



Summer 6-1-2015

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Recommended Citation

Stephen I. Vladeck, *The FISA Court and Article III*, 72 Wash. & Lee L. Rev. 1161 (2015).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol72/iss3/4>

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The FISA Court and Article III

Stephen I. Vladeck*

Although it has existed for nearly forty years, the Foreign Intelligence Surveillance Court (FISC) has received newfound attention (and criticism) after, and in light of the 2013 disclosures of a series of controversial U.S. surveillance programs by former NSA contractor Edward Snowden. Among other things, the Snowden disclosures precipitated suggestions from at least some circles that the FISC had failed to serve as a meaningful check on the Executive Branch, at least largely because it had too easily accepted and signed off on the government's debatable (if not dubious) interpretations of the relevant statutory authorities.¹

Contemporary critics of the role of the FISC have tended to focus on (1) the one-sided nature of most—if not all—proceedings before the court; (2) the unique (and perhaps troubling) role of the Chief Justice of the United States in selecting all of the FISC's judges—along with those of the Foreign Intelligence Surveillance Court of Review (FISCR)—without any outside input or oversight; and (3) the unconvincing reasoning in at least some of the key FISC opinions upholding the telephone metadata program.² To

* Professor of Law, American University Washington College of Law. My thanks to Margaret Hu for inviting me to participate in the symposium for which this Essay was prepared.

1. For the most comprehensive summary and encapsulation of these critiques to date, see generally ELIZABETH GOITEIN & FAIZA PATEL, *BRENNEN CTR. FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT* (2015) (analyzing potential constitutional concerns raised by FISC).

2. See *id.* at 29–43 (discussing constitutional concerns raised by FISC); see also, e.g., Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215*, *VOLOKH CONSPIRACY* (Sept. 17, 2013, 7:39 PM), <http://www.volokh.com/2013/09/17/thoughts-august-2013-fisc-opinion-section-215/> (last visited June 16, 2015) (analyzing and critiquing the reasoning in a FISC opinion sustaining the metadata program) (on file with the Washington and Lee Law Review); Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, *LAWFARE* (July 8, 2013, 11:46 PM), <http://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr> (last visited Aug. 4, 2015) (responding to Orin Kerr's critiques of the FISC process and advocating for the use of private attorneys to serve as "special advocates") (on file with the Washington and Lee Law Review).

that end, most calls for reform of the underlying surveillance programs disclosed by Snowden have come alongside calls for at least some reform of the FISC itself, whether by changing how its judges are appointed, providing for more regular adversarial participation by an outside “special advocate,” or even reassigning some of the FISC’s jurisdiction to “ordinary” Article III courts.³

Whatever their merits, many of these proposed reforms have been met with an array of prudential and constitutional objections—including concerns that changes to the composition and structure of the FISC would implicate Articles II and III of the United States Constitution.⁴ But perhaps most remarkably, these objections have revealed just how little effort has been undertaken to explain why the FISC is constitutionally permissible in the first place.⁵ After all, the FISC is an Article III court that was designed to exclusively hear *ex parte*, *in camera* applications from the government, notwithstanding Article III’s interrelated requirements of a case or controversy and of meaningful “adverseness.”⁶ And although the FISC expressly held in 2002 that the nature of such warrant applications before the FISC satisfies Article III,⁷ its analysis was, charitably, incomplete.

This symposium Essay aims to fill that gap. In particular, my goal is to unpack the relationship between the FISC and Article III

3. See, e.g., Stephen I. Vladeck, *The Case for a FISA “Special Advocate,”* 2 TEX. A&M L. REV. (forthcoming 2015) [hereinafter *Special Advocate*].

4. See, e.g., ANDREW NOLAN ET AL., CONG. RES. SERV., REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 44–46 (2014) (discussing potential constitutional problems raised by “housing the advocate in the judicial branch”); see also Letter from Hon. John D. Bates, Director, Admin. Off. of the U.S. Courts, to Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary 5–7 (Aug. 5, 2014) (relating legal concerns).

5. See Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA “Special Advocate,”* JUST SECURITY (Nov. 4, 2013, 1:34 PM), <http://justsecurity.org/2873/fisa-special-advocate-constitution/> (last visited June 17, 2015) (arguing that the addition of a special advocate would not be unconstitutional, assuming the current proceedings are constitutional) (on file with the Washington and Lee Law Review).

6. See *id.* (discussing the Article III adverseness requirement and the FISA court).

7. See *In re Sealed Case*, 310 F.3d 717, 732 n.19 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002) (per curiam) (stating that the court did “not think there is much left to an argument made by an opponent of FISA in 1978 that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities”).

in some detail—and to provide a more detailed framework within which to assess which aspects of the FISC’s caseload do and do not raise Article III concerns, and how contemporary reform proposals might assuage the former.

