mar. 2, 2023, 10:00 PM), https://epic.org/reforming-702-strengthening-fisa-amici/ [https://perma.cc/5PG3-529V].

21. *Id.*

22. ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RSCH. SERV., R43260, REFORMING OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 2 (2014).

ensuring greater and competitive scrutiny of the government's representations to the FISC. Thus, by providing an adversarial element in the FISA process, the proposal would make the process less prone to abuse and ensure accountability at the FISC.

To that end, this Note will propose a framework for amending FISA to empower the panel of amici curiae, created under 50 U.S.C. § 1803(i), to intervene as a matter of statutory right in proceedings for a surveillance warrant under FISA, i.e., 50 U.S.C. § 1805. Section II will explain the non-adversarial nature of the FISC and resulting controversy, as well as discuss past efforts to reform the act. Section III, proposing the framework, will analyze how amici curiae might exercise their right of intervention and will argue for their suitability for the role. It will argue that empowering amici to intervene will improve the FISC's review of surveillance applications, hold the government accountable for any abuse of FISA authority, and compel the adoption of stricter standards to protect U.S. persons from unconstitutional surveillance.

## II. BACKGROUND

### *A. The Origins of FISA and its Reforms*

Before FISA's enactment in 1978, there was no statutory framework to regulate the federal government's surveillance activities for national security-related reasons.[23] The footnote in *Katz* that appeared to exempt such conduct from Fourth Amendment procedures was, perhaps, the only case law on the matter.[24] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("OCC Act"), meanwhile, provided the procedure under the Fourth Amendment to seek warrants for electronic surveillance.[25] Two events, whereby much controversy was elicited over surveillance, compelled the government to action.

The first event was the 'Keith Case,' known formally as *United States v. United States District Court*, where the Supreme Court ruled that the government was required to obtain a warrant before beginning electronic surveillance within the United States, even in cases of national security.[26] In that case, the government had relied on a provision in the OCC Act—giving the government discretion to act to protect national security—to claim that a warrant was not required.[27] The Court rejected the argument. "The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security

23. United States v. U.S. Dist. Ct. for E. Dist. of Mich., 407 U.S. 297, 299 (1972) ("Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time.").

24. *Katz*, 389 U.S. at 358.

25. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 212 (1968) (codified at 18 U.S.C. § 2516, *et. seq.*).

26. *U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. at 297-99.

27. *Id.*; Omnibus Crime Control, *supra* note 25, at 214 (current version at 18 U.S.C. § 2511(3)).

surveillances are conducted solely within the discretion of the executive branch, without the detached judgment of a neutral magistrate," wrote Justice Lewis F. Powell, Jr. for the unanimous court.[28] Powell's opinion also urged Congress to create standards for situations involving national security that would be compatible with the Fourth Amendment.[29]

The second event was the "Church Committee," known formally as the "Senate Select Committee to Study Government Operations with Respect to Intelligence Activities." Following the Watergate scandal and several press revelations of covert activity by the executive branch,[30] both houses of Congress convened select committees to study intelligence collection by the government.[31] The Senate committee, chaired by Democratic Sen. Frank Church of Idaho, in 1976 produced a report six books in length,[32] uncovering widespread abuses of surveillance power by the government to monitor the behavior and communications of U.S. persons, "who engaged in no criminal activity and who posed no genuine threat to the [*sic*] national security."[33] Much of the activity reported the Church Committee was pursued despite doubts about its constitutionality with legal considerations simply being ignored by officials.[34] "The root cause of the excesses which our record amply demonstrates has been failure to apply the wisdom of the constitutional system of checks and balances to intelligence activities," wrote Church in his preface to Book II of the committee's report, which detailed intelligence activities and the rights of Americans.[35] "I believe they make a compelling case for substantial reform."[36]

At the urging of the Supreme Court and the Senate, combined with public outrage at the nature of warrantless surveillance, Congress proceeded to enact FISA two years later.[37] The principal reform of FISA was its creation

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28. *U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. at 298.

29. *Id.* at 322-23.

30. *See* Seymour Hersh, *Huge C.I.A. Operation Reported In U.S. Against Antiwar Forces, Other Dissidents In Nixon Years*, N.Y. TIMES (Dec. 22, 1974), https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html [https://perma.cc/T3G4-VQ2R].

31. The Senate's counterpart committee in the House was known as the "Pike Committee," after its chairman, Democratic Rep. Otis G. Pike of New York, and conducted a similar investigation. *See The Unexpurgated Pike Report*, INTERNET ARCHIVE, https://archive.org/details/PikeCommitteeReportFull/page/n1/mode/2up [https://perma.cc/9YA5-L4K9]. .

32. *Intelligence Related Commissions, Other Select or Special Committees and Special Reports*, U.S. S. SELECT COMM. ON INTEL., https://www.intelligence.senate.gov/resources/intelligence-related-commissions (last visited Apr. 10, 2025) [https://perma.cc/KWZ7-L3ER].

33. S. REP. NO. 94-755, at 12 (1976).

34. *Id.* at 13.

35. *Id.* at III.

36. *Id.*

37. James G. McAdams, III, *Foreign Intelligence Surveillance Act (FISA): An Overview*, U.S. FED. L. ENF'T TRAINING CTRS., https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf [https://perma.cc/WYE3-RV56].

of judicial scrutiny over intelligence collection done within the United States. Should the federal government seek to conduct surveillance within the United States targeted at an agent of a foreign power, it must seek an order from the FISC authorizing such surveillance.[38] While the court reviews such applications *in camera* and *ex parte*, the statute makes the issuance of such an order subject to extensive disclosure requirements as well as "minimization procedures"[39] to prevent the inadvertent gathering of information on U.S. persons.[40] The statute imposes criminal penalties and civil liability for damages upon government personnel who conduct surveillance in violation of the statute,[41] as well as empowers defendants to move to suppress evidence in criminal proceedings if FISA surveillance is gathered unlawfully.[42] Intelligence gathered unintentionally from a U.S. source by FISA-authorized surveillance, which is otherwise protected by the Fourth Amendment, must be destroyed.[43]

### *B. The Emergence of Section 702*

FISA's enactment in 1978 was welcomed by watchdogs of government surveillance,[44] though continued exercise of surveillance authority proved controversial among them.[45] The biggest paradigm shift in the FISA regime, however, occurred following the terrorist attacks of September 11, 2001 against the United States by al-Qa'ida. Surveillance authority claimed and exercised by the executive branch, thereafter, spurred further controversy about government surveillance during the "War on Terrorism," which prompted FISA's significant amendment to meet both the privacy and security demands of the 21st Century.[46]

In diagnosing intelligence failures surrounding the government's inability to detect the attacks in advance, the 9/11 Commission opined about the rigidity of safeguards under FISA to protect the privacy of U.S. persons.[47] In 1995, following concerns about informal exchanges of FISA-gathered intelligence between U.S. Department of Justice ("DOJ") criminal prosecutors and Federal Bureau of Investigation ("FBI") counterintelligence officials, Attorney General Janet Reno implemented procedures to regulate

