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REVISITING THE FISA COURT APPOINTMENT PROCESS

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Abstract: The Foreign Intelligence Surveillance Act (FISA) courts are the only active Article III courts without full-time judges directly appointed by the President. The Chief Justice unilaterally chooses generalist judges to serve as part-time FISA judges. Proceedings are classified and only the government is represented, so the only legal or technical arguments against any surveillance request are the ones judges raise themselves. This Essay argues that the FISA court appointment process lacks democratic legitimacy, threatens the separation of powers, undermines the ideological balance of the judiciary, and asks too much of generalist judges. The author concludes that, whatever the wisdom of the FISA courts' decisions, they belong in the hands of permanent, specialist judges appointed by the President and confirmed by the Senate.

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REVISITING THE FISA COURT APPOINTMENT PROCESS

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I. THE ROLE OF FISA JUDGES

The Foreign Intelligence Surveillance Court (FISC) and its Court of Review (FISCR)[1] are the principal arbiters of mass surveillance by the United States. These two FISA courts are the only active Article III courts without full-time judges directly appointed by the President.[2] FISA judges serve part-time for fixed terms.[3] The Chief Justice unilaterally chooses eleven district judges for the FISC and three district or circuit judges for the FISCR,[4]

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[1] I refer to the FISC and FISCR collectively as "FISA courts" and to their judges collectively as "FISA judges," in reference to their creation by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 § 103, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1803 (2010)). *See, e.g.*, Letter from John D. Bates, Director, Administrative Office of the Courts, to Patrick J. Leahy, Chairman, Senate Committee on the Judiciary 1 n.1 (Aug. 5, 2014), *available at* http://online.wsj.com/public/resources/documents/Leahyletter.pdf.

[2] *In re* Release of Court Records, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) (noting that "the FISC is an inferior federal court established by Congress under Article III" (citing *In re* Sealed Case, 310 F.3d 717, 731–32 (FISA Ct. Rev. 2002))); *e.g.*, ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 2 (2014) ("The FISC is wholly unique among federal [Article III] courts in that . . . the selection of its judges deviates from traditional constitutional appointments process . . . ."). *See generally* Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004).

[3] 50 U.S.C. § 1803(a)–(b), (d) (2012).

[4] *Id.* § 1803(a)–(b). The only restrictions are that FISC judges must come from at least seven different circuits and at least three must live near Washington, D.C. *Id.*

and designates presiding judges for each.[5] FISA judges are life-tenured on their respective generalist courts, but serve seven-year terms on the FISA courts, after which the life-tenured Chief Justice replaces them.[6] Putting aside the substantive controversies of surveillance law, I argue that the FISA courts are structurally flawed. This appointment process lacks democratic legitimacy, threatens the separation of powers, undermines the ideological balance of the judiciary, and asks too much of generalist judges. Congress should amend the Foreign Intelligence Surveillance Act to create permanent FISA judgeships with Presidential appointment and Senate confirmation.

Life tenure under Article III means that the federal judiciary is not simply a reflection of any one President or Senate. The current bench includes judges appointed by each of the past ten Presidents.[7] But FISA judges serve seven-year terms and the Chief Justices who appoint them tend to serve longer, so each Chief Justice since the creation of the FISA courts in 1978 has had the chance to fill every seat on the FISA bench.[8] With the exception of Harlan Fiske Stone, every Chief Justice in the past two centuries has served for over seven years.[9] Thus, it is likely that the trend of all FISA judges being chosen by a single individual will continue.

The FISA courts operate unlike any other court. Their proceedings are classified. Their decisions are classified. Their opinions are classified. All cases are heard ex parte, with only the government represented. Despite the massive stakes and deeply technical issues involved, these are specialized courts without specialized judges. Counsel for the government argues for broad surveillance powers, and designated district judges rotate the part-time duty of ruling on those

[5] The statute is clearer on the Chief Justice's authority to choose a presiding judge for the FISCR than for the FISC. *Id.* It is nonetheless established practice that he appoints one for the FISC as well. *See, e.g.*, FOREIGN INTELLIGENCE SURVEILLANCE COURT RULES OF PROCEDURE R. 4(b), *available at* www.uscourts.gov/uscourts/rules/FISC2010.pdf ("The Chief Justice designates the 'Presiding Judge.'").

[6] U.S. CONST. art. III § 1; 28 U.S.C. §§ 44(b), 134(a) (2012); 50 U.S.C. § 1803(a)–(b).

[7] This includes both active and senior judges. *Export of All Data in the Biographical Directory of Federal Judges, 1789–present*, FEDERAL JUDICIAL CENTER, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (follow instructions for download of comma delimited text file; save with ".csv" file extension; open in spreadsheet software; filter for rows with blank cells in the column titled "Date of Termination").

[8] The FISA courts were created in 1978 through the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 § 103, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1803 (2010)). Chief Justices Burger, Rehnquist, and Roberts, the post-1978 Chief Justices, each presided as Chief Justice for more than seven years. Additionally, while Chief Justice Burger was in office when FISA passed, more than seven years of his tenure came after that. *Members of the Supreme Court of the United States*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 8, 2015).

[9] *Id.*

requests without ever hearing opposing arguments.[10] Because the case law is secret, judges have no prior exposure to FISA court precedent—they have to learn it for the first time after they are selected. And judges normally serve only one of every eleven weeks on the FISC, with the other ten at their "home" district courts.[11]

Executive branch lawyers work closely and informally with FISC staff attorneys on the details of the government's requests, and they are almost never denied in the end.[12] Perhaps because the government's requests are so frequently granted, the FISCR has only been empaneled to hear two appeals in its thirty-seven year history.[13] Likewise, the Supreme Court has never heard a case originating in the FISA courts.[14] The FISC is technically capable of meeting en banc, but it rarely does so.[15]

Emerging technology and the FISA courts allow America's intelligence agencies to collect mountains of data on millions of people that would normally

[10] Letter from Reggie B. Walton, Presiding Judge, Foreign Intelligence Surveillance Court, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (July 29, 2013), *available at* http://www.fisc.uscourts.gov/sites/default/files/Leahy.pdf ("Each week, one of the eleven district court judges who comprise the Court is on duty . . . ."); *see also* Andrew Weissmann, *The Foreign Intelligence Surveillance Court: Is Reform Needed?*, JUST SECURITY (June 12, 2014, 9:45 AM), http://justsecurity.org/11540/guest-post-foreign-intelligence-surveillance-court-reform-needed/ ("Importantly, a FISC judge sits for only a single week every 11 weeks . . . .").