To that end, after providing a brief historical overview of the FISC, Part I turns to the original role of the FISC under the Foreign Intelligence Surveillance Act of 1978 (FISA),⁸ which exclusively encompassed applications for individualized “warrants,” albeit under a different probable cause standard than is typically utilized in criminal cases. As Part I documents, whereas FISA as originally enacted raised a host of Article III concerns, the statute was ultimately predicated on an analogy to “ordinary” warrant applications—which have long been held to satisfy Article III’s case-or-controversy requirement insofar as they are ancillary to subsequent judicial proceedings.

Part II turns to the post-1978 practice under FISA, along with the September 11-era changes to FISA, especially those embodied within the USA PATRIOT Act of 2001⁹ and the FISA Amendments Act of 2008.¹⁰ As Part II notes, leaving aside the substantive merits of these developments in the abstract, both undermined at least to some degree the Article III justifications that carried the day when FISA was enacted. After all, practice under “classic” FISA revealed how unusual it was for FISA warrants to *actually* lead to subsequent criminal or civil proceedings—and how difficult it was for litigants to collaterally attack FISA warrants even in the rare cases in which they did.

Far more fundamentally, the authorities Congress subsequently provided in statutes such as the USA PATRIOT Act and FISA Amendments Act categorically departed from the warrant model insofar as they invested the FISC with the ability and responsibility to approve government surveillance authorities that are wholly untethered from a specific target, but rather provide for either or both bulk and programmatic collection of foreign intelligence surveillance. Whatever the FISC is doing when

8. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1885 (2012)).

9. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 18, and 50 U.S.C. (2012)).

10. Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified as amended in scattered sections of 50 U.S.C. (2012)).

it approves a government request for a production order or a directive, it is most certainly *not* approving anything that remotely resembles a “warrant” to conduct surveillance of an identified suspect. At a minimum, then, these authorities require fundamentally different Article III justifications (that have so far not been provided).

To be sure, Congress may well have anticipated these Article III concerns by authorizing adversarial participation by the recipients of production orders under the USA PATRIOT Act¹¹ and directives under the FISA Amendments Act.¹² But as Part II concludes, the fact that such adversarial process has seldom been utilized opens the door to serious Article III objections—that may well be ameliorated through more regular participation by a “special advocate.”

I. “Classic” FISA and Article III

As has been explained in detail elsewhere, FISA

was a response to two interrelated developments: the Supreme Court’s 1972 decision in the *Keith* case declining to articulate a domestic intelligence exception to the Warrant Clause of the Fourth Amendment,¹³ and a series of intelligence abuses documented by the Church Committee several years later.¹⁴ Together with the creation of the congressional intelligence committees and a series of other reforms, FISA was part of a larger structural accommodation between the three branches of government: The Executive Branch agreed to have many of its foreign intelligence surveillance activities subjected to far greater legal oversight and accountability, in exchange for which Congress and the courts agreed to provide such oversight and accountability in secret. To that end, the core of FISA as originally enacted was the authority provided by Title I of the Act, which empowered the government to obtain secret warrants for electronic—and, later, physical—surveillance of

11. See 50 U.S.C. § 1861(f) (2012) (setting out procedures for judicial review of production orders).

12. See *id.* § 1881a(h) (authorizing directives and providing for judicial review thereof).

13. See *United States v. U.S. Dist. Court*, 407 U.S. 297, 320–21 (1972) (rejecting the government’s arguments for a domestic surveillance exception).

14. S. REP. NO. 94-755 (1976).

individuals whom the government had probable cause to believe were acting as an agent, or on behalf, of a foreign power.¹⁵

To supervise these new “FISA warrants,” Congress created a specialized court—the FISC—to hear government applications *ex parte* and *in camera*.¹⁶ The court would be staffed by seven (now eleven) sitting Article III district judges selected to serve seven-year terms by the Chief Justice of the United States, three of whom “shall reside within 20 miles of the District of Columbia.”¹⁷ Except

15. *Special Advocate*, *supra* note 3 (manuscript at 2). Applications in the non-FISA context require probable cause to believe that the suspect committed a crime. FISA, in contrast, requires probable cause to believe that the target of the surveillance is, or is an agent of, a “foreign power.” The relaxed probable cause standard in the FISA context has been challenged as not satisfying the Fourth Amendment’s Warrant Clause. But that argument was rejected by numerous courts prior to September 11 2001, at least largely because of the “primary purpose” doctrine—which required the government to certify that the primary purpose of a FISA warrant was foreign intelligence surveillance and not ordinary law enforcement. *See, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (“[B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.”); *see also* *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“[T]he investigation of criminal activity cannot be the primary purpose of the surveillance.”).