38. *See* 50 U.S.C. § 1805.
39. *See id.* § 1801(h).
40. *See id.* § 1801(i).
41. *See id.* § 1809-10.
42. *See id.* § 1806(e).
43. *See id.* § 1806(i).
44. *See* David Burnham, *Panel Cites U.S. Compliance With Law Limiting Wiretaps*, N.Y. TIMES (Oct. 19, 1984), at B5, https://www.nytimes.com/1984/10/19/us/panel-cites-us-compliance-with-law-limiting-wiretaps.html [https://perma.cc/QBY5-V33S].
45. *See* Michael Wines, *Panel Criticizes F.B.I. for Scrutiny of U.S. Group*, N.Y. TIMES (July 17, 1989), at A13, https://www.nytimes.com/1989/07/17/us/panel-criticizes-fbi-for-scrutiny-of-us-group.html [https://perma.cc/7ZRG-5RXW].
46. *See* Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 151 (2006).
47. *See* THE 9/11 COMM'N, THE 9/11 COMM'N REPORT: FINAL REPORT OF THE NATIONAL COMM'N ON TERRORIST ATTACKS UPON THE U.S. 78-79 (2004).

transmission of such intelligence between the former and latter.[48] The procedures, known as "the Wall,"[49] effectively discouraged the sharing of intelligence information to criminal investigators and prosecutors, as well as vice versa with respect to grand jury information.[50] The Commission's report concluded that the strict procedures of "the Wall" regarding intelligence gathering and sharing, as well as FISA's own statutory requirements for warrants, precluded the FBI from gathering intelligence about Zacarias Moussaoui—an al-Qa'ida operative connected to 9/11 mastermind Khalid Sheikh Mohammad, and who had suspiciously sought flight school lessons in Minneapolis on a Boeing 747 platform—prior to the attacks.[51] "If Moussaoui had been connected to al Qaeda [*sic*], questions should instantly have arisen about a possible al Qaeda plot that involved airliners, a possibility that had never been seriously analyzed by the intelligence community," the report concluded.[52]

The George W. Bush Administration, meanwhile, took matters into its own hands. Shortly after 9/11, on October 4, President Bush issued the first in a series of executive orders to the National Security Agency ("NSA"), authorizing the creation of the President's Surveillance Program ("PSP").[53] Under the PSP, the NSA was directed to gather massive telephone and Internet metadata regarding communications if there was probable cause regarding a connection to international terrorism. The connection could either involve U.S. persons or information transmitted through the United States, and could be gathered without obtaining a warrant from the FISC.[54] These programs were legally justified by DOJ memoranda, written by John Yoo, a deputy assistant attorney general in the Office of Legal Counsel, who directly challenged FISA's authority to make surveillance conditional on a FISC warrant.[55] Acknowledging that Bush Administration's initial executive order could not satisfy FISA standards,[56] Yoo claimed that FISA's restrictions on surveillance represented an "unconstitutional infringement on the President's Article II authorities"[57] and that the president possessed "inherent constitutional power to conduct warrantless searches for national security

48. *Id.*

49. *Id.*

50. These limitations on communication were statutorily removed by the USA PATRIOT Act of 2001. *See* 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, 364 (2001) (codified at 50 U.S.C. § 1806(k)(1)).

51. THE 9/11 COMM'N, *supra* note 47, at 273-76.

52. *Id.* at 273.

53. OFF. OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUST., CENT. INTEL. AGENCY, NAT. SEC. AGENCY, AND DIR. OF NAT'L. INTEL., NO. 2009-0013-AS, (U) UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 7 (2009), https://www.dni.gov/files/documents/424/2009%20Joint%20IG%20Report%20on%20the%20PSP%20Vol.%20I.pdf [https://perma.cc/3KSV-345S].

54. *Id.* at 8.

55. *Id.* at 12.

56. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. 9-10 (Nov. 2, 2001) (on file with author) https://www.justice.gov/olc/page/file/1154156/dl?inline [https://perma.cc/TU83-DNBB].

57. *Id.* at 9.

purposes."[58] Among other matters, Yoo further opined that foreign intelligence surveillance of communications entering or exiting the United States, contrary to FISA, were instead governed by Fourth Amendment jurisprudence alone, and fell within a "border search exception" that allowed for their collection without a warrant.[59]

The activities under the PSP, which was code-named "STELLARWIND,"[60] continued unbeknownst to the public until 2005, when a front-page article in The New York Times broke the news of the program's existence based on information provided by unnamed government officials amid concerns about its legality.[61] "[The NSA] has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants," read the article, which the administration had asked the Times to not publish.[62] The program was formally acknowledged by Attorney General Alberto Gonzales in 2007,[63] and, following The New York Times's revelation, aspects of the program were gradually brought into FISA compliance with fresh applications to the FISC for their authorization.[64] Nevertheless, knowledge of the program ignited public opposition to it, which prompted Congress to consider action that might rein in executive conduct and bring it into compliance with FISA.[65]

The result of that effort was the FISA Amendments Act of 2008.[66] This act created a new provision of FISA known as Section 702, which authorizes the executive branch, in one-year increments, to collect intelligence regarding non-U.S. person targets, who are "reasonably believed to be located outside the United States."[67] The government is required, however, to submit a certification to the court—regarding minimization procedures and Fourth Amendment compliance—before implementing any surveillance under Section 702,[68] unless an emergency situation (as defined by the Attorney General and Director of National Intelligence) necessitates immediate surveillance and *ex post facto* certification.[69] The FISC, thereafter, reviews

58. *Id.*

59. *Id.* at 14.

60. *NSA inspector general report on email and internet data collection under Stellar Wind – full document*, THE GUARDIAN (June 27, 2013, 12:01 PM), https://www.theguardian.com/nsa-inspector-general-report-document-data-collection [https://perma.cc/9EYH-S4LU].

61. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html [https://perma.cc/83ZE-GUKR].

62. *Id.*

63. Letter from Alberto R. Gonzales, Att'y Gen., to Hon. Patrick J. Leahy, Chairman, Comm. on Judiciary, U.S. Senate (Aug. 1, 2007) (on file with author), https://irp.fas.org/news/2007/08/ag080107.pdf [https://perma.cc/KXB7-KURX].

64. OFF. OF INSPECTORS GEN., *supra* note 53, at 50-60.

65. *See* H.R. REP. NO. 110-373, pt. I, at 9-10 (2007).

66. *See* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2009).

67. 50 U.S.C. § 1881a(a), *et. seq.*

68. *See id.* § 1881a(h)(1)(A).

