
ESSAY

PROCEDURAL PROTECTIONS IN A SECRET COURT: FISA AMICI AND EXPANDING APPELLATE REVIEW OF FISA DECISIONS

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INTRODUCTION

Section 702 of the Foreign Intelligence Surveillance Act (FISA) is set to expire at the end of this year, a development which has renewed energy in Congress to contemplate its reform. On the Hill, both sides of the political

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spectrum have levied sharp criticism against the law.¹ In April 2023, the House Judiciary Subcommittee on Crime and Federal Government Surveillance heard testimony on methods to “Fix[] FISA,” with some lawmakers highlighting abuse of the law and the lack of procedural protections for United States persons.² Yet Senate leaders on both sides have expressed skepticism about the more sweeping suggestions put forth by congressional hardliners.³ The Executive Branch’s top national security lawyers, meanwhile, warn that allowing FISA to lapse as Congress contemplates its wholesale reform may lead to “one of the worst intelligence failures of our time.”⁴

But Congress need only enact modest changes to existing law to bolster due process protections, while honoring the original architecture of the FISA system and avoiding the pitfalls of legislative solutions advanced in the April testimony. The key lies in reforming how the FISA appeals court and amicus system interact.

Congress created the Foreign Intelligence Surveillance Court of Review (FISCR) to serve as an intermediate appellate court. The tribunal is tasked with “review[ing] the denial of any application” for electronic surveillance by the Foreign Intelligence Surveillance Court (FISC).⁵ Its own decisions, meanwhile, can be reviewed by the Supreme Court.⁶ FISA lays out that “the court of review . . . shall be considered to be a court of appeals” for purposes of seeking certiorari.⁷ Yet only a few cases have made it to FISCR, and *none* have been appealed from FISCR to the Supreme Court. FISCR convened for the first time in 2002, twenty-four years after its founding,⁸ and it has only rendered a handful of decisions since. Of the over 100 declassified

¹ Ryan Tarinelli, *Congress Starts Work on Renewal of Controversial Surveillance Law*, ROLL CALL (Apr. 27, 2023), <https://rollcall.com/2023/04/27/congress-starts-work-on-renewal-of-controversial-surveillance-law/> [https://perma.cc/V87T-MFH6].

² *Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them*, Hearing Before the Subcommittee on Crime and Federal Government Surveillance of the House Judiciary Committee, 118 Cong. 53-54 (2023) (Statement of Sharon Bradford Franklin, Chair, Priv. and C.L. Oversight Bd.) (“[I]f a U.S. person communicates with a foreign target, their communications can be collected through what the government calls incidental collection.”).

³ Tarinelli, *supra* note 1.

⁴ Matthew Olsen & Joshua Geltzer, *Reauthorizing Section 702 of the Foreign Intelligence Surveillance Act Is a National Security Imperative*, THE HILL (Aug. 16, 2023), <https://thehill.com/opinion/congress-blog/4154631-reauthorizing-section-702-of-the-foreign-intelligence-surveillance-act-is-a-national-security-imperative/> [perma.cc/MC26-YY8T].

⁵ 50 U.S.C. § 1803(b).

⁶ *See id.* (providing for the transmission of FISCR’s decisional record “on petition of the United States for a writ of certiorari”).

⁷ *Id.* § 1803(k).

⁸ Simon Chin, Note, *Introducing Independence to the Foreign Intelligence Surveillance Court*, 131 YALE L.J. 655, 659 (2021).

opinions from the FISA courts between 1981 and 2018, just four are from FISCER.⁹

This result is hardly surprising. Unlike ordinary courts, the FISA courts are non-adversarial.¹⁰ Since the U.S. government is the only party to FISC proceedings,¹¹ it is the only body that can appeal. Thus, FISCER is tasked with “review[ing] the *denial* of any application made under [FISA].”¹² The statute does not similarly task FISCER with reviewing the *approval* of FISA applications—at least not expressly.¹³ The Senate Committee Report on FISA confirms that only “the Government [may] seek[] review of [a FISC] decision” in the “special court of review.”¹⁴ Thus, under current law, only decisions *adverse* to the government may be appealed. While the U.S. government gets three bites of the apple, targeted U.S. persons only get one.