[11] Letter from Reggie B. Walton to Patrick J. Leahy, *supra* note 10; Weissmann, *supra* note 10.

[12] *See, e.g.*, Letter from Reggie B. Walton to Patrick J. Leahy, *supra* note 10, at 3; Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney Gen. for Legislative Affairs, Dep't of Justice, to Harry Reid, Majority Leader, U.S. Senate (Apr. 30, 2013), *available at* https://www.fas.org/irp/agency/doj/fisa/2012rept.pdf. Judge Walton argues that the statistics about very high approval rates "do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them." Letter from Reggie B. Walton to Patrick J. Leahy, *supra* note 10, at 3. Without providing numbers, Walton implies that the government routinely modifies or withdraws applications that are at risk of being denied. Such a practice would suggest that, as a rule, the government values avoiding adverse FISC precedent more than whatever chance it has of winning on appeal. One might speculate as to the effect of that dynamic on the FISC's body of case law. Regardless, specific revelations about FISC authorizations alarm privacy advocates as much as any approval rate could. *See infra* notes 16–18 and accompanying text.

[13] Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html.; Weissmann, *supra* note 10. Those cases were *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002), and *In re* Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008).

[14] *See, e.g.*, Lichtblau, *supra* note 13.

[15] 50 U.S.C. § 1803(a)(2) (2012); *see also In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (FISA Ct. 2002), *abrogated by In re* Sealed Case, 310 F.3d 717. The FISCR in *In re Sealed Case* cast doubt on the legitimacy of the en banc procedure used by the FISC in *In re All Matters*, but Congress later provided a clear textual basis for the FISC to sit en banc. FISA Amendments Act of 2008, Pub. L. No. 110-261 § 109, 122 Stat. 2436 (amending 50 U.S.C. § 1803).

require individualized search warrants.[16] For example, a leaked April 25, 2013 FISC order required Verizon Business Network Services to *continue* giving the NSA all call records for all customers in the United States every day for three months.[17] In a heavily redacted, declassified opinion, a FISC judge allowed the government to collect Internet metadata en masse—a level of sophisticated intrusion into the private lives of Americans that was inconceivable even one generation ago.[18]

The Foreign Intelligence Surveillance Act was passed in the wake of widespread surveillance abuses.[19] Its authors were keenly aware that unchecked surveillance was a threat to democracy, but they could not have imagined how easy, how pervasive, and how dangerous surveillance would become. When Congress created the FISA courts in 1978, the World Wide Web had not even been invented yet.[20] As the challenges of privacy and surveillance policy grow and evolve, so must the institutions that grapple with them. The increasing importance and complexity of these issues, as well as the advent of mass collection authorizations, demand a full-time FISA court with democratic legitimacy and constitutional footing befitting the gravity of its decisions.

This Essay focuses on concerns regarding the FISA courts' appointments and composition, but there are other problems demanding attention. Ex parte proceedings, in which only pro-surveillance arguments are heard, raise serious doubts about whether FISA courts give due consideration to civil liberties. It should not be a judge's duty to anticipate the contrary arguments of hypothetical adversaries. Impartial judges are only human and will inevitably be swayed by hearing one side of an argument and not the other. The risk is particularly acute

[16] The FISC's authorization of bulk collection, rather than individualized surveillance, is a post-9/11 phenomenon that departs considerably from prior practice. All three branches of government have contributed to it. *E.g.*, ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT 21–22 (2015), *available at* http://www.brennancenter.org/sites/default/files/publications/What_Went_%20Wrong_With_The_FISA_Court.pdf.

[17] *In re* Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc. *ex rel.* MCI Communication Services, Inc. d/b/a Verizon Business Services, No. BR 13-80, 2013 U.S. Dist. LEXIS 147002 (FISA Ct. Apr. 25, 2013), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/709012/verizon.pdf.

[18] Redacted Order of U.S. Foreign Intelligence Surveillance Court Modifying and Granting U.S. Government's Application for NSA to Collect Information Under FISA, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf (last visited Mar. 30, 2015) (released by the Executive Branch on Nov. 18, 2013); *see also* Orin Kerr, *Problems with the FISC's Newly-Declassified Opinion on Bulk Collection of Internet Metadata*, LAWFARE (Nov. 19, 2013, 2:35 AM), http://www.lawfareblog.com/2013/11/problems-with-the-fiscs-newly-declassified-opinion-on-bulk-collection-of-internet-metadata/.

[19] GOITEIN & PATEL, *supra* note 16, at 13–15.

[20] *The birth of the web*, CERN, http://home.web.cern.ch/topics/birth-web (last visited Mar. 21, 2015).

when the one party present—the government—has far greater expertise than the judge and insists that its requests are vital to prevent the next 9/11. Proposals have been put forth to appoint special advocates, either from within the government or from a pool of cleared outside lawyers, to argue for the public's privacy and against the government in the FISA courts.[21] These proposals would substantially increase the quality of judicial process and deliberation, and likely ensure a more thoughtful and balanced body of FISC precedent. But improvements in process and deliberation are not enough.

The makeup of the FISA courts is critical because the stakes are so high, the technology changes so rapidly, and the law is so open to interpretation. Reasonable citizens and respected scholars disagree as to whether certain programs authorized by the FISC are vital to national security or infringe upon the rights of hundreds of millions of people—or both. The job of a FISA judge is to secretly rule on the acceptable scope of a democratic government's dragnet snooping into its citizens' lives. The weight of that responsibility demands that the judges entrusted with it be appointed through the regular constitutional process. Once chosen, they should focus their professional energy on grappling with these issues, rather than doing so as a secondary responsibility of a generalist judge.