69. *See id.* § 1881a(c)(2), (h)(1)(B).

such certification for compliance with the Act, after which it may modify or prohibit such collections.[70] Importantly, the amendments ensure that the government is not required to submit individual certifications to the court for each person surveilled, but may do so for a class of persons to be surveilled under a program, known as "programmatic" authorization.[71] The law countenances the incidental acquisition of information about U.S. persons under such programs but aims to mitigate them by virtue of judicial review of the certification and FISA's existing provisions preventing their use. Electronic service providers who receive directives from the government pursuant to a FISA order may challenge them by petitioning the FISC, which is the only incidence of adversarial proceedings at the court, on the limited question of whether the directives to them (and not the underlying surveillance programs) violate FISA or are otherwise unlawful.[72]

### *C. The Current Controversy*

Since Section 702 was enacted, programmatic surveillance by the United States government has dramatically expanded. Disclosures to media organizations by former NSA contractor Edward Snowden in 2013 revealed the existence of a program—code-named PRISM—whereby the federal government collected information from electronic communications service providers, such as Google, Meta, and Apple, using Section 702 authority.[73] PRISM reportedly accounted for up to 91% of NSA internet search traffic under FISA authority.[74] Another program, code-named XKeyscore, also conducted programmatic surveillance of foreign targets, though it is unclear whether it operated pursuant to FISC order.[75] The intelligence collected by such surveillance programs is often stored in databases, known colloquially as "Section 702 databases,"[76] to which intelligence officials may submit queries to obtain information about a foreign target.[77]

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70. *See id.* § 1881a(j)(3)(A)-(B).

71. Banks, *supra* note 11, at 1635.

72. *See* 50 U.S.C. § 1881a(i)(4)(A).

73. *See* Glenn Greenwald & Ewan MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, THE GUARDIAN (June 7, 2013), https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data [https://perma.cc/4BJ7-WGLF]; Barton Gellman & Laura Poitras, *U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [https://perma.cc/V6ZD-TMLX].

74. *See* JOHN W. ROLLINS & EDWARD C. LIU, CONG. RSCH. SERV., R43134, NSA SURVEILLANCE LEAKS: BACKGROUND AND ISSUES FOR CONGRESS 4 (2013).

75. *See* Glenn Greenwald, *XKeyscore: NSA tool collects 'nearly everything a user does on the internet'*, THE GUARDIAN (July 31, 2013), https://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data [https://perma.cc/NE4W-YZZM].

76. *See Section 702 Overview*, OFF. OF THE DIR. OF NAT'L INTEL. (Apr. 17, 2018, 4:37 PM), https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf [https://perma.cc/EH25-GX8S].

77. 50 U.S.C. § 1881a(f), *et. seq.*

Section 702 has been criticized by civil liberties organizations for a variety of reasons. One of the most potent critiques of the law is the phenomenon of "backdoor" searches of information conducted by federal government officials.[78] In the massive collection of incidental intelligence about U.S. persons, critics argue that law enforcement can query and obtain such information, despite the information being unrelated to national security.[79] The only limitation on these searches is that they must be "reasonably likely" to retrieve either foreign intelligence or evidence of a crime, which critics assert is a low standard.[80] In effect, they argue that Section 702's authority, while intended for foreign intelligence collection and national security, is being used for criminal justice purposes and circumvents the Fourth Amendment limitations on their collection,[81] as specified in the Keith Case.[82] They also argue that the prevalence of such large-scale surveillance has a "chilling effect"[83] on speech and expression permitted by the First Amendment, deterring activists and critics of the government from engaging in such activity out of fear of being surveilled.[84]

Opposition to Section 702 has been increasingly bipartisan with both left-wing and right-wing opponents. The latter group, however, has grown hostile to Section 702 primarily following the presidential election of 2016. As part of a counterintelligence investigation, known as Crossfire Hurricane, into whether Donald Trump's 2016 campaign received material assistance from the Russian government, the FBI obtained a FISA warrant to surveil Carter Page, a U.S. citizen and foreign policy advisor to Trump.[85] The FBI's application for the warrant from the FISC was later found to have material defects and false statements.[86] Trump has frequently invoked the FISA warrant on Page to justify claims of a "conspiracy" against him by government intelligence personnel (i.e., the "deep state") due to his political

78. *See* Sarah Taitz, *Five Things to Know About NSA Mass Surveillance and the Coming Fight in Congress*, ACLU (Apr. 11, 2023), https://www.aclu.org/news/national-security/five-things-to-know-about-nsa-mass-surveillance-and-the-coming-fight-in-congress [https://perma.cc/3LRV-LQU2].

79. *Id.*

80. *Id.*

81. *Id.*

82. *U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. at 298.

83. Rainey Reitman, *NSA Internet Surveillance Under Section 702 Violates the First Amendment*, ELEC. FRONTIER FOUND. (Nov. 22, 2017), https://www.eff.org/deeplinks/2017/11/nsa-internet-surveillance-under-section-702-violates-first-amendment [https://perma.cc/24JN-DRNF].

84. *See* Taitz, *supra* note 78.

85. *See FISA Warrant Application for Carter Page*, U.S. S. COMM. ON THE JUDICIARY (Feb. 7, 2020), https://www.judiciary.senate.gov/imo/media/doc/FISA%20Warrant%20Application%20for%20Carter%20Page.pdf [https://perma.cc/MB47-LPV4].

86. *See* OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION 156 (Dec. 9, 2019), https://www.justice.gov/storage/120919-examination.pdf [https://perma.cc/ZK5G-FQAJ].

views.[87] One of the documents allegedly relied upon by the FBI to support its warrant for surveilling Page was the "Steele Dossier," which was prepared by a former British intelligence officer and claimed the existence of embarrassing sexual material possessed by the Russian government regarding Trump, The dossier was later discredited by DOJ investigators and its production was found to have been sponsored by the supporters of Trump's electoral opponent, Hillary Clinton.[88] While this surveillance does not implicate Section 702 directly, it has created a climate of hostility among conservatives to the expansion of FISA authority, which has resulted in opposition to Section 702 among Republican members of Congress.[89]

When critics have waged legal challenges to programs under Section 702, the results have been largely ineffectual due to procedural hurdles of standing. The Supreme Court ruled in *Clapper v. Amnesty Int'l U.S.A* in 2012 that persons whose communications might be collected, as opposed to being definitively collected, by programs under Section 702 lack standing to sue.[90] Additionally, the government's assertions of the "state secrets privilege"—a privilege that enables the government to withhold evidence that may "expose military matters which, in the interest of national security, should not be divulged"[91]—in lawsuits challenging Section 702 has often led to their dismissal.[92] The result is that no court has ever ruled on the merits of Section 702's legality under the Fourth Amendment.

Consequently, opponents have turned their focus to Congress. In 2008, Section 702's authority was not authorized permanently but, instead, was to expire five years later, at the beginning of 2013.[93] It was then renewed for another five years until 2018,[94] and, renewed again until 2023.[95] Opponents have sought to use the periodic reauthorizations to reform the law, or repeal it, with the 2018 reauthorization including statutory amendments regarding

87. *See* Donald J. Trump, @realDonaldTrump, X (July 22, 2018, 6:28 AM), https://x.com/realDonaldTrump/status/1020978929736265729 [https://perma.cc/UL47-HY2Y].

88. JOHN H. DURHAM, REPORT ON MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS 109, 110, 123 (May 12, 2023), https://www.justice.gov/storage/durhamreport.pdf [https://perma.cc/UX54-AS93].