But when Congress abolished the primary purpose doctrine in the USA PATRIOT Act, the FISC—in its first-ever published decision—nevertheless upheld the probable cause standard against a Fourth Amendment challenge. *See In re Sealed Case*, 310 F.3d 717, 736–46 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002) (per curiam) (holding that the relaxed “significant purpose” standard does not violate the Fourth Amendment). *But see* *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1031 (D. Or. 2007) (holding that the lesser “significant purpose” standard in the USA PATRIOT Act violates the Fourth Amendment), *vacated on other grounds*, 599 F.3d 964 (9th Cir. 2009).

16. Because the FISC is an inferior court created by Congress, staffed by Article III judges, exercising jurisdiction over what are indisputably federal questions, and subject to supervision within the Article III judicial system, it is beyond peradventure that it is an “Article III court.” *See, e.g.*, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (U.S. Foreign Intell. Surveil. Ct. Rev. 2007) (“Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III . . .”). *But see* Orin Kerr, *More on Article III and Appellate Review in the Leahy Bill*, LAWFARE (Aug. 5, 2014, 3:20 AM), <http://www.lawfareblog.com/2014/08/more-on-article-iii-and-appellate-review-in-the-leahy-bill/> (last visited Sept. 10, 2015) (“[I]t’s not obvious to me that having a federal judge review a warrant application makes that review an exercise of Article III power.”) (on file with the Washington and Lee Law Review).

17. 50 U.S.C. § 1803(a) (2012).

in emergencies (where, presumably, the locally resident judges would be available), the judges otherwise rotate through the FISC, such that each judge is on duty in Washington for one out of every eleven weeks.

If the FISC denies the government's application, Congress authorized the government to either seek rehearing before the entire FISC, sitting en banc, appeal to the newly created Foreign Intelligence Surveillance Court of Review (FISCR) staffed by three sitting circuit judges designated by the Chief Justice, or both.¹⁸ If unsuccessful there, FISA authorized the government to appeal to the Supreme Court.¹⁹ As originally constituted, FISA thus contemplated that the FISC would resolve individualized warrant applications on a case-by-case basis, ex parte and in camera, and with only the government authorized to participate—and, if necessary, to appeal.²⁰

Separate from the substantive foreign intelligence surveillance authorities codified in FISA, Congress justified the creation of a new, specialized court largely on grounds of expediency: "Requiring the special court to sit continuously in the District of Columbia will facilitate necessary security procedures and, by ensuring that at least one judge is always available, will ensure speedy access to it by the Attorney General when timeliness is essential for intelligence purposes."²¹ Moreover, a specialized court would "likely . . . be able to put claims of national security in a better perspective and to have greater confidence in interpreting

18. See *id.* § 1803(b) (establishing a court of review).

19. See *id.* (providing for appeal to the Supreme Court).

20. In the first case to reach the FISCR, the Court of Review received amicus briefs from several parties. See *In re Sealed Case*, 310 F.3d 717, 719 n.1, 737 (U.S. Foreign Intell. Surveill. Ct. Rev. 2002) ("We are, therefore, grateful to the ACLU and NACDL for their briefs that vigorously contest the government's argument."). But after the FISCR ruled for the government, the Supreme Court denied the ACLU's motion to intervene for purposes of filing a petition for certiorari. See *ACLU v. United States*, 538 U.S. 920, 920 (2003) (denying the ACLU's motion for leave to intervene to file a petition for certiorari).

21. H.R. REP. No. 95-1283, at 71 (1978); see also S. REP. No. 95-701, at 12 (1978) ("The need to preserve secrecy for sensitive counterintelligence sources and methods justifies . . . consolidation of judicial authority in a special court."), reprinted in 1978 U.S.C.C.A.N. 3973, 3980.

this bill than judges who do not have occasion to deal with the surveillances under this bill.”²²

Congress’s confidence notwithstanding, at least some experts feared that such a categorically ex parte structure for the FISC would raise serious Article III concerns. Thus, then-Professor (and future Judge) Laurence Silberman testified that “[a]lthough it is true that judges have traditionally issued search warrants ex parte, they have done so as part of a criminal investigative process which . . . for the most part, leads to a trial, a traditional adversary proceeding.”²³ FISA surveillance, in contrast, was designed principally (if not primarily) to facilitate foreign intelligence investigations—and not criminal prosecutions. Indeed, that very orientation away from ordinary law enforcement helped to allay what otherwise might have been serious Fourth Amendment (and prudential) objections to FISA’s lower probable cause standard.²⁴

But Silberman’s objections were largely mooted by a memorandum (and subsequent congressional testimony) prepared by the Justice Department’s Office of Legal Counsel (OLC). Although OLC agreed that the Article III question was “difficult,” it concluded that the structure FISA contemplated for the FISC was probably constitutional, both because (1) “FISA Court judges . . . would still be applying the law to the facts of a particular case” and (2) “in normal criminal cases, the government is permitted to persuade a court of the need for a warrant without the target being present.”²⁵ In other words, the constitutional defense of the FISC turned on the limited scope of the review it was providing and the analogy to “ordinary” warrant applications—which, despite typically involving ex parte, in camera proceedings, were understood to raise no Article III

22. H.R. REP. No. 95-1283, at 91 (1978).

23. *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 224 (1978) (statement of Hon. Laurence Silberman) [hereinafter “*FISA Hearings*”].