But FISCER exists for a reason. Congress did not create the appeal provisions to be idle. In a system of secret law, where the substance of decisions is not subject to public scrutiny, procedural protections carry extra importance.

In Part I of this piece, I explain why and how we ought to improve opportunities for FISCER review. Congress intended to introduce stronger procedural protections to the FISA court system through the 2015 USA FREEDOM Act, a law passed in response to Edward Snowden’s leak of two National Security Agency mass surveillance programs. Notably, though, the 2015 Act specifically aimed to preserve the non-adversarial nature of the FISA court system. Expanding FISCER review advances procedural protections for unknowing targets, but only if FISCER can somehow review FISA warrant *approvals* as well as denials.

In Part II, I suggest one way to expand FISCER review of warrant approvals *without* establishing an adversarial party. I propose allowing existing FISA amici curiae to flag cases for FISCER but leaving the decision to hear a case to FISCER’s discretion. To make this a reality, I propose modest changes to existing law, and suggest that the decision to let amici intervene ought to be seated elsewhere. Ultimately, I propose a way of expanding FISCER review to strengthen procedural protections, while staying cognizant

⁹ Brief Appendix for Professor Laura K. Donohue as Amicus Curiae, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCER 18-01 (FISA Ct. Rev. Mar. 16, 2018), 2018 WL 2709456, <https://www.fisc.uscourts.gov/sites/default/files/FISCER%2018-01%20Amicus%20Appendix%20-%20Part%201.pdf> [<https://perma.cc/PS2X-MPX5>].

¹⁰ See Transcript of Hearing at 100, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (No. 02- 001)(explaining that the proceeding was non-adversarial in nature).

¹¹ See *id.* (“This is a strange proceeding because it is not adversarial. It is *ex parte*.”).

¹² 50 U.S.C. § 1803(b) (emphasis added).

¹³ *Id.*

¹⁴ FOREIGN INTEL. SURVEILLANCE ACT OF 1978, S. REP. NO. 95-701, at 48 (1978).

of Congress's desire to preserve the FISA court system's non-adversarial nature.

I. WHY IMPROVE OPPORTUNITIES FOR FISC REVIEW?

Existing proposals to reform the FISA court system hinge on turning the FISA courts adversarial.¹⁵ Yet, as will be demonstrated below, Congress's 2015 reforms to the FISA court system via the USA FREEDOM Act suggest that it aimed to bolster due process protections *without* turning the system into an adversarial one. Expanding FISC review to address cases in which the government won in FISC presents one way to strengthen procedural protections, while preserving the system's non-adversarial nature.

A. Appellate Review of FISA Warrant Approvals Provides Procedural Protection

By passing the USA FREEDOM Act, Congress signaled its desire to strengthen due process protections in the FISA courts without turning them flatly adversarial. In response to the public outcry precipitated by Edward Snowden's disclosure of the National Security Agency's mass surveillance programs, Congress entertained proposals to reform the FISA courts.¹⁶ Frontrunner bills would have introduced a permanent special advocate to represent civil liberties at FISC against the government, granting it party standing.¹⁷

Congress declined this proposal, opting for a modest form of adversarial participation.¹⁸ The USA FREEDOM Act provided for the appointment of at least five amici curiae who could intervene at the discretion of FISC and FISC judges.¹⁹ The Senate Committee Report on the USA FREEDOM

¹⁵ See, e.g., Chin, *supra* note 8, at 711-13 (advocating for the creation of a permanent Special Advocate, who would "exercise . . . authority to raise privacy and civil liberties issues proactively with the court," and thus oppose the government).

¹⁶ Sabrina Siddiqui, *Congress Passes NSA Surveillance Reform in Vindication for Snowden*, GUARDIAN (June 3, 2015), <https://www.theguardian.com/us-news/2015/jun/02/congress-surveillance-reform-edward-snowden> [<https://perma.cc/6VWJ-KXVB>].