89. *See* H.R. 577, 118th Cong. (2023), https://www.congress.gov/118/bills/hres577/BILLS-118hres577ih.pdf [https://perma.cc/J46L-PMQH]. Several Republican members of Congress have publicly called for Section 702's authority to lapse. *See* Arjun Singh, *House Conservatives Tank FISA Vote In Blow To Speaker Mike Johnson*, THE DAILY CALLER (Apr. 10, 2024, 3:02 PM), https://dailycaller.com/2024/04/10/house-blocks-fisa-reauthorization-bill/ [https://perma.cc/8GT9-A8MS].

90. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013) ("respondents' theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'").

91. United States v. Reynolds, 345 U.S. 1, 10 (1953).

92. *See* Wikimedia Found. v. Nat. Sec. Agency, 14 F.4th 276 (4th Cir. 2021) (opinion and order affirming dismissal).

93. FISA Amendments Act of 2008, *supra* note 66, at 2474.

94. *See* FISA Amendments Act Reauthorization Act of 2012, Pub. L. No. 112-238, 126 Stat. 1631 (2012).

95. *See* FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (2018).

querying provisions and FBI access to intelligence collections for criminal justice purposes.[96] Amid continued demands for reform, Congress in December 2023—when Section 702 was set to expire—temporarily reauthorized it until April 19, 2024; it was reauthorized for two years in April, with new limits on the querying of terms.[97]

### *D. Proposals to Reform FISA for Greater Accountability*

Many proposals to reform FISA, to ensure a greater check on the executive branch in its surveillance requests and activities, have previously been published.[98] An exhaustive discussion of all proposals is unnecessary here. Merely, at a juncture where Section 702's reauthorization is under consideration by Congress,[99] it is relevant to review current congressional proposals to amend the law, as well as previous attempts to create an adversarial process in the pre-warrant stage of FISA surveillance. These are relevant because of their ongoing consideration by Congress. They would make FISA adversarial, an idea that is advanced by this Note.

Before Congress's reauthorization of Section 702 in December 2023,[100] several congressional initiatives were undertaken to propose reforms that might gain political support. The Republican majority of the House Permanent Select Committee on Intelligence ("HPSCI"), which has jurisdiction over foreign intelligence collection, proposed 45 ideas for reforming FISA—including DOJ audits of all U.S. person queries, requirements of warrants to seek evidence of a crime before any U.S. person queries are conducted, penalties for "noncompliant querying of U.S. person contents" and criminal charges for intentional leaking information of U.S. persons.[101] The list also includes measures to ensure Congress is periodically informed about non-compliant U.S. person queries and any disciplinary action under them as well as to permit members of Congress and staff to

96. *See id*. at 4-10.

97. *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (2023); Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024).Both laws were short-term extensions to give lawmakers more time to consider permanent FISA reauthorization.

98. *See generally* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013); PRIV. AND C.L. OVERSIGHT BD., REPORT ON THE TELEPHONE RECORD PROGRAM CONDUCT UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 184 (2014), https://irp.fas.org/offdocs/pclob-215.pdf [https://perma.cc/CH8J-9LHN].

99. Letter from Mike Johnson, Speaker of the House of Representatives, to members of the House of Representatives, (Dec. 7, 2023) (on filed with author), https://www.documentcloud.org/documents/24199528-1272023-speaker-dear-colleague [https://perma.cc/N53X-PNP6].

100. *Id.*

101. MAJORITY FISA WORKING GRP., U.S. H.R. PERMANENT SELECT COMM. ON INTEL., FISA REAUTHORIZATION: HOW AMERICA'S MOST CRITICAL NATIONAL SECURITY TOOL MUST BE REFORMED TO CONTINUE TO SAVE AMERICAN LIVES AND LIBERTY 42-47 (2023), https://intelligence.house.gov/uploadedfiles/hpsci_fisa_reauthorization_2023_report.pdf [https://perma.cc/4P3D-M8JG].

attend FISC hearings.[102] Unfortunately, the HPSCI's proposals only address the issue of accountability for abuse, rather than *ex ante* measures to preclude such abuse.[103] Should its ideas be implemented, they would not directly affect the FISC's tailoring of surveillance programs to minimize incidental collection, which is fundamental to ensuring that U.S. persons are protected from surveillance at the outset. Rather, they merely protect information from being misused after the fact.

A parallel proposal, with support among many civil libertarian groups,[104] was introduced in both the Senate and House, known as the Government Surveillance Reform Act.[105] This proposal would narrow the purposes for which information collected under FISC orders may be used, limit the kind of intelligence that may be collected,[106] and limit "reverse targeting" or the targeting of foreign sources for the purpose of obtaining U.S. person information.[107] This proposal's changes to the law's language, if implemented, would likely affect the FISC's standard of review when considering applications for surveillance. However, it offers no reform to the warrant application process and, thus, leaves in place the *ex parte* dynamic between the court and the government. Tangentially, the bill would make FISC applications reviewable by an Inspector General but merely allows that official to make recommendations to various bodies regarding how those orders might be improved.[108]

Regarding reforms to the *ex parte* system, Congress has previously taken steps to offer the FISC an independent perspective when considering warrant applications. In the USA FREEDOM Act of 2015, Congress created a panel of amici curiae to assist the FISC.[109] The amici are authorized to assist the court with warrant applications that present a "novel or significant interpretation of the law" or to provide "technical expertise" when the court is dealing with difficult questions.[110] The USA FREEDOM Act requires that amici be made eligible for security clearances and grants them access to information regarding the FISC's past decisions as well as the current

102. *Id.* at 42, 46

103. *Id.*

104. *Wyden, Lee, Davidson and Lofgren Introduce Bipartisan Legislation to Reauthorize and Reform Key Surveillance Law, Secure Protections for Americans' Rights*, RON WYDEN, U.S. SENATOR FOR OREGON (Nov. 7, 2023), https://www.wyden.senate.gov/news/press-releases/wyden-lee-davidson-and-lofgren-introduce-bipartisan-legislation-to-reauthorize-and-reform-key-surveillance-law-secure-protections-for-americans-rights/ [https://perma.cc/5378-3LFD].

105. Government Surveillance Reform Act of 2023, H.R. 6262, 118th Cong. (1st Sess. 2023).

106. *Id.* § 103. This limitation pertains to "abouts" collection, a short-hand for queries for all information that simply mentions a target, rather than merely communications between them and another party. *See generally* Julian Sanchez, *All About "About" Collection*, JUST SECURITY (Apr. 28, 2017), https://www.justsecurity.org/40384/ado-about/ [https://perma.cc/6DXL-TEF2].

107. FISA Amendments Reauthorization Act of 2017, *supra* note 95, §§ 101-103.

108. *Id.* § 112.