24. See *supra* note 15 and accompanying text (discussing the probable cause requirements in the FISA context).

25. *FISA Hearings*, *supra* note 23, at 26–31 (statement of John M. Harmon, Asst. Att’y. Gen., Office of Legal Counsel).

questions insofar as they were ancillary to subsequent criminal (or civil) proceedings.²⁶

To further pretermit these constitutional objections, Congress revised the draft of FISA to help strengthen the analogy to “ordinary” warrants. FISA as thus enacted required that criminal defendants be notified when “any information obtained or derived from an electronic surveillance” was to be used in their prosecutions.²⁷ The statute also provided an express cause of action for damages for an “aggrieved person” who was subjected to unlawful surveillance under FISA.²⁸ And although FISA warrants were not typically meant to produce evidence to be used in criminal prosecutions, the fact that they *could* be collaterally attacked in at least some cases provided both a vehicle for raising Article III objections and the rejoinder courts would supply in rejecting them.

Thus, in *United States v. Megahey*,²⁹ a district court rejected a criminal defendant’s attempt to suppress FISA-derived evidence on the ground that the proceedings before the FISC violated Article III.³⁰ As Judge Sifton explained,

Applications for electronic surveillance submitted to FISC pursuant to FISA involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them, much as he might otherwise act on an *ex parte* application for a warrant. In the case of each application, the FISC judge is statutorily obliged to ensure that

26. In a recent article, James Pfander and Daniel Birk have identified FISA warrant proceedings as emblematic of a larger species of “non-contentious jurisdiction”—cases in which it has long been understood that Article III’s typical requirement of “adverseness” simply does not apply, whether or not the judicial review is ancillary to subsequent proceedings. James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1462–65 (2015). As explained below, however, *whatever* the Article III justification for “classic” FISA warrants, neither the OLC’s explanation at the time FISA was enacted nor Pfander and Birk’s article helps to provide an Article III justification for the role of the FISC under the far different and more expansive judicial review scheme contemplated by the USA PATRIOT Act and FISA Amendments Act. *See infra* Part III.B (discussing the role of FISC under these later statutes).

27. 50 U.S.C. § 1806(c) (2012).

28. *Id.* § 1810.

29. 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982), *aff’d*, 729 F.2d 1444 (2d Cir. 1983).

30. *See id.* at 1196–98 (rejecting arguments that the FISA court is inconsistent with constitutional requirements with regard to the judicial branch).

each statutory prerequisite is met by the application before he may enter a surveillance order. The FISC judge who is faced with a surveillance application is not faced with an abstract issue of law or called upon to issue an advisory opinion, but is, instead, called upon to ensure that the individuals who are targeted do not have their privacy interests invaded, except in compliance with the detailed requirements of the statute.³¹

In other words, because of the analogy to ordinary warrants and the concrete nature of the question that the FISC's judges were asked to resolve in approving a government application, the FISC raised no unique Article III concerns.

Although *Megahey* was a district court decision, its analysis was widely adopted by every other court to consider an Article III challenge to the FISC, including in an influential 1987 Ninth Circuit opinion by then-Judge Anthony Kennedy.³² Thus, by the time the FISC heard the government's first-ever appeal of a denial of an application by the FISC in 2002, a three-judge panel that included Judge Silberman—who had testified against FISA in 1978 at least in part because of Article III concerns—concluded that “we do not think there is much left to an argument . . . that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities of federal judges because of the secret, non-adversary process.”³³

II. Modern FISA and Article III

By the time the FISC gave the back of its hand to the Article III objections to the role of the FISC in 2002, it should have known better, because two separate sets of flaws in the warrant analogy—and, thus, in the constitutional defense of the FISC—had begun to emerge. First, it had proven increasingly difficult for warrants approved by the FISC to be meaningfully reviewed in subsequent judicial proceedings. Second, and more fundamentally, the FISC

31. *Id.* at 1197. Judge Sifton also rejected the defendant's constitutional objections to the specialized nature of the court, or the manner in which the judges were selected. *Id.* at 1196–98.

32. *See* United States v. Cavanagh, 807 F.2d 787, 791–92 (9th Cir. 1987) (citing *Megahey* and adopting its reasoning).

33. *In re Sealed Case*, 310 F.3d 717, 732 n.19 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002) (per curiam).

had begun to do far more than merely approve government applications for foreign intelligence surveillance warrants.