II. PROBLEMS WITH THE FISA COURTS' COMPOSITION

> *The Constitution structures relations between the judiciary and the representative branches of government to accord with a fundamental insight: The rule of law requires legal institutions that have democratic legitimacy.*[22]

"Article III" courts or "constitutional" courts, as contrasted with "Article I" courts or "legislative" courts, are those in which "the judicial power of the United States" is vested.[23] The distinction is an important one in the doctrine of separation of powers. For example, the FISCR has found that "the constitutional bounds that restrict an Article III court" limit the proper role of the FISC in overseeing ex-

[21] *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2014, S. 2685, 113th Cong. (2014); FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. (2014); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013); Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (2013).

[22] Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 39 (2006); *see also* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 593–94 (2005).

[23] *See generally* U.S. CONST. art. III; 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3528 (3d ed. 2014).

ecutive programs.[24] Judges of Article III courts are required by the Constitution to be appointed by the President with the advice and consent of the Senate, and entitled to life tenure.[25] The appointment process and tenure of Article I judges, on the other hand, is determined by Congress.[26]

The Chief Justice and chief circuit judges have broad powers to designate Article III judges to temporary assignments on courts other than those to which they were appointed.[27] This normally consists of a judge from one generalist court sitting temporarily on another generalist court.[28] The FISA courts are the only active Article III courts made up *entirely* of such designees.[29] By contrast, Supreme Court Justices, circuit judges, district judges, and judges of the U.S. Court of International Trade are directly and permanently appointed by the President with the advice and consent of the Senate as judges of those respective courts.[30] When district or circuit judges are assigned to sit by designation on other district or circuit courts, "the eclectic case mixture and random selection mechanisms of these courts make it impossible to precisely match a judge with a case . . . . [T]he veil of subject matter uncertainty obviates most of the potential for meaningful strategic allocation of judges."[31] But the FISA courts are narrowly focused on a single issue—surveillance—so strategic allocation of judges for desired outcomes is a real possibility.

There exist other organs made up entirely of Article III judges designated by the Chief Justice, but no other active courts. Like the FISA courts, the Alien Terrorist Removal Court (ATRC) is made up exclusively of district judges designated by the Chief Justice,[32] but in the nineteen years since its creation, it has never heard a single case.[33] Thus, I do not consider it an "active" court. I likewise exclude the Judicial Panel on Multidistrict Litigation. Though active and made up exclusively of Article III judges assigned part-time, it is not a court that rules on sub-

[24] *In re* Sealed Case, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (discussing whether a detailed FISC order "exceeded the constitutional bounds that restrict an Article III court").

[25] U.S. CONST. art. III; *see also* WRIGHT, *supra* note 23, § 3528.

[26] U.S. CONST. art. I; *see also* WRIGHT, *supra* note 23, § 3528.

[27] 28 U.S.C. §§ 291–293 (2013).

[28] *Id.* §§ 291–292.

[29] *See, e.g.*, NOLAN & THOMPSON, *supra* note 2, at 2.

[30] U.S. CONST. art. III, § 1; 28 U.S.C. §§ 44(a)–(b), 133(a), 134(a), 251(a), 252.

[31] Ruger, *supra* note 2, at 380 (citing J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069–79 (2000)).

[32] 8 U.S.C. § 1532.

[33] *See, e.g.*, Stephanie Cooper Blum, *"Use It and Lose It": An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*, 16 LEWIS & CLARK L. REV. 677, 679 (2012). The FISCR likewise did not hear a case until twenty-four years after it was created by Congress, *In re* Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002), but it has done so twice since. *Id.*; *In re* Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008). The regular FISC has a more active docket.

stantive legal matters in the traditional sense.[34] There have, however, been other active Article III courts composed entirely of designees in the past. The most recent was the Temporary Emergency Court of Appeals (TECA), which was abolished in 1992.[35] When it abolished the TECA, Congress sensibly transferred its jurisdiction to the Court of Appeals for the Federal Circuit—a specialist Article III tribunal with normal appointment process and permanent, full-time judges.[36]

However legally sound it may be, giving the Chief Justice the power to appoint an entire court is a sharp departure from the normal mechanism by which federal judges are chosen. "The Framers, recognizing that the appointment of judges was an act that entailed the exercise of political discretion rather than legal judgment, vested that choice in branches of government that were at least indirectly responsible to the public."[37] Because FISA judges are chosen by a fellow judge, FISA courts have a more attenuated relationship with the public—and with the political branches—than do other courts. Because a single individual unilaterally fills the entire FISA courts, they lack the ideological balance of the generalist judiciary. Finally, because FISA judges serve part-time and have no prior exposure to FISA court precedent, they are not well prepared to deal with the issues before them.

A. FISA Court Appointments are Uniquely Unmoored from the Will of the People

Because the Chief Justice is, himself, appointed, his appointees are a step further removed from voters than judges serving on the courts to which they were appointed by the President. Moreover, as the Chief Justice serves for life, the disconnect between FISA court appointments and voters is a problem of time as well as degree. Presidents are never more than four years removed from election, and Senators never more than six. But Chief Justice Roberts, having been ap-

[34] 28 U.S.C. § 1407(d). The D.C. Circuit Special Division for Appointing Independent Counsels would also not be a court in this sense, nor is it active. *See also* 28 U.S.C. § 49(d). My intention is to draw a practical distinction, rather than a technical one. For a leading scholar's take on panels of Article III judges appointed entirely by the Chief Justice, see generally Ruger, *supra* note 2.

[35] Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(b)–(h), 85 Stat. 743, 749-50, *repealed by* Federal Courts Administration Act of 1992 , Pub. L. No. 102-572, § 102, 106 Stat. 4506, 4506-07.

[36] Federal Courts Administration Act of 1992 , Pub. L. No. 102-572 § 102, 106 Stat. 4506, 4506-07. While such courts existed, were upheld throughout the Twentieth Century, and this kind of appointment system is likely constitutional, "not all constitutionally permissible legislative choices are equally consistent with the Constitution's basic allocation of authority, and with the theoretical grounds that justify the Constitution's structure." Ruger, *supra* note 2, at 367–72. Moreover, vesting the "Chief Justice with meaningful discretion to select specific judges to sit on specific kinds of courts . . . uncomfortably [grants] a single unelected official" extraordinary authority that violates a number of Article III norms. *Id.* at 368, 376–84. Likewise, my critique is one of constitutional structure and democratic process, rather than constitutionality.