¹⁷ See H.R. 3361 § 401, 113th Cong. (2013) (suggesting the appointment of an amicus curiae to assist the court); FISA Court Reform Act of 2013, H.R. 3228, 113th Cong. (2013) (describing the establishment of an Office of Constitutional Advocacy for FISA); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159 § 2, 113th Cong. (2013) (proposing the appointment of a public interest advocate for FISC matters); Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. (2013) (introducing an amendment to the Foreign Intelligence Surveillance Act of 1978 that would establish an "Office of the Privacy Advocate General"); USA FREEDOM Act of 2014, S. 2685 § 401, 113th Cong. (2014) (describing the appointment of individuals with special expertise in "privacy and civil liberties"); see also Chin, *supra* note 8, at 664 ("[T]his Note argues for the creation of a FISA special advocate.").

¹⁸ Chin, *supra* note 8, at 669.

¹⁹ 50 U.S.C. § 1803(i)(1).

Act clarifies that the amicus provision was meant to provide “greater accountability” by “safeguarding the Constitution’s Fourth Amendment privacy protections.”²⁰ In rejecting the special advocate proposal, Congress referred to former FISC Judge John Bates’ letter, which contended that introducing an adversarial party would interfere with the government’s “heightened duty of candor.”²¹ By legislating for amici over a special advocate, Congress sought to embed procedural protections while preserving the non-adversarial nature of the system.

Expanding FISC review to address cases in which the government won below would help bolster due process protections without transforming the proceedings into adversarial trials. Beyond standardizing and resolving tough questions of law, appellate review represents an important procedural protection. Congress affirmed this idea in its Circuit Court of Appeals Act of 1891 (“Evarts Act”), which expanded opportunities for appellate review by establishing an appeals court in each judicial circuit.²² At the time, the Supreme Court was severely overburdened: it only resolved 400 of the 1,200 cases on its annual docket, which placed the Court “four years behind.”²³ For the most part, therefore, a trial judge’s findings were uncontestable, for the Supreme Court lacked the bandwidth to hear new cases. As Senator Dolph put it, “in a very large proportion of cases, there is no appeal from the decisions of the [trial court], but the decision of a single judge is final”²⁴

Consequently, the Committee Report on the Evarts Act noted that the law intended to “destroy[] the ‘judicial despotism’ of the present system.”²⁵ It sought to do this by reducing the cases on the docket of the Supreme Court and expanding appellate review.²⁶ Representative Culberson, a key sponsor of the law in the House, reiterated this need to “relieve the country of . . . judicial despotism” so as to protect individual rights.²⁷ Congress therefore

²⁰ S. REP. NO. 113-119, at 15 (2013).

²¹ See [Redacted] Memorandum Opinion and Order, at 59 (FISA Ct. Nov. 6, 2015) (“[T]he Court . . . expects the government to comply with its heightened duty of candor in ex parte proceedings at all times. Candor is fundamental to this Court’s effective operation”).

²² H.R. REP. NO. 51-1295, at 3 (1890); 51 CONG. REC. 10221 (1890); Circuit Court of Appeals Act (Evarts Act) of Mar. 3, 1891, ch. 517, 26 Stat. 826 (current version at 28 U.S.C. §§ 43, 44, 46, 604, 711, 713, 961, 962, 2101, 2106, 2107).

²³ 51 CONG. REC. 10220 (1890) (statement of Sen. William Evarts).

²⁴ *Id.* at 10226 (statement by Sen. Dolph).

²⁵ H.R. REP. NO. 51-1295, at 3.

²⁶ 51 CONG. REC. 10221 (1890); see also Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 946-47 (2016) (“It became virtually ‘impossible for the circuit justices or the circuit judges to attend all the sittings of these courts,’ and the remaining district judge on the circuit panel was sometimes left to review [their] . . . own decisions on appeal [F]rom the start, then, Congress viewed the primary function of these intermediate courts to be to reduce or ‘unload the docket of the Supreme Court.’” (footnote omitted)).