A. The Warrant Analogy as a “Razor-Thin Legal Fiction”

Recall from above that the OLC’s constitutional defense of the role of the FISC turned largely on the extent to which FISA warrants would be ancillary to subsequent criminal or civil proceedings, in which they could (and presumably *would*) be subject to collateral attack.³⁴ To that end, FISA itself required the government to disclose to a criminal defendant “any information obtained or derived from an electronic surveillance of that aggrieved person” whenever it “intends to enter [such information] into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States.”³⁵ It then also furnished the defendant with an opportunity to seek to suppress the introduction of such information,³⁶ and, in addition, created a civil cause of action for damages presumably for cases in which such criminal remedies were inadequate or ineffective.³⁷

In practice, however, these mechanisms have gone largely under-(if not un-)utilized. For example, the government reportedly failed to satisfy its notice obligations under FISA for a substantial period of time, culminating in a rare public concession by Solicitor General Verrilli in October 2013 that a number of defendants had not received the notice required by FISA—and had therefore been unable to vindicate their right to collaterally attack the underlying FISA warrant.³⁸

But even when defendants *did* receive the notice mandated by the statute (and, quite possibly, the Constitution), courts have

34. See *supra* notes 25–33 and accompanying text (discussing FISA warrant requirements and judicial review).

35. 50 U.S.C. § 1806(b) (2012).

36. *Id.* § 1806(f).

37. *Id.* § 1810.

38. See, e.g., Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Oct. 17, 2013, at A3 (discussing how the provision of notice to criminal defendants opened the door to new legal challenges to certain government surveillance programs).

refused to require the government to disclose the materials submitted in support of the underlying FISA application—holding, time and again, that such disclosure is not necessary to resolve the validity of the warrant or of the surveillance conducted pursuant thereto.³⁹ Although it is impossible to assess the correctness of these rulings based solely on the public record, at least one circuit judge has suggested that the statutory process for resolving such “*Franks*”⁴⁰ challenges in FISA cases is deeply flawed—and is, indeed, effectively unavailable to criminal defendants regardless of the merits of their claims.⁴¹

Finally, even though FISA is the rare example of a statute creating an express civil cause of action for damages in the national security sphere,⁴² the rare plaintiffs who can actually prove that they were subjected to secret surveillance under FISA (and who therefore have standing to even invoke FISA’s cause of action)⁴³ have run into federal court decisions holding, rather counterintuitively, that FISA is not an express waiver of the United States government’s “sovereign immunity,” so damages are not available against the government itself.⁴⁴

39. *United States v. Daoud*, 755 F.3d 479, 486 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 1456 (2015).

40. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that a defendant has a right to challenge a search or arrest warrant on the ground that it was procured by a knowing or reckless falsehood by the officer who applied for the warrant—and that district courts are entitled to conduct adversarial hearings to resolve such claims. *See id.* at 169–72 (discussing probable cause requirements and district court hearings).

41. *See Daoud*, 755 F.3d at 485–96 (Rovner, J., concurring) (“As a practical matter, the secrecy shrouding the FISA process renders it impossible for a defendant to meaningfully obtain relief under *Franks* . . .”); *see also* Steve Vladeck, *Judge Posner v. Judge Rovner: On Daoud, FISA, and Franks*, LAWFARE (June 17, 2014, 7:56 AM), <http://www.lawfareblog.com/2014/06/judge-posner-v-judge-rovner-on-daoud-fisa-and-franks/> (last visited Aug. 8, 2015) (comparing the majority and concurring opinions in the *Daoud* case) (on file with the Washington and Lee Law Review).

42. *See* 50 U.S.C. § 1810 (2012) (creating a civil cause of action).

43. *See, e.g., Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1143 (2013) (finding a lack of standing and reasoning that a present injury is not established where a party could show no more than a risk of surveillance).

44. *See al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 855 (9th Cir. 2012) (holding that Congress “deliberately did not waive immunity with respect to § 1810”).

The net effect of these three interrelated phenomena has been to call into serious question just how meaningful an opportunity FISA provides to those whose communications are intercepted pursuant to a FISA warrant to collaterally attack that warrant. And insofar as the existence of such collateral proceedings is a necessary element of any Article III defense of the role of the FISC, their practical unavailability may well call that defense into serious question. As Professor Robert Chesney suggested in 2013 congressional testimony, the possibility that a FISA warrant today will meaningfully be litigated in subsequent judicial proceedings is a “razor-thin legal fiction.”⁴⁵

B. Moving Away from the Warrant Analogy

And yet, as significant as these developments have been in calling into question the *strength* of the warrant analogy, shifts in the substantive authorities that the FISC is tasked with overseeing—and the review the FISC provides—have all but eviscerated even the “razor-thin legal fiction” that the warrant analogy still provides for “classic” FISA applications.