[37] Ruger, *supra* note 2, at 374. Ruger does not, however, argue that the FISA courts are unconstitutional. *Id.*

pointed in 2005, derives his democratic legitimacy from the voters who elected President Bush in 2004, and who elected the Senators of the 109th Congress in 2004, 2002, and 2000. FISA judges chosen in 2015 thus find their (even more indirect) democratic legitimacy through the same President and Senators who were elected more than a decade prior. Life-tenured Chief Justices lack the political incentives that bind Presidents and Senators to popular will. They never need to seek reelection and as long as health permits, they can easily time their retirements to ensure like-minded successors.[38]

Thus, in contrast to the primary appointments that determine the makeup of all other active Article III courts, FISA court selections are more indirect, made by a selector whose power and legacy are largely immune to the will of the voters, and made unilaterally by a single individual.

The fact that FISA judges are chosen from among regularly appointed district and circuit judges does not remedy the democratic deficit. Those judges were nominated and confirmed with a certain understanding—by the President, the Senate, and the public—of what their roles would be. District and circuit judges sit on generalist courts whose proceedings and dockets are open to the public, in which the public may participate, with sub-national jurisdiction, and with appellate review by higher courts. It is for those reasons that lower court appointments garner less political and public attention than higher court appointments, and that individual Senators wield substantial power over the selection of judges in the jurisdictions they represent.[39] These initial appointment decisions are qualitatively unlike what the political process would go through for direct appointments to secret courts with exclusive, national jurisdiction over complex and highly salient constitutional questions, in which only the executive branch is represented, and whose decisions are never reviewed by any other court.

B. The FISA Courts' Appointment Process Threatens Ideological Balance and Separation of Powers

Choosing Article III judges is a constitutional power of the President, and a very significant one. The opportunity to shape the ideology of the federal judiciary

[38] The strategic retirement theory is controversial but not without evidence. *See, e.g.*, Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPIAC L. REV. 131, 157–60 (2011) (finding little empirical support for the strategic retirement hypothesis in Supreme Court retirements) ; James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeal, 1893–1991*, 48 Pol. Res. Q. 573, 562 (1995) (concluding statistically that "Democratic and Republican presidents increase the number of judicial retirements from within their party."). While the strategic retirement of any one Justice may affect the ideological balance of the high court on some issues, the problem is more acute as it concerns powers the Chief Justice exercises alone.

[39] *E.g.*, Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

is one of the most important spoils owed to the victor of a national election. When this is denied to a President, an executive branch prerogative is violated and public will is disregarded. But the issue is also one of ideological balance. Each President serves no more than eight years, and thus is unlikely to choose every judge of any life-tenure court. However, a Chief Justice serving for life is very likely to choose every judge of the FISA courts, as FISA judges serve no more than seven years.[40] Every Chief Justice since the creation of the FISA courts has done so, and only one Chief Justice in the past two centuries has failed to serve that long.[41]

The traditional appointment process comes with a built-in ideological balancing function: turnover among Presidents and Senators ensures that various viewpoints are represented and no one faction can dominate the judiciary.[42] When one person unilaterally appoints every member of a court, that balancing is lost. The loss is compounded by the fact that the party whose President appointed a Chief Justice is likely to appoint the next one, even if it does not consistently hold the White House. In fact, only six of the nation's seventeen Chief Justices were appointed by Presidents who did not share the previous appointer's party.[43] Recent experience is illustrative. Between President Kennedy's inauguration in 1961 and the anticipated end of President Obama's second term in 2017, each party has had five Presidents occupying the White House for exactly twenty-eight years.[44] During this period, three of the five Republican Presidents appointed Chief Justices. Zero of the five Democrats have.[45] While some of this is coincidence, there is plenty of incentive and ample evidence to suggest that strategic judicial retirement is a real phenomenon.[46] That is not to say Chief Justices would put FISA court appointments above all else, but this is one among many ideological issues that may drive a judge to seek a like-minded successor.

Judicial ideology and viewpoint are of greater concern for the FISC than for other trial-level courts. The issues are novel, they evolve quickly, and they are immensely controversial. FISA court proceedings are ex parte with only the government represented. No matter how noble or non-ideological FISA judges may be, the circumstances systemically prejudice them in favor of surveillance,

[40] *See generally* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006) (discussing, inter alia, the problems that come with vesting appointment power in a life-tenured official).

[41] *Members of the Supreme Court of the United States*, *supra* note 8. The exception was Chief Justice Stone, who died in office in 1946. *Id.*

[42] Indeed, ten Presidents' appointees are currently serving on the Article III bench. *Export of All Data in the Biographical Directory of Federal Judges*, *supra* note 7.

[43] *Members of the Supreme Court of the United States*, *supra* note 8; *accord The Presidents*, THE WHITE HOUSE, https://www.whitehouse.gov/1600/Presidents (last visited Mar. 12, 2015).

[44] *See The Presidents*, *supra* note 43.

[45] *Id.*; *Members of the Supreme Court of the United States*, *supra* note 8.

[46] *E.g.*, Peretti & Rozzi, *supra* note 38, at 157–60; Spriggs & Wahlbeck, *supra* note 38, at 562. *See also supra* note 38 and accompanying text.

rather than privacy.[47] That problem is exacerbated by the empirically evident selection of judges whose ideology and experience indicate predisposition for the government's side of Fourth Amendment issues.[48] As with any other trial court, one judge typically presides over each case. But the last time Congress amended the FISA court statute, it permitted the FISC to hear issues en banc, so there really is potential for judges to get together and vote on tough questions the way divided appellate courts do.[49] Moreover, FISC decisions are nearly always final in fact. The FISCR has only ever heard two cases, and the Supreme Court has never once reviewed a case originating in the FISC.[50]

These are costs to the political separation of powers as well. As an Associate White House Counsel in the Reagan Administration, the future Chief Justice Roberts once wrote a scathing critique of a proposal for a new tribunal below the Supreme Court to resolve circuit splits. Roberts found "particularly offensive" the proposal that the Chief Justice designate the members of the tribunal, believing that to be "an unprecedented infringement on the President's appointment powers."[51]

[47] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.").