²⁷ 51 CONG. REC. 3403 (1890).

enlarged appellate review to expand access to a key procedural protection: having a second opportunity to be heard.

Similarly, encouraging more FISC review can afford U.S. persons²⁸ greater procedural protections. This is only true, though, if the court can also review consequential *approvals* of FISA warrants, not just denials. Otherwise, FISC's entire docket would be stacked almost exclusively with government-originated appeals. Consequently, in Part II, I advance one way to preserve the non-adversarial nature of the FISA courts but expand appellate review of FISA warrant *approvals*.

Critics, however, might suggest that Congress intended FISC to be different from ordinary appeals courts precisely because it is non-adversarial.²⁹ Thus, Congress's conventional reasons for expanding appellate review—like protecting due process—apply less strongly. But procedural protections like appellate review are doubly important in non-adversarial systems of secret law like the FISA courts. When the *substance* of judicial opinions is rendered behind closed doors and the law is sheltered from public scrutiny, *procedural* safeguards are all the public can rely on.³⁰ An adversarial trial is one such protection, and when that is stripped away, other protections become more important. Granted, former Assistant Attorney General David Kris convincingly lays out that the FISA courts are not a mere rubber stamp; for example, judges often scrutinize government stances through informal calls and meetings.³¹ These informal procedures, however, are entirely up to the judges. Procedural protections, especially in a secret system, ought not turn entirely on judicial discretion. More review of FISC decisions favorable to the government can bolster due process without compromising the integrity of the FISA courts' non-adversarial nature.

²⁸ See 50 U.S.C. § 1801(i) (“‘United States person’ means a citizen of the United States, [or] an alien lawfully admitted for permanent residence . . .”).

²⁹ Some might also contest that in the case of the Evarts Act, Congress was expanding appellate review because there was such a great caseload, and such a large caseload does not exist here. But part of the reason such a caseload may not exist is because there is no mechanism for the surveyed to appeal. Besides, the prudential reasons for wanting more appellate review apply regardless of the demand for appeals.

³⁰ Senator Richard Blumenthal levied a similar critique against the secrecy of the FISA court system during a speech at Harvard Law School. Senator Richard Blumenthal, Address at Harvard Law School (Aug. 8, 2013) (“The existence of secret law makes it less likely that the laws on the books will reflect the will of the people. . . . [W]e might be comfortable with an extensive surveillance program if we could trust that it was approved by a fair arbiter after a fair process. This attention to process makes good sense.”); see also 114 CONG. REC. S3396 (2015) (statement of Sen. Blumenthal) (“Secret, one-sided courts were one of the reasons we rebelled [against Britain].”).

³¹ David Kris, *How the FISA Court Really Works*, LAWFARE (Sept. 2, 2018, 5:29 PM), <https://www.lawfareblog.com/how-fisa-court-really-works> [<https://perma.cc/TE54-8WH7>]

B. Congress Intended FISCRC to Hear a Broader Swath of Cases

The USA FREEDOM Act's text and legislative history reflect that Congress intends for FISCRC to hear a larger set of cases than just government appeals. Section 103(j) lays out that after issuing an order, a FISC judge can certify any question of law that "warrants [FISCRC] review" when doing so "would serve the interests of justice."³² When this happens, FISCRC can either "give binding instructions" or decide "the entire matter in controversy."³³ The Committee Report on the Act clarifies that this provision is meant to empower FISCRC to hear a "wider range" of cases than it had previously heard.³⁴ In addition, the Report addresses this new review provision concurrently with the amici curiae provision.³⁵ This suggests that Congress hoped FISC judges would lean on amici to help identify thorny legal issues, and certify them for review by FISCRC. Either way, Congress meant for FISCRC to hear a broader spectrum of appeals.

Hence, expanding FISCRC review of FISA warrant approvals would strengthen due process without altering the non-adversarial nature of the system, in accordance with Congressional intent. But how exactly can we accomplish this?