For example, Congress in 1998 for the first time authorized the FISC to approve more than just an individual warrant, giving its judges the power under new “Title V” of the Act to issue “an order authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or an [FBI] investigation concerning international terrorism”⁴⁶ Whereas classic FISA “warrants” required a determination of probable cause to believe that the target was (or was an agent of) a foreign power, this new provision only required a determination that “there are specific and articulable facts giving reason to believe that the person *to whom*

45. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1224 n.187 (2013) (quoting *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 31 (2013) (written statement of Robert Chesney, Professor, Univ. of Tex. Law Sch.)).

46. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2411 (prior version codified at 50 U.S.C. § 1862 (2012)).

the records pertain is a foreign power or an agent of a foreign power.”⁴⁷ Thus, the 1998 amendment still required a nexus to an identified suspect, but the role of the FISC had shifted—fundamentally—from approving something akin to a search warrant to signing off on something that looked much more like a subpoena directed to a (narrow) class of innocent third parties.

After the September 11 attacks, Congress dramatically expanded the business records provision through § 215 of the USA PATRIOT Act of 2001.⁴⁸ In particular, § 215 rewrote Title V to empower the FISC to require “the production of *any* tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”⁴⁹ Unlike the 1998 language, § 215 of the USA PATRIOT Act was not limited to a small class of businesses, nor did it require any showing of a connection between the “tangible things” being sought and “a foreign power or an agent of a foreign power.”⁵⁰

Instead, all the government had to show—and all the FISC was allowed to require—was that “there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”⁵¹ Thus, whereas the 1998 addition of Title V could have been defended as a shift in the degree of the FISC’s review, § 215 represented a shift in kind—away from any individualized inquiry about suspected agents of a foreign power and toward far broader, “bulk” collection against putatively unidentified individuals.

Perhaps because of the fundamental shift in the role of the FISC that § 215 portended, the USA PATRIOT Act also for the first

47. *Id.* (emphasis added).

48. Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified at 50 U.S.C. § 1861 (2012)).

49. 50 U.S.C. § 1861(a)(1) (2012) (emphasis added).

50. *Id.*

51. *Id.* § 1861(b)(2)(A).

time authorized adversarial participation before the FISC. Thus, anyone receiving a “production order” under § 215 was given the right to challenge the order before the FISC on the ground that it “does not meet the requirements of [section 215] or is otherwise unlawful.”⁵² And if such a challenge was unsuccessful, the recipient was further empowered to file a petition for review of the FISC’s decision with the FISCR—and, if they were unsuccessful there, a petition for certiorari with the United States Supreme Court.⁵³ Tellingly, though, as of July, 2013, no recipient of a production order under § 215 had ever availed themselves of the adversarial review Congress had provided.⁵⁴

Although Congress amended FISA a number of times in the ensuing years,⁵⁵ the next major shift in the role of the FISC came via the temporary Protect America Act of 2007 (PAA),⁵⁶ which was quickly followed by the more permanent FISA Amendments Act of 2008 (FAA).⁵⁷ Whereas section 215 was directed toward surveillance conducted within the United States, both the PAA and FAA were principally concerned with the collection of information involving non-U.S. persons, but that transited through servers, internet switches, or other infrastructure located within the United States.⁵⁸ To that end, Congress authorized the government to obtain “directives” from the FISC—annual authorizations for the programmatic collection of communications that, so long as they were not targeted at U.S. persons, would be reviewed by the FISC solely for adherence to a series of (detailed) procedural

52. *Id.* § 1861(f)(2)(B).

53. *Id.* § 1861(f)(3).

54. See Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Sen. Comm. on the Judiciary, at 8–9 (July 29, 2013) (“To date, no recipient of a production order has opted to invoke [the judicial review provisions] of the statute.”).

55. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 18 and 50 U.S.C. (2012)).

56. Pub. L. No. 110-55, 121 Stat. 552 (2007) (formerly codified in scattered sections of 50 U.S.C.).

57. Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C. (2012)).

58. See GOITEIN & PATEL, *supra* note 1, at 25–27 (discussing the background and content of the FISA Amendments Act).

requirements.⁵⁹ Thus, and unlike § 215, new § 702 of FISA appeared to enlist the FISC in ex ante approval of programmatic surveillance—as opposed to applying legal principles to specific facts.