[48] *See, e.g.*, John Shiffman & Kristina Cooke, *The Judges Who Preside Over America's Secret Court*, REUTERS (June 21, 2013, 6:59 AM), http://www.reuters.com/article/2013/06/21/usa-security-fisa-judges-idUSL2N0EV1TG20130621 (observing that at a time when all FISA judges were Roberts appointees, "[t]welve of the 14 judges who [served on the FISA courts in 2013] are Republicans and half are former prosecutors"). *See also* Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 257 (2007) ("I embarked on this empirical project with the hypothesis that Chief Justice Rehnquist has selected FISA judges who are conservative ideologically and who tend to favor government interests when assessing surveillance requests. Nothing in these findings leads me to think otherwise. However, the study findings also suggest that the Rehnquist choices were not significantly more conservative than the baseline federal judiciary during the period he served as Chief Justice. It appears that the Chief Justice's choices generally reflected background attitudinal features present on the federal district bench at the time he made his selections. This congruence is not necessarily evidence of random selection by the Chief Justice. It is probable that Chief Justice Rehnquist was aware of the ideological background rate of the federal district court judiciary, and possible that he strategically chose a group of judges that roughly approximated that conservative baseline. The fact that the actual FISA judges' Fourth Amendment behavior was more consistently pro-government than the individual random judges (a group with much higher variance on this dimension) provides at least a hint of this kind of conscious selection.").

[49] FISA Amendments Act of 2008 § 109, Pub. L. No. 110-261, 122 Stat. 2436 (codified in relevant part at 50 U.S.C. § 1803(a)(2)).

[50] *See, e.g.*, Lichtblau, *supra* note 13.

[51] Memorandum from John G. Roberts, Assoc. White House Counsel, to Fred F. Fielding, White House Counsel (Apr. 19, 1983), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1084&context=historical.

Because the Chief Justice's appointments would have required the approval of a majority of the Supreme Court (unlike FISA court selections), Roberts posited that the new court would be "either bland or polarized," and "[i]n either case the new court will assuredly not represent the President's judicial philosophy."[52] These same criticisms apply to the FISA courts. The power to appoint judges is one of the core constitutional powers of the President. When that power is given to someone else, someone he may not even have appointed himself, it undermines his influence and that of the voters who elected him. *Of course* President Reagan would not want to "sacrifice [his] Constitutionally-based appointment power" by creating a court composed of judges chosen by someone else, to "provide nationally-binding legal interpretations" reviewable only by the Supreme Court.[53] That is, however, precisely what the FISA courts are.

Every judge in the history of the FISA courts been chosen unilaterally by either Chief Justice Burger, Chief Justice Rehnquist, or Chief Justice Roberts. All three were white, male, Midwestern, Republican appointees;[54] no Democrat, woman, or person of color has ever had a voice in selecting a FISA judge. All three Chief Justices previously served as high-ranking Presidential appointees at the Department of Justice in Republican administrations.[55] Each has influenced his successor; Chief Justice Roberts clerked for Chief Justice Rehnquist, who served as an Associate Justice on the Burger Court for over a decade.[56] Because Chief Justice Roberts has been in office for over seven years, he has necessarily chosen every current FISA judge (as had Rehnquist and Burger before him). Nine of the eleven current FISC judges were appointed to their district courts by Republican Presidents, and half are former prosecutors.[57] These patterns are especially notable because the FISC nearly always rules in favor of the Executive Branch.[58]

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[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 113, 169, 203–05 (2011).

[55] Chief Justices Burger and Rehnquist had been Assistant Attorneys General; Chief Justice Roberts had been Principal Deputy Solicitor General. *Id.* at 113, 169, 206.

[56] *Id.* at 170, 204.

[57] *See, e.g.*, *Current Membership – Foreign Intelligence Surveillance Court*, UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov/current-membership (last visited Mar. 9, 2015); Tal Kopan, *Roberts names 2 new FISA court judges*, POLITICO (Feb. 7, 2014, 11:58 AM), http://www.politico.com/blogs/under-the-radar/2014/02/roberts-names-new-fisa-court-judges-182921.html; Shiffman & Cooke, *supra* note 48. The FISCR is currently composed of three Roberts-designated Democratic appointees. However, it is unlikely that the FISCR has met at all during their tenure. It is only known to have heard two cases, the most recent having been in 2008, before any of the current FISCR judges were chosen. *In re* Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008) (the last known FISCR case); *Current Membership – Foreign Intelligence Surveillance Court of Review*, UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov/fiscr_membership (last visited Mar. 1, 2015). Regardless, I note these patterns to point out that the

Thus, the FISA courts' composition undermines all three branches: the executive branch (which has an appointment prerogative), the legislative branch (as the Senate confirms appointments), and the judicial branch (as the FISC is unrepresentative of the judiciary's ideological balance and accused of being a rubber stamp[59]).

C. FISA Judges Lack Requisite Specialization or Expertise

Beyond concerns about democratic legitimacy and constitutional structure, it is bad policy to fill these important specialist courts with part-time, generalist judges. The Federal Circuit and Court of International Trade are the only other active Article III courts with subject-specific jurisdiction. Their judges are appointed directly to those courts by the President with the advice and consent of the Senate, serve for life on those courts, and deal with their specialized issues full time.[60] Presidents appoint lawyers to specialized courts who already know the specialized law. The vast majority of Federal Circuit and Court of International Trade judges had substantive experience in their courts' issue areas before appointment.[61]

FISA judges lack that expertise. Surveillance law is complex, idiosyncratic, scientifically technical, and subject to quick developments as technological capability rapidly evolves. But because the FISC's extensive body of case law is mostly classified, a newly designated FISA judge likely has less familiarity with FISC precedent than a new generalist judge has about virtually any other area of law. No other court is composed of judges who were totally ignorant of the underlying law until their appointment. Yet a hypothetical Court of International Trade judge who knew nothing of trade law would have a much easier time getting up to speed than FISA judges do. Secret law means no scholarship and no commentary by other courts, so new FISA judges are without secondary sources or persuasive authority to learn from. Appeals to the FISCR are extraordinarily rare, so there is a dearth of higher court precedent for guidance. The secrecy and lack of scholarship make for a steep learning curve, exacerbated by the fact that FISA judges are not actually specializing. They spend ten of every eleven weeks at their regular district

FISA courts are flawed manifestations of representative democracy and aberrations in our constitutional system, not to cast aspersions on the good faith of the Chief Justices or their designees.