109. USA FREEDOM Act, *supra* note 19; Pub. L. No. 114-23, § 401 (codified at 50 U.S.C. § 1803(i)).

110. 50 U.S.C. § 1803(i)(2)(A)-(B).

application they have been called to review.[111] The amici are required to be "persons who possess expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area."[112] The FISC has published the list of current amici on its website.[113]

Introducing amici to the FISC process is significant and offers the opportunity for government submissions to the court to be scrutinized by independent experts. However, this opportunity is only afforded subject to the court's discretion.[114] It is entirely plausible that a judge reviewing an application may not grasp the full implications of the proposed surveillance by themselves. The judge may not recognize when proposed methods or minimization procedures may threaten U.S. persons. In a landscape of rapidly changing technologies, particularly involving artificial intelligence, it is difficult to foresee that an Article III judge appointed to the FISC for a limited duration may remain abreast of these changes to adequately know all the issues with an application by themselves. Deference to the government's interpretation and its mere assurances of compliance with FISA would defeat the purpose of holding it accountable. An independent review is required, at the application stage, with sufficient expertise to understand the technical scope of surveillance proposed and its conformity with the law. Indeed, given the government's record of past abuses,[115] the FISC's high rate of approval of requests,[116] and the potential for further constitutional erosion of U.S. persons' rights, nothing short of zealous advocacy in an adversarial setting is appropriate.

To this end, the concept of a special or "public advocate" who would challenge the government's requests for surveillance at the FISC has been previously proposed.[117] Such an individual, or group of individuals, would likely be empowered to argue against the government's warrant applications, make submissions before the court and, if the warrant was granted, appeal the matter to the Foreign Intelligence Surveillance Court of Review ("FISCR")—an appellate court that only hears government appeals from denials of requests

111. *Id.* §§ 1803(i)(3)(B), (6)(A)-(C).

112. *Id.* § 1803(i)(3)(A).

113. *Amici Curiae*, U.S. FOREIGN INTEL. SURVEILLANCE CT., https://www.fisc.uscourts.gov/amici-curiae (last visited Mar. 3, 2025) [https://perma.cc/DLJ5-SGRK].

114. 50 U.S.C. § 1803(i)(2)(A) ("shall appoint [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"). The discretion of the court is evinced in the ability to make amicus curiae appointments when it deems necessary in its opinion.

115. UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM, *supra* note 53.

116. The FISC reports data on the number of orders granted, modified, denied in part, and denied; historical assessments of this data have revealed that the court grants applications at a high rate, i.e., above 99% of all requests. *See* Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125, 131 (2014), https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2014/02/66_Stan_L_Rev_Online_125_Clarke.pdf [https://perma.cc/2SYJ-P8MT].

117. Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013).

by the FISC—and, in extraordinary circumstances, the Supreme Court.[118] The proposals suggest that public advocate[s] be appointed from among individuals who have requisite expertise for such a role.[119] The idea appears to have been seriously considered by the Obama Administration before to the USA FREEDOM Act's passage. President Barack Obama, himself, endorsed the idea in public remarks[120], while the Privacy and Civil Liberties Oversight Board ("PCLOB") recommended the idea in its review of the FISC's operations.[121]

The proposal for a public advocate has, to date, not been adopted by Congress. Objections have been raised about the alleged difficulties that such "public advocates" would create, regarding their constitutional status as government employees and their legal standing to challenge applications on behalf of the general public.[122] It is unclear how much influence the PCLOB report had on Congressional consideration of the proposal. At least two bills were introduced in the 113th Congress to create a public advocate or a similarly-named office that would argue before the FISC, but neither received any action.[123]

## III. ANALYSIS

To ensure more accountability in the process of authorizing FISA surveillance, as well as compliance with statutory and constitutional requirements, the current system of *ex parte* hearings before the FISC must be reformed. Accordingly, this section will propose the empowerment of the current group of amici curiae by granting them a statutory right of intervention in proceedings before the FISC. The new group, which may be termed the "Panel of Experts," would be expanded and authorized to challenge applications for a warrant of surveillance, or reauthorization of the same, by the government under any provision of FISA. They would no longer be limited, as are the amici, to questions involving a "novel interpretation" of the law, and would have a statutory right to appeal decisions granting government requests, as well as petition the Supreme Court for certiorari if the FISCR denies relief. The panel, expanded beyond amici, would comprise individuals appointed by the Presiding Judge of the FISCR, with an emphasis upon recommendation of the current amici, i.e., a collegium system. That the panel would be drawn from existing amici, who are granted discretion on when to intervene, distinguishes this proposal from other adversarial reforms previously advanced, where the advocates in question would appear to be

118. *See* Foreign Intelligence Surveillance Act of 1978, *supra* note 3.

119. *See* NOLAN, ET AL., *supra* note 22.

120. Barack Obama, President of the U.S., The White House, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence [https://perma.cc/PK4K-3D8L.

121. PRIV. AND C.L. OVERSIGHT BD., *supra* note 98.

122. *See* Clarke, *supra* note 116.

123. FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. (1st Sess. 2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (1st Sess. 2013).

government employees with a duty to oppose applications submitted by the United States. The employment status of such a person under those "public advocate" proposals implicated constitutional questions concerning their executive authority and validity of appointment,[124] which this proposal circumvents by virtue of the amici's private citizen status.

### *A. Summary of Proposed Statutory Language to Create Panel Of Experts*

The full statutory language to create a Panel of Experts has been included in the Appendix to this Note.[125] The language replaces 50 U.S.C. § 1803(i), the provision of law that authorizes amici curiae, with modifications to empower the panel to intervene in proceedings of the FISC and FISCR. A summary of the proposed language's provisions, which are relevant to the creation of adversarial proceedings, follows.

#### 1. Paragraph 1, Appointments of experts:

> This paragraph establishes that the Presiding Judge of the FISCR shall appoint "not fewer than 15 individuals to be eligible to serve as members of a Panel of Experts."[126] The number is an increase from the current statute's composition of amici, which sets the number at "not fewer than 5."[127] The reason for such an increase is to ensure the body has a diversity of opinion and heterogeneity of expertise. To aid the chief judge in the exercise of appointment duties, certain entities are named as empowered to make recommendations regarding individuals to be appointed. The PCLOB is one group, an independent agency of the U.S. government that provides advice on civil liberties issues.[128] The other entity empowered to make recommendations are members of the Panel, whose grasp of issues enables them to opine on the suitability of candidates. The Presiding Judge is not bound to accept their recommendations, but their inclusion in the language is intended to grant their recommendations persuasive authority.

124. *See* NOLAN, ET AL., *supra* note 22.
125. *See infra* Part V, pp. 21-24.
126. *Id.* at 21.
127. 50 U.S.C. § 1803(i).
128. *History and Mission*, PRIV. AND C.L. OVERSIGHT BOARD, https://www.pclob.gov/About/HistoryMission (last visited Mar. 3, 2025) [https://perma.cc/Z5NL-YUZC].

2. Paragraph 3, Expert qualifications:

This paragraph lays out qualifications for the Presiding Judge of the FISCR to consider when making appointments to the panel, namely their "expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise."[129] The qualifications ensure that the panel is authoritative and capable of grasping the issues that may come before the court, as well as challenging their decisions. Additionally, and importantly, the paragraph establishes that at least seven members of the body must be attorneys. This enables the panel to have sufficient legal expertise when either advising the court as amici or challenging applications for warrants as intervenors. It is envisioned that, in the event of an intervention, these attorneys would act as counsel for the panel, as the hiring of outside counsel would be very difficult due to the highly classified nature of the proceedings.