As in § 215, Congress again provided for adversarial review, authorizing an “electronic communication service provider” that received such a “directive” to seek to modify or set aside the directive on the ground that “the directive does not meet the requirements of [the FAA], or is otherwise unlawful.”⁶⁰ The 2007 and 2008 Acts also provided far more detail about what such judicial review should look like, including procedures for initial (and, if warranted, “plenary”) review,⁶¹ and express authorization to hold non-compliant parties in contempt.⁶² As with § 215, the party that lost in the FISC was given an express right to appeal to the FISCR and, if necessary, to the Supreme Court.⁶³

Unlike § 215, these procedures have been taken advantage of at least once—culminating in a 2008 FISCR decision in a case we now know to have been brought by the technology company Yahoo!, in which the FISCR upheld the Protect America Act against a Fourth Amendment (but, tellingly, not an Article III⁶⁴) challenge.⁶⁵ And yet, as of July, 2013, Yahoo!’s case was the only publicly acknowledged instance in which an electronic communication service provider had pursued the adversarial process provided by

59. 50 U.S.C. § 1881a (2012). This provision is commonly referred to as “section 702” because it is § 702 of FISA itself—as amended over time.

60. *Id.* § 1881a(h)(4)(C).

61. *Id.* §§ 1881a(h)(4)(D)–(E).

62. *Id.* § 1881a(h)(4)(G).

63. *See id.* § 1881a(h)(6) (providing for appellate review).

64. Although Yahoo! did not appear to raise Article III objections in the litigation before the FISC or FISCR, the plaintiffs in *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013), *did* challenge the FISA Amendments Act at least in part on Article III (in addition to First and Fourth Amendment) grounds. Because that suit went to the Supreme Court on (and was ultimately thrown out for lack of) standing, no court ever considered the plaintiffs’ (serious) Article III objections.

65. *See In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1009–13 (U.S. Foreign Intell. Surveil. Ct. Rev. 2008) (“[A]ssessing the intrusions at issue in light of the governmental interest at stake and the panoply of protections that are in place, we discern no principled basis for invalidating the PAA as applied here.”).

either the 2007 or 2008 Acts.⁶⁶ Whether because the FISCR's decision in the Yahoo! case foreordained the merits of any such challenge, the providers had no interest in biting the hand that fed them, or any number of other reasons, the adversarial process Congress provided in the USA PATRIOT Act, the Protect America Act, and the FISA Amendments Act has proven more theoretical than real.

C. The Contemporary FISC and Article III

Given the virtually empty set of adversarial cases before the FISC, along with the concern that the recipients of production orders under the USA PATRIOT Act or directives under the FISA Amendments Act may not share the interests of their customers, one of the more common themes of calls for post-Snowden reforms to United States surveillance law and policy has been to provide for more adversarial participation before the FISC. Although these proposals have taken a number of forms, their core idea involves the creation of a "special advocate," whose job is to appear opposite of the government in at least some cases before the FISC and to argue on behalf of the public, those whose communications are being targeted by the government application at issue, or some combination of the two.⁶⁷

Curiously, one of the objections that has been raised to such proposals is that such participation by a nominal adversary would not satisfy Article III.⁶⁸ But as I have explained before,

if the government's application suffices to create an Article III case or controversy, that case or controversy necessarily persists for the duration of the authorities that the FISA Court's granting of the application provides. That's why . . . there is no Article III problem with having a "special advocate" participate in the FISA Court itself, even after the initial application has been approved.⁶⁹

66. Walton Letter, *supra* note 54, at 8–9.

67. See *Special Advocate*, *supra* note 3, at 18–23 (arguing that the addition of a special advocate is a necessary reform measure).

68. See, e.g., NOLAN ET AL., *supra* note 4, at 29–35 (pointing out theoretical Article III standing concerns raised by the addition of a public advocate).

69. Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A*

In other words, although there may be Article III problems with the FISC, it is difficult (if not impossible) to see how those problems are exacerbated (rather than ameliorated) by more consistent adversarial participation. The harder question is just how serious these Article III concerns truly are. In that respect, it will be helpful, once again, to differentiate between “classic” FISA and the newer authorities, especially those provided by the USA PATRIOT Act and the FISA Amendments Act.

In the context of “classic” FISA, there are two different grounds on which the FISC’s fealty to Article III could be defended: First, razor-thin though the fiction may be, the analogy to warrants still holds, at least in theory.⁷⁰ Thus, FISA warrants are generally still subject to collateral attack, whether through *Franks*-like motions to suppress in criminal cases, or through civil suits under FISA’s own cause of action.⁷¹ That these efforts rarely succeed does not of itself prove their unavailability.⁷² After all, even in the context of “ordinary” warrants, collateral attacks are, in practice, only realistically available in a small minority of cases.⁷³

Second, if one accepts the theory of “non-contentious jurisdiction” offered by James Pfander and Daniel Birk, “classic” FISA would satisfy Article III whether or not warrants issued by the FISC were in fact ancillary to subsequent judicial proceedings.⁷⁴ As they explain, “the FISC’s role in hearing warrant applications on an ex parte basis seems to fit comfortably within the scope of federal judicial power over matters of non-contentious

Response to Orin Kerr, LAWFARE (July 31, 2014, 10:54 AM), <http://www.lawfareblog.com/2014/07/article-iii-appellate-review-and-the-leahy-bill-a-response-to-orin-kerr/> (last visited July 11, 2015) (discussing a FISA Court proceeding) (on file with the Washington and Lee Law Review).