[58] Letter from Peter J. Kadzik to Harry Reid, *supra* note 12. For a discussion of whether the Justice Department's statistics on this paint an incomplete picture, see *supra* note 12.

[59] *See, e.g.*, GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE 128 (2014).

[60] 28 U.S.C. § 44(a)–(b) (2009); *id.* §§ 251(a), 252.

[61] *Judges*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/judges (last visited March 9, 2015); *Judges of the United States Court of International Trade*, UNITED STATES COURT OF INTERNATIONAL TRADE, http://www.cit.uscourts.gov/Judges/index.html (last visited Mar. 9, 2015).

courts.[62] On top of all that, FISA judges are expected to anticipate hypothetical arguments that might be made by an absent advocate for privacy.

Furthermore, because the only lawyers with experience in FISA court precedent are the rare few who have practiced before the FISC, it is less likely that any particular generalist judge would have experience with FISA court case law than with nearly any other significant body of law. Likewise, one-sided ex parte proceedings mean that all current and former FISA court practitioners—all those who know the case law—have worked exclusively on the government's side. This creates a risk of groupthink from which judges are not immune. That risk is compounded by the intimate working relationship between FISA court personnel and executive branch attorneys[63] and the alleged pro-surveillance bias among Roberts' appointees to the FISA courts.[64]

In the absence of an adversary or any advocate for the rights of the public, it is the judge's responsibility to anticipate the arguments those absent parties might make. Judicial deference must not be a function of judicial ignorance.

III. OPTIONS FOR REFORM

Given the preceding discussion, I sought to identify reforms that would address the FISA courts' uniquely undemocratic appointment process, the losses to ideological balance and separation of powers inherent in that appointment process, and the lack of specialization or expertise among FISA judges.

To assess existing composition reform plans, I conducted a survey of all bills referencing the FISA court statute introduced in Congress since President Obama took office.[65] None have become law, and as of writing, none are pending before the new 114th Congress. Five bills, all of which died in committee, would have altered the composition of the FISA courts.[66] Six bills would have substan-

[62] *See* Weissmann, *supra* note 10.

[63] *See* Letter from Reggie B. Walton to Patrick J. Leahy, *supra* note 10.

[64] *See, e.g.*, Shiffman & Cooke, *supra* note 48.

[65] This consisted of thirty bills proposed in the 111th, 112th, and 113th Congresses amending or otherwise relating to 50 U.S.C. § 1803. Each unique proposal substantially affecting FISA court composition is noted. Identical bills and those not changing the statute are omitted.

[66] FISA Court Oversight Underscoring Responsibility and Transparency Act (FISA COURT Act), H.R. 3195, 113th Cong. (2013) (providing for a few of the various FISA judges to be chosen by each of the President, a majority of the Supreme Court, and various Congressional leaders); FISA Judge Selection Reform Act of 2013, S. 1460, 113th Cong. (2013) (giving selection power primarily to the chief judges of the circuits); Surveillance State Repeal Act, H.R. 2818, 113th Cong. (2013) (proposing ten-year, renewable terms for FISA judges); Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (2013) (transferring designation authority from the Chief Justice to the President and Senate); FISA Court Accountability Act, H.R. 2586, 113th Cong.

tially reformed their operation in ways beyond the scope of this discussion, primarily by providing for participation of special advocates or amici to ameliorate the problems of secret and ex parte proceedings.[67] Each of these died in committee as well, save the USA FREEDOM Act, versions of which commanded majorities in both houses and the support of the intelligence community,[68] though it failed to overcome a Senate filibuster.[69]

None of the proposals introduced in Congress would ameliorate the FISA courts' issues with expertise and specialization. All would leave this a part-time court with non-specialist judges who serve on the FISC one week of every eleven. Four of the bills affecting composition concern only who gets to choose FISA judges from among existing judges, while the fifth merely extends their tenure.[70]

In order to address all of the concerns raised in Section II, I begin by exploring the options proposed in Congress, then address comments of a former FISC Presiding Judge. Finally, I explain why the best FISA court composition reform would be the traditional judicial appointment process: life-tenured, full-time FISA judges nominated by the President and confirmed by the Senate.

A. Designation by the President

In 2013, Congressman Adam Schiff proposed the Presidential Appointment of FISA Court Judges Act.[71] This bill merely strikes "The Chief Justice of the United States" and inserts "The President, by and with the advice and consent of the Senate" in the parts of FISA that grant the power to designate judges temporarily.[72] Though the process looks the same as the one used for primary appointments to the judiciary, appointees would still have to be sitting district and

(2013) (providing for a few of the various FISA judges to be chosen by each of the Chief Justice and various congressional leaders).

[67] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2014, S. 2685, 113th Cong. (2014) (a wide-ranging proposal by Senator Leahy, then Chairman of the Senate Judiciary Committee; the bill narrowly failed to overcome a filibuster in November 2014, while H.R. 3361, 113th Cong. (2013), an alternate version, passed the House in June 2014); FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. (2014) (special advocates); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013) (special advocates); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013) (special advocates); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013) (special advocates); Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (2013) (special advocates).

[68] Cody Poplin, *DOJ and ODNI Support Leahy NSA Reform Bill*, LAWFARE (Sept. 4, 2014, 4:36 PM), http://www.lawfareblog.com/2014/09/doj-and-odni-support-leahy-nsa-reform-bill/.

[69] S. 2685.

[70] That bill, the Surveillance State Repeal Act, replaces FISA judges' seven-year non-renewable terms with ten-year renewable terms. H.R. 2818.

[71] H.R. 2761, 113th Cong. (2013).