In sub-paragraph (B), the paragraph establishes eligibility for a security clearance as a requirement for membership of the panel. This requirement may serve as a limiting factor for some prospective candidates who could provide zealous advocacy in defense of civil liberties during FISC proceedings. Security clearances are issued according to a rigorous process governed by different legal authorities.[130] Given the subject matter sensitivity, it is likely that members will be required to possess high-level clearances (e.g., TS//SCI, or "Top Secret" clearance with access to "Sensitive Compartmented Information") that will require additional procedures, such as a Single Scope Background Investigation.[131] While a potential limitation, this requirement is inevitable and necessary to ensure the proposal is compatible with the interests of national security.

3. Paragraph 4, Right of intervention:

129. *See infra* p. 21.

130. 50 U.S.C. § 3341.

131. *Investigation Types*, U.S. DEP'T OF THE ARMY DEPUTY CHIEF OF STAFF G-2, https://www.dami.army.pentagon.mil/site/PerSec/InvTypes.aspx (last visited Apr. 11, 2025) [https://perma.cc/BN5N-X6RZ].

This paragraph forms the backbone of the proposal, by granting the Panel the right to "intervene in any proceeding of [the FISC] to challenge any petition, application for an order, or motion presented to the court by the United States or any party before the court." In this respect, the Panel enjoys the general rights of litigants before an Article III court, e.g., to gain access to evidence, file motions and briefs, and request a rehearing. Should the FISC not grant their application, they may appeal to the FISCR and, thereafter, seek a writ of certiorari from the Supreme Court.

For the Panel to intervene in matters before the FISC, a majority of its members must deem it necessary. This provision is designed to ensure that the Panel acts as a collective entity and that its power of intervention may be exercised responsibly. The only statutory standard governing the factors the Panel should consider is whether intervention will "advance the protection of individual privacy and civil liberties," and what is reasonable to that end. More specific standards are not elucidated due to the potentially technical nature of such matters, extending beyond the legal discipline. It is best left to the amici to determine specific standards using their expertise on an ad hoc basis.

Unlike previous "public advocate" proposals, this provision grants the Panel discretion in choosing cases upon which to intervene. Chiefly, it ensures efficiency in the FISA process, whereby uncontroversial requests for surveillance need not be deliberately opposed, enabling the panel to focus its efforts on cases where the public interest is more directly implicated.

4. Paragraph 6, Access to information:

This paragraph enables the Panel to access past precedents of the court and other documents that would otherwise be published, to aid it during litigation initiated by intervention. It also empowers members to consult with third parties regarding their duties, subject to the requirement that classified information is only shared with individuals who have a security clearance and/or are otherwise eligible to access it.

5. Paragraph 11, Exception:

> This paragraph concerns the extraordinary circumstance of when a member of the Panel may, themselves, be the target of an application to the FISC for surveillance by the government. In this situation, the ability of the Panel of experts to intervene is foreclosed, due to the significant national security vulnerability if one member of the Panel communicates about their involvement in the case of a targeted member. In such a situation, the whole subsection is deemed inapplicable, and knowledge of an application for a warrant would be withheld from them in entirety. It is foreseen that the FISC will use its discretion in this situation to adjudicate the matter.

6. Paragraph 6, Access to information:

> This paragraph enables the Panel to access past precedents of the court and other documents that would otherwise be published, to aid it during litigation initiated by intervention. It also empowers members to consult with third parties regarding their duties, subject to the requirement that classified information is only shared with individuals who have a security clearance and/or are otherwise eligible to access it.

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### *B. Statutory Basis and Legality of Intervention*

Granting a right of intervention to the proposed Panel of Experts in the FISC would not be a "new" framework. Indeed, other statutes grant parties a statutory right of intervention. For instance, under the Fair Housing Act, individuals who are aggrieved by discriminatory practices may intervene in lawsuits commenced by the U.S. government to challenge that practice.[132] The Federal Rules of Civil Procedure ("FRCP"), in Rule 24, allow a party granted either a conditional or unconditional right of intervention by statute

132. *See e.g.*, 42 U.S.C. § 3612(o)(2) (granting parties the right to intervene in Fair Housing Act cases brought by the government).

to participate in a proceeding.[133] The proposed panel would be granted a conditional right, subject to a majority of members deeming intervention necessary under Paragraph (4)(B) of the proposed text.[134] This would conform to the requirements of existing federal rules under the FRCP to make such a framework within precedent. Because FISC proceedings are, presumptively, not criminal in nature,[135] the applicability of the federal civil rules as a standard is appropriate. It should be noted that granting parties statutory rights to participate in FISC proceedings has already been accomplished in Section 702 in the limited circumstance of electronic communications providers petitioning to set aside government directives for compliance with court orders.[136] Due to this circumstance, the FISC's rules of procedure make allowance for adversarial proceedings, which may be borrowed by the Panel of Experts in seeking relief, as proposed, without the creation of substantially new rules to govern their conduct.[137]

However, the similarity does not resolve the issue. The strongest constitutional objections to adversarial participation in the warrant application process are raised in the Congressional Research Service's ("CRS") 2014 report on the matter.[138] The report raises some objections concerning the Appointments Clause, indicating concern about whether a "public advocate" may be a principal officer of the United States, an inferior officer, or non-officer employee.[139] The status of persons appointed by the government in the performance of their duties is certainly a relevant constitutional question that bears upon the performance of their duties.[140] Yet, it is not a question relevant to the proposed framework for a Panel of Experts, none of whom are intended to be permanent or special government employees who may receive a salary drawn from the U.S. Treasury. The Panel of Experts would remain, akin to amici curiae, private individuals who are empowered by statute to participate in FISC proceedings, and would not be compensated for their service. This characteristic avoids the complicated issue of their status under the Appointments Clause, and their designation by the court and discretion over intervention in a matter is facially distinguishable from appointment to a governmental office with statutory duties. While extensive uncompensated service may be a policy concern, the classified nature of the FISC's past jurisprudence make it difficult to predict just how often the Panel's services may be required.

The most potent objection that the report raises to the concept is the matter of standing. Article III of the Constitution requires that parties seeking

133. FED. R. CIV. P. 24(a)(1), (b)(1)(A).

134. *See infra* p. 22.

135. *Foreign Intelligence Surveillance Act (FISA) Part 2 (MP3)*, FED. L. ENF'T TRAINING CTRS., https://www.fletc.gov/audio/foreign-intelligence-surveillance-act-fisa-part-2-mp3 (last visited Mar. 3, 2025).

136. *See* 50 U.S.C. § 1881a(i)(4)(A), *et seq*. Unlike the Panel of Experts, communications providers are an aggrieved entity seeking relief against government, making the circumstances of intervention substantially different.

137. FISA Ct. R. 7(h)-(k), 8(a).

138. *See* NOLAN, ET AL., *supra* note 22.

139. *Id.* at 10.