70. See *supra* Part II (analyzing the continuing vitality of the warrant analogy).

71. See *supra* notes 36–37 and accompanying text (discussing remedies created for aggrieved parties).

72. Cf. *Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) (noting that a constitutional issue might arise if an avenue of judicial review available in theory turns out to be unavailable in practice).

73. See *supra* notes 42–44 and accompanying text (explaining the hurdles potential plaintiffs face when seeking relief).

74. See *supra* note 26 and accompanying text (explaining the “non-contentious jurisdiction” theory).

jurisdiction.”⁷⁵ Thus, one could defend the work of the FISC in approving FISA warrants against an Article III challenge solely by reference to Pfander and Birk’s approach without regard to the remedies actually available in subsequent criminal or civil proceedings. Taken together, then, it seems likely that, insofar as FISA satisfied Article III at its inception, the FISC is continuing to satisfy Article III today at least when called upon to issue individualized FISA warrants.⁷⁶

As should be clear by now, the far closer question is whether the FISC is also acting consistently with Article III when it issues production orders under § 215 of the USA PATRIOT Act, or when it issues directives under § 702 of FISA as provided in the FISA Amendments Act. To reiterate, such proceedings raise two separate Article III concerns: First, unless the recipient of the production order or directive chooses to object, there is no adverse party before the FISC—and, unlike in the context of classic FISA, no meaningful analogy to ordinary warrants with regard to the availability of collateral attacks in subsequent judicial proceedings or with regard to Pfander and Birk’s theory of “non-contentious jurisdiction.”⁷⁷ Second, insofar as the FISC is asked in these cases to do something other than apply established law to case-specific facts, there is also a concern that there is no “case or controversy” for the court to decide, more generally.⁷⁸

Ultimately, it is impossible to predict whether the Supreme Court might eventually find either of these Article III objections convincing. On the one hand, both the USA PATRIOT Act and the FISA Amendments Act do contemplate adversarial participation, even if they do not mandate it in every case.⁷⁹ And although the FISA Amendments Act, especially, seems to enlist the FISC in approving relatively abstract authorizations, federal courts often play a largely similar role in the context of reviewing other

75. Pfander & Birk, *supra* note 26, at 1464.

76. *See supra* notes 52–68 (discussing the changes in warrant procedures since FISC’s inception).

77. *See supra* note 26 and accompanying text (discussing the adverseness requirement and its relation to FISC).

78. *See supra* note 7 and accompanying text (discussing the Article III case or controversy requirement as applied to FISC).

79. *See supra* note 26 and accompanying text (discussing the adverseness requirement and its relation to FISC).

administrative action—the abstract nature of which has not generally been fatal to the courts’ power to entertain facial (as opposed to “as applied”) challenges thereto.

On the other hand, the warrant analogy was weak enough to begin with and there have been vanishingly few examples of adversarial participation under the procedures Congress created in the USA PATRIOT Act and the FISA Amendments Act. Thus, one could certainly sympathize with arguments such as those made in a recent Brennan Center report—that the FISC probably is acting in violation of Article III when it approves directives under the FISA Amendments Act and perhaps when it approves production orders under § 215, as well.⁸⁰ And unlike in the context of classic FISA warrants, neither of these authorities would seem to be examples of the kind of “non-contentious jurisdiction” for which Pfander and Birk have suggested no meaningful ancillary proceedings are constitutionally necessary.

Whether or not they are meritorious, the Article III concerns raised by how the FISC handles government applications under both the USA PATRIOT Act and the FISA Amendments Act should at the very least be strong enough so as to encourage Congress, as it did when it enacted FISA originally, to take steps to mitigate the potential unconstitutionality. Mandating adversarial participation by a “special advocate,” at least in cases arising under the USA PATRIOT Act and the FISA Amendments Act, could only be a salutary measure in that respect.⁸¹ Indeed, although the participation of a meaningful adversary would not vitiate the case-or-controversy objections to § 702, it would certainly convert judicial review of directives under the FISA Amendments Act to something that far more closely resembles ordinary administrative law processes, for which the Article III precedents are far better established.

At that point, to be sure, one might well wonder why a super-secret court designed to act *ex parte* and *in camera* should also be in charge of reviewing such fundamentally different

80. *See supra* notes 1–2 (discussing critiques regarding the constitutionality of FISC).

81. *See supra* note 67 and accompanying text (arguing that the addition of a special advocate is an important reform measure).

surveillance authorities. But that debate would largely take place on terms of prudential wisdom, at least, and not constitutionality.