[72] *Id.* (amending 50 U.S.C. § 1803(a)–(b) (2012)).

circuit judges, and appointments would still be for fixed terms. It would therefore look like the process by which the President, with the advice and consent of the Senate, designates the Chairs and Vice Chairs of the Federal Reserve Board of Governors and Federal Deposit Insurance Corporation from among existing members of those bodies.[73] Of course, the Fed and FDIC heads, once designated, serve full time.

This proposal is a mild improvement over the current system. Only near the end of a two-term presidency would all FISA judges have been chosen by the same person. Senate confirmation would temper the ability of Presidents to stack the FISA courts with judges who either share their ideology or are particularly surveillance-friendly. Presidents and Senators come and go more frequently than Chief Justices, so there would be greater ideological and personal diversity brought to bear in the designations, and likely more ideological diversity among the designees. But this fails to address other problems. FISA judges would still lack expertise, would still not specialize, and would still serve limited terms during their service as generalist judges. The requirement that they be sitting judges would continue to undermine the presidential prerogative to shape the judiciary. Moreover, the continuing seven-year term limit means that Presidents and Senators would shape the FISA courts in a fundamentally different way than they do other courts.

Another option, albeit one without pending legislation, would be to give the President *unilateral* designating power without involving the Senate. This would be a poor choice because in addition to the objections above, Presidents would be incentivized to simply pick whichever sitting judges they believe to be most sympathetic to surveillance.

One commentator argues that both of these models are constitutionally problematic, as designation by the President and the Senate would raise questions about the FISA courts' Article III status,[74] while designation by the President alone would undermine the separation of powers—a particularly grave concern with respect to courts that only ever hear the executive branch's side of each case.[75] Because it fails to create specialized, permanent judgeships, I view the Schiff proposal as an incremental improvement at best.

[73] 12 U.S.C. § 242 (2010); *id.* § 1812(b)(1).

[74] Because the Federal Reserve Board of Governors and Federal Deposit Insurance Corporation are not courts, the unchallenged legitimacy of their secondary designations says nothing of whether such a process is compatible with Article III.

[75] *See, e.g.*, VIVIAN CHU, CONG. RESEARCH SERV., R43534, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (FISC): SELECTION OF JUDGES 7–9 (2014) (citing Mistretta v. United States, 488 U.S. 361, 371–412 (1989)).

B. Designation by Other Judges

Senator Richard Blumenthal's proposal, the FISA Judge Selection Reform Act, would require the Chief Justice to appoint district judges proposed by the chief judges of each of the thirteen courts of appeals from within their circuits to the FISC.[76] It would require at least five Associate Justices to concur in his selection of the three FISCR judges.[77]

This ameliorates only one of the ways in which FISC appointments are uniquely undemocratic: selection of an entire court by a single individual. As to ideological balance, this is better than nothing because the thirteen chief judges are more ideologically diverse than any one Chief Justice. But since matters before the FISC are generally resolved by a single judge, coherent balance cannot be achieved by simply letting thirteen people each unilaterally appoint one of thirteen judges. Nor would this do anything to address the lack of specialization or expertise. A similar proposal was made by the President's Review Group on Intelligence and Communications Technologies, which would have each of the nine Justices of the Supreme Court choose one or two FISC judges from the circuits they oversee.[78]

C. Diffusion of Selection Power Between Political and Judicial Actors

Similar proposals by Congressmen Steve Israel and Steve Cohen would split the judgeships between the Speaker of the House, House Minority Leader, Senate Majority Leader, and Senate Minority Leader, as well as the President and a majority of the Supreme Court (in Rep. Israel's bill), or the Chief Justice (in Rep. Cohen's bill).[79] These schemes raise a series of significant constitutional concerns, including Congressional action without bicameralism or presentment.[80]

D. Bates' Comments of the Judiciary

Judge John Bates of the D.C. District Court, Director of the Administrative Office of the Courts and a former Presiding Judge of the FISC, has sent several memoranda to Congress about FISC reform on behalf of the judiciary.[81] The de-

[76] S. 1460, 113th Cong. (2013). The bill would enlarge the FISC from eleven to thirteen members such that every circuit (including the non-geographic Federal Circuit) is always represented.

[77] *Id.*

[78] LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 207–08 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

[79] FISA Court Oversight Underscoring Responsibility and Transparency Act (FISA COURT Act), H.R. 3195, 113th Cong. (2013); FISA Court Accountability Act, H.R. 2586, 113th Cong. (2013).

[80] *See* I.N.S. v. Chadha, 462 U.S. 919, 946 (1983); CHU, *supra* note 75, at 9.

[81] *E.g.*, JOHN D. BATES, COMMENTS OF THE JUDICIARY ON PROPOSALS REGARDING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) , *available at* http://www.lawfareblog.com/wp-content/uploads/2014/01/1-10-2014-Enclosure-re-FISA.pdf; Letter from John D. Bates, Director,

gree to which those memoranda reflect judicial consensus is disputed,[82] but Judge Bates' own experience and perspective are valuable regardless. In relevant part, he expresses strong reservations about the judge selection reforms discussed above. Bates does so for two primary reasons.

First, he is "concerned that a selection process that involves more persons—and especially one that is likely to introduce political factors—would result in vacancies detrimental to Court operations and possibly to national security."[83] While vacancies are unfortunate and the Senate (for example) moves slowly, this seems to imply FISA judges are too important to wait for the democratic appointment process. To the contrary, their importance is an argument *for* democratic process. And FISA court appointments are not more critical than those of President's Cabinet, the directors of the various intelligence agencies, the Joint Chiefs of Staff, or the Justices of the Supreme Court—all of whom must be nominated by the President and confirmed by the Senate. In particular, it is hard to see why slow-moving political appointments would threaten detrimental vacancies under systems that maintain fixed terms with knowable end dates, or that keep this a part-time appointment. Knowable end dates would allow nominations well in advance of anticipated vacancies. If vacancies required remaining FISA judges to serve once every eight to ten weeks instead of eleven, surely that would that not be a threat to national security. Congress might even allow vacancies on a full-time FISC to be alleviated by temporary designation by the Chief Justice, just like other Article III courts.