140. *See* Selia Law v. CFPB, 591 U.S. 197, 204 (2020).

relief from federal courts have standing to bring a case or controversy before the court.[141] The Supreme Court, in *Lujan v. Defenders of Wildlife*, has resolved that, in general, a party seeking relief from federal courts must have a concretized injury that is particular in fact, with damages being actual and imminent if such relief is not granted.[142] The heightened burden includes requirements that the party seeking relief present a "causal connection" between their injury and the government's conduct that is "fairly traceable," and that any relief by the court will sufficiently resolve the injury.[143] Normally, an *ex parte* non-adversarial proceeding before the FISC is akin to those conducted before district judges in criminal cases, is ancillary to an Article III court's powers in[144] cases and controversies. A hypothetical adversarial challenge by the proposed Panel of Experts likely would transform the situation into a form of controversy between them and the government. The CRS report opines that empowering amici to intervene in proceedings, as this proposal seeks to do, would "make an end-run around Article III standing requirements."[145]

A recent case where the Supreme Court addressed the question of whether statutory intervenors require Article III standing was *Town of Chester v. Laroe Estates*.[146] In that case, which involves a complicated dispute over property and a party's intervention, the Court suggests that an intervenor who makes no different a claim from an existing plaintiff need not satisfy the requirements of Article III standing to make an intervention.[147] Applying this framework to a FISC proceeding is challenging because proceedings are both classified and entirely *in camera*; there is certainly an individual, the target[s] of surveillance, who would satisfy standing requirements if seeking to participate, but cannot do so (e.g., due to a lack of a security clearance and national security imperatives of confidentiality). Based on *Chester* jurisprudence, this fact deprives the Panel of Experts of the necessary plaintiff on whose back they may safely intervene in proceedings to block the issuances of FISA warrants.

There is a doctrine of "third party standing" where a plaintiff, suing on behalf of another entity, is granted standing to pursue their claims. In *Singleton v. Wulff*, the Supreme Court ruled that a party may sue to assert the rights of a third party if they have a close relationship with that party and there are "obstacles" to the assertion of that party's rights.[148] Applying this framework to the Panel of Experts, the second condition of obstacles is satisfied in respect of the limitations imposed by the court's classified

141. *See* U.S. CONST., art. III, § 2; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

142. *See Lujan*, 504 U.S. at 560.

143. *Id.* at 560-61.

144. Clarke, *supra* note 116, at 17.

145. *Id.* at 25.

146. *See* Town of Chester v. Laroe Ests., 581 U.S. 433, 439-41 (2017).

147. *See id.* ("If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene.").

148. Singleton v. Wulff, 428 U.S. 106, 107 (1976).

proceedings. The first condition—a close relationship with the party—is not discretely evinced from this case, and the Court's opinion specifies the confidential nature of a doctor-patient relationship as being the basis for its decision.[149]

However, the issue of standing should not limit the proposed framework, for the intervention of the Panel of Experts in FISC proceedings lies within a fundamentally different paradigm than usual "cases or controversies" heard by federal courts. A Panel of Experts, unlike other entities, would not seek any affirmative relief from the FISC and FISCR in a manner that benefits itself. The Panel's only empowerment under the proposed framework is to challenge applications for orders authorizing surveillance under FISA on others, with the relief sought being limited to a denial or modification of the application. These are powers already exercised by the FISC[150], and the Panel of Experts' intervening challenges would merely ask for their exercise to bring governmental action in conformity with FISA. Thus, it would be improper to consider proceedings at the FISC as akin to regular cases or controversies that the federal courts frequently address, for the purpose of determining standing.

Instead, because controversies at the FISC are of a very different nature than regular cases or controversies, a court (and, ultimately, the Supreme Court) should deem the *Lujan* framework inapplicable to evaluating questions of standing for the Panel of Experts and, instead, rule that it satisfies Article III standing on different grounds, such as the notion that the Panel comprises a subset of U.S. persons writ large who, being affected by a general surveillance program, would have standing. There are plausible reasons for doing so, foremost being the exigencies involved. The concept of the Panel of Experts would exist to ensure that the Constitution's safeguards for persons subject to its jurisdiction (i.e., U.S. persons) may be upheld in the FISA warrant process while ensuring that legitimate national security interests are uncompromised. Indeed, in doing so, as the proposed framework reads, to "advance the protection of individual privacy and civil liberties" the Panel can satisfy most of the *Lujan* requirements for standing. They may certainly show a "concretized" injury of surveillance harming privacy and civil liberties of a target, with the injury of such surveillance being "particular" in fact, which would satisfy standing requirements. It may also show that damages to the targets are actual and imminent if such surveillance is to be undertaken, with causal connections between surveillance actions and the targets' damages, also satisfying standing requirements. The only element of the *Lujan* requirements that the Panel of Experts would miss is readily demonstrating the injury to themselves,[151] a necessary requirement to affect standing in cases of a discrete target being surveilled. Indeed, when it comes to the government's programmatic surveillance on a large scale, members of the Panel of Experts may, themselves, have a claim to standing as a subset of a vast class of persons who may be affected by such surveillance. Regarding

149. *Id.* at 115-16.
150. 50 U.S.C. § 1803(a).
151. *See Lujan*, 504 U.S. at 560.

cases of individual surveillance, the courts may recognize the Panel's interventions as Congress' legitimate effort to provide for representation of the interests of U.S. persons—who, for reasons of secrecy, cannot be permitted to participate—as a narrow exception to *Lujan*.

### *C. Policy Arguments for the Panel's Right of Intervention*

Empowering the Panel of Experts to intervene in applications for warrants from the FISC will yield several policy benefits. It is likely that the Panel would improve the FISA process, considerably, as a result of the newfound adversarial nature of applications before the FISC. The adversarial process would unveil new issues for the FISC to consider and ensure that the government's applications were fully scrutinized with the greatest degree of rigor that may be used, akin to suits challenging the government in civil cases. The government would likely be compelled to adopt similar rigor in its curation of programs to ensure legal compliance while also averring from testing the FISC's willingness to expand the government's surveillance authority due to the scrutiny that an empowered Panel of Experts would offer. Over time, the Panel's cumulative experience at litigating at the FISC would progressively deepen the extent of accountability that could be exacted against the government in its FISA applications. This would have especially great benefits for determining the bounds of proposed surveillance's constitutionality, which remains a subject of prime concern to the public.[152] The Supreme Court has opined that "concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]"[153] It has also observed that a system of *ex parte* proceedings is "likely to be less vigorous."[154] When constitutional questions of such gravity affecting millions of U.S. persons are at stake, regarding programmatic surveillance, a "less vigorous" proceeding is insufficient. An empowered Panel of Experts would fill this gap.

## IV. CONCLUSION

The current FISA process leaves U.S. persons vulnerable to unconstitutional and unlawful targeting through surveillance by the federal government. Due to the classified nature of matters before the FISC, there are limited opportunities for the public to play a greater role in asserting rights against the government. Congressional action is appropriate, but even Congress's oversight of a classified system, codified since the statute was enacted,[155] has not been sufficient to prevent governmental abuses as well as check public dissatisfaction. What is not needed is yet another external entity

152. *Warrantless Surveillance Under Section 702 of FISA*, ACLU (Sept. 28, 2023, 9:43 PM), https://www.aclu.org/issues/national-security/warrantless-surveillance-under-section-702-fisa [https://perma.cc/NXM5-G92E].

153. *See* Baker v. Carr, 369 U.S. 186, 205 (1962).

154. Franks v. Delaware, 438 U.S. 154, 169 (1978).

155. Foreign Intelligence Surveillance Act of 1978, *supra* note 3, § 108, 92 Stat. at 1795.

to examine the FISC's conduct but, rather, a novel form of participation in the FISA process that reforms it from within. It will bring scrutiny, internally, for accountability of the government. That scrutiny must be adversarial, given the high stakes of constitutional rights. The Panel of Experts can accomplish that task successfully. It must be created to do so.

## V. APPENDIX

The proposed statutory language to create a Panel of Experts empowered to intervene in FISA proceedings may be as follows[156]:

> Section 103(i) of the Foreign Intelligence Surveillance Act of 1978 (Public Law 95-511, 50 U.S.C. 1803) is amended by striking all text and replacing it with the following:
>
> (i) PANEL OF EXPERTS AND AMICUS CURIAE. —
>
> (1) DESIGNATION. — The presiding judge of the court established under subsection (b) shall, no later than 180 days after the enactment of this subsection, jointly designate no fewer than 15 individuals to be eligible to serve as members of a Panel of Experts, who shall serve pursuant to rules the presiding judge may establish. In designating such individuals, the presiding judge may consider individuals recommended by any source, including members of the Privacy and Civil Liberties Oversight Board, the presiding judge determines appropriate. Current members of the Panel may submit recommendations to the presiding judges of individuals they deem suitable for any vacancies on the Panel.
>
> (2) AUTHORIZATION. — A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other

156. The proposed language is adapted from the amendment of Section 103 of FISA by Section 401 of the USA FREEDOM ACT that creates amicus curiae, with modifications of the legislative language to enable a Panel of Experts with the right of intervention. *See* USA FREEDOM ACT, *supra* note 19.

statutory requirement that the court act expeditiously or within a stated time —

(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 any individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.

(3) QUALIFICATIONS OF EXPERTS. —

(A) EXPERTISE. — Individuals designated under paragraph (1) shall be persons who possess expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise to a court established under subsection (a) or (b). No fewer than seven members of the Panel shall be attorneys and members in good standing of a bar association of a state or territory of the United States.

(B) SECURITY CLEARANCE. — Individuals designated pursuant to paragraph (1) shall be persons who are determined to be eligible for access to classified information necessary to participate in matters before the courts. Amicus curiae appointed by the court pursuant to paragraph (2)(B) shall be persons who are determined to be eligible for access to classified information, if such access is

necessary to participate in the matters in which they may be appointed.

(4) DUTIES. —

(A) If a court established under subsection (a) or (b) appoints an amicus curia under paragraph (2)(A), the amicus curiae shall provide and present to the court—

(i) legal arguments that advance the protection of individual privacy and civil liberties;

(ii) information related to intelligence collection or communications technology; and

(iii) legal arguments or information regarding any other area relevant to the issue presented to the court.

(B) The individuals named in paragraph (1)(A), when a majority of them may deem it necessary, shall have the right to intervene in any proceeding of a court established under subsection (a) to challenge any petition, application for an order, or motion presented to the court by the United States or any party before the court as they deem appropriate to advance the protection of individual privacy and civil liberties. In doing so, they shall[157] —

(i) have the right to participate fully in proceedings of the court, with the same rights and privileges as the Government;

(ii) shall have access to all relevant evidence in such matter and may petition the court to order the

157. The provisions of sub-paragraph (B) are modelled on provisions of the Ensuring Adversarial Process in the FISA Court Act. *See* H.R. 3159, supra note 117, § 2(b).

Government to produce documents, materials, or other evidence necessary to perform their duties;

(iii) may file timely motions and briefs, in accordance with the procedures of the court, and shall be given the opportunity by the court to respond to motions or filings made by the Federal Government in accordance with such procedures; and

(iv) may request a rehearing or en banc consideration of a decision of the court.

(C) Subject to the provisions of paragraph (4)(B), the individuals named in paragraph (1)(A) shall have the right to appeal any decision of a court established under subsection (a) to a court established under subsection (b) after having exercised their right of intervention under paragraph (4)(B).

(D) Subject to the provisions of paragraph (4)(C), if an appeal made under paragraph (4)(C) is denied, the individuals named in paragraph (1)(A) may petition for a writ of certiorari to the Supreme Court, where the record shall be transmitted shall under seal, and which shall have jurisdiction to review such decision and grant relief as it may deem appropriate.

(5) ASSISTANCE. — An amicus curiae appointed under paragraph (2)(A) may request that the court designate or appoint additional amici curiae pursuant to paragraph (1) or paragraph (2), to be available to assist the amicus curiae.

(6) ACCESS TO INFORMATION. —

(A) IN GENERAL. — The individuals named in paragraph (1)(A) —

(i) shall have access to any legal precedent, application, certification, petition, motion of the court and such other materials that the court determines are relevant to the duties of the Panel of Experts; and

(ii) may, if the court determines that it is relevant to the duties of the Panel of Experts, consult with any other individual regarding information relevant to any proceeding, provided that classified information may only be disclosed to other individuals as described in sub-paragraph (C).

(B) BRIEFINGS. — The Attorney General shall brief or provide relevant materials to individuals designated pursuant to paragraph (1) regarding constructions and interpretations of this Act and legal, technological, and other issues related to actions authorized by this Act.

(C) CLASSIFIED INFORMATION. — Individuals designated pursuant to paragraph (1) or amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States.

(D) RULE OF CONSTRUCTION. — Nothing in this section shall be construed to require the Government to provide information to the Panel of Experts or amici curiae appointed by the court that is privileged from disclosure.

(7) NOTIFICATION. — A presiding judge of a court established under subsection (b) shall notify the Attorney General of each exercise of the authority to appoint an individual to serve as amicus curiae under paragraph (2).

(8) ASSISTANCE. — A court established under subsection (a) or (b) may request and receive

(including on a non-reimbursable basis) the assistance of the executive branch in the implementation of this subsection.

(9) ADMINISTRATION. — A court established under subsection (b) may provide for the designation, appointment, removal, training, or other support for an individual designated to serve a member of the Panel of Experts under paragraph (1) or appointed to serve as amicus curiae under paragraph (2) in a manner that is not inconsistent with this subsection.

(10) RECEIPT OF INFORMATION. — Nothing in this subsection shall limit the ability of a court established under subsection (a) or (b) to request or receive information or materials from, or otherwise communicate with, the Government, the Panel of Experts appointed under paragraph (1), or amicus curiae appointed under paragraph (2) on an ex parte basis, nor limit any special or heightened obligation in any ex parte communication or proceeding.

(11) EXCEPTION. — The provisions of this subsection shall not apply to any proceeding where any of the individuals named in paragraph (1)(A) are individually named as targets in an application for an order presented to the court under section 104, and the courts established under subsection (a) or (b) shall withhold information from the individuals in paragraph (1)(A) so long as they are so named."