Second, Bates opposes sharing selection authority among either the various Justices of the Supreme Court, the chief judges of the circuits, or other judicial actors, because he believes the Chief Justice to be "uniquely positioned" to select qualified judges. Diffusing the power to select members of a trial-level court between various actors, rather than picking one or requiring cooperation, *does* seem problematic. But there are options other than that and the status quo, including cooperative political appointment (i.e., Presidential nomination and Senate confirmation). I am unconvinced that the Chief Justice is special in this regard.

Administrative Office of the Courts, to Diane Feinstein, Chairman, Senate Select Committee on Intelligence (Jan. 13, 2014), *available at* http://www.lawfareblog.com/wp-content/uploads/2014/01/1-13-2014-Ltr-to-DFeinstein-re-FISA.pdf (accompanying letter summarizing and explaining the memorandum). *See also* Letter from John D. Bates to Patrick J. Leahy, *supra* note 1 (Aug. 5, 2014) (objecting to FISA court reform proposals unrelated to the FISA courts' composition).

[82] *See* Letter from Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 14, 2014), *available at* http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html. *See also* Steve Vladeck, *Chief Judge Kozinski's "Serious Doubts" About Judge Bates' FISA Reform Letters*, JUST SECURITY (Aug. 21, 2014; 8:56 AM), http://justsecurity.org/14212/chief-judge-kozinskis-serious-doubts-judge-batess-fisa-reform-letters/; Steve Vladeck, *Judge Bates and FISA Reform*, JUST SECURITY (May 20, 2014; 5:06 PM), http://justsecurity.org/10637/judge-bates-fisa-reform/.

[83] BATES, COMMENTS OF THE JUDICIARY, *supra* note 81, at 12.

E. Recommendation: Traditional Presidential Appointment

The clearest proposal to change the composition of the FISA courts would be to make them look more like other Article III courts: full-time judges appointed by the President with the advice and consent of the Senate to permanent judgeships on these courts. This would alleviate the losses to representative democracy, separation of powers, ideological balance, and expertise inherent in designation by the Chief Justice. Allowing judges to devote their full attention to specializing in one area is more important for FISA law than for other subjects because the law is secret, the proceedings are ex parte, and individual rulings directly touch upon millions of people's constitutional rights. The Federal Circuit and Court of International Trade provide working examples of Article III courts of special subject matter whose judges are appointed directly, with life tenure on the specialist courts, and with careers of experience in the areas of law for which they are responsible. Their technical expertise and their democratic legitimacy are worth emulating.

Of course, this approach is not without drawbacks. A full-time FISC would need fewer judges, increasing the influence of each judge.[84] Unlike the district judges who currently compose the FISC, full-time FISC judges would grow accustomed to a system decidedly unlike traditional Anglo-American courts, in which the government is the only party, decisions are made in secret, courts engage in informal dialogue with government over policy minutiae, and the answer to the government's request is nearly always "yes."[85] Through no fault of their own, full-time FISC judges might become less skeptical of government requests and less vigilant about anticipating contrary arguments. But the opposite phenomena are just as likely. Perhaps full-time FISC judges would gain the expertise, experience, and confidence to assert a more vigorous role in questioning the government's assertions. One need not take any particular position on the proper extent of surveillance to realize the benefits of having full-time, permanent FISA judges appointed through the regular constitutional process. That said, if one's goal is to create a FISC more skeptical of executive power, there appears little room to regress.

A full-time FISCR, however, would find three appellate judges with an empty docket for years on end. In that case, I would abolish the FISCR rather than have full-time judges with an empty docket. To replace it, I would suggest making greater use of the en banc FISC, with appellate jurisdiction transferred to

[84] It would not, however, increase the influence of any one President, since the President who appoints the Chief Justice indirectly appoints the entire FISC and FISCR now.

[85] Letter from Peter J. Kadzik to Harry Reid, *supra* note 12; Letter from Reggie B. Walton to Patrick J. Leahy, *supra* note 10. For a discussion of whether the Justice Department's statistics on the FISC application approval rate paint an incomplete picture, see *supra* note 12.

either the D.C. Circuit or the Supreme Court. The FISCR's workload is so light that either of those courts could easily take it on, though getting involved in this might damage their reputations. In particular, the specter of secret, ex parte Supreme Court cases is an unpleasant possibility. Yet the Supreme Court already has the power and responsibility to review FISCR decisions.[86] And to the degree that secret, ex parte proceedings sound unseemly, one should question their suitability for any constitutional court—including the FISC.

Were Congress to adopt some version of the special advocate system that has been debated,[87] my proposal would become even more palatable. Routine involvement of a privacy-protective counterparty could dramatically increase the frequency of appeals, leading to a fully utilized FISCR. The presence of special advocates would alleviate many of the concerns over full-time FISC judges, giving them a more traditional adversarial process to preside over. Regardless of any change in appointment or composition, special advocates would relieve FISA judges of the burden of imagining contrary arguments and raising privacy concerns on their own.

No proposed legislation would effect a system of traditional presidential appointment. Likewise, none of the proposed bills would create full-time FISA courts or life tenure for their judges. Thus, the only FISA court composition problems that Congress is even proposing to address are those stemming from the Chief Justice's unilateral selection power. Yet, as is so often the case, the simplest solution is the best one. The FISA courts should look as much like other Article III courts as possible.

CONCLUSION

No matter the wisdom of their jurisprudence, the FISA courts are institutionally broken. In order to meet the threshold of democratic legitimacy found in other courts, restore the separation of powers in judicial appointments, maintain the ideological balance of the judiciary, and staff them with judges who truly understand the law and the technology, FISA judges should be nominated by the President and confirmed by the Senate to dedicated FISA judgeships—just like any other Article III court. There are other problems with the FISA courts that demand legislative action. Ex parte proceedings and the inability of individuals to

[86] 50 U.S.C. § 1803(b).

[87] *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2014, S. 2685, 113th Cong. (2014); FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. (2014); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013); Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (2013).

fight for their rights are extremely problematic. A special advocate system is needed even if my proposal is adopted. But until Congress fixes the composition of the FISA courts, they will never be truly equipped to make the hard choices about privacy and surveillance that a twenty-first century democracy demands.