II. ALLOWING AMICI CURIAE TO FLAG CONTROVERSIAL CASES TO EXPAND APPELLATE REVIEW OF FISA WARRANT APPROVALS

Chief among the suggestions for FISA reform advanced in the testimony before the House Judiciary subcommittee was to empower FISA amici "to petition for appeal to the FISA Court of Review."³⁶ The problem with this otherwise reasonable suggestion is that amici are constitutionally forbidden from being given the direct power to appeal an adverse decision to FISCRC. Only parties to a controversy have standing.³⁷ Since amici are not parties to FISC proceedings, they cannot appeal to FISCRC. In fact, earlier drafts of the

³² 50 U.S.C. § 1803(j).

³³ *Id.*

³⁴ H.R. REP. NO. 114-109 (2015).

³⁵ H.R. REP. NO. 114-109, at 25-26 (2015) ("This section requires the Administrative Office of the U.S. Courts to report to Congress annually the number of FISA orders and certifications applied for, issued, modified, and denied, and the number of appointments by the FISA Court of amici curiae under section 103.").

³⁶ *Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them*, *supra* note 2 (Statement of Sharon Bradford Franklin, Chair, Priv. and C.L. Oversight Bd.).

³⁷ U.S. CONST. art. III, § 2; *see Baker v. Carr*, 369 U.S. 186, 204 (1962) (explaining that "the gist of the question of standing" is whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

amici provision empowered amici to appeal directly to FISC, but Congress stripped them of this power precisely because of the standing issue.³⁸ This precludes direct appeal as a model for expanding FISC review. Even formalizing the role of the amici as a party might not circumvent the standing issue,³⁹ and certainly would run against Congress's desire to preserve the non-adversarial nature of the FISA court system.

Thus, to broaden appellate review of FISC decisions, Congress can instead empower the FISA amici to *flag* consequential FISC decisions for FISC's attention. As it stands, the amici have no clear procedural mechanism to bring issues to FISC's attention.⁴⁰ Since the government is the only party to FISC, no other body can appeal under current legal authorities.

Allowing the amici to flag cases for FISC would address the due process problems the 2015 USA FREEDOM Act aimed to remedy; doing so would create a mechanism by which FISC can become aware of and review controversial *approvals* of government warrants. To make such a proposal a reality requires modest changes to current law to overcome legal and structural barriers.

A. *Overcoming Legal Barriers: Standing and Sua Sponte Review*

To avoid constitutional standing issues, amici could simply flag decisions they deem important for FISC review and leave the decision on whether to review to FISC. To operationalize this, Congress would need to expand FISC's *sua sponte* powers to review FISC orders. Though at first this might sound radical, this would build on a power FISC already has. Section 103(j) grants FISC discretion to decide an "entire matter in controversy" if FISC determines appellate review "would serve the interests of justice."⁴¹ That means FISC can hear a case even if a party (i.e., the government) does not appeal. This could be broadened to allow FISC to reach down *sua sponte*, and allow review to turn on FISC discretion, rather than solely on FISC's

³⁸ Faiza Patel & Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, JUST. SEC. (Feb. 26, 2020), <https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici> [<https://perma.cc/YG4W-8KY8>] (explaining that earlier iterations of the USA FREEDOM Act allowed for amici to appeal decisions); *see, e.g.*, S. 1599, 113th Cong. § 903(c)(1) (as introduced in Senate, Oct. 29, 2013) (allowing for amici to participate in argument by motion of the Special Advocate).

³⁹ Congress' formalization of the amici as a party still might not resolve the issue of standing. The Supreme Court held in *Transunion v. Ramirez* that Congress cannot legislate, into existence, standing for someone who has not suffered an injury. 141 S. Ct. 2190, 2198 (2021). While the FISA amici might be parties, they may still lack standing because they have not suffered an injury.

⁴⁰ Patel & Koreh, *supra* note 38 (describing how amici are hindered from bring "critical issues" to light because there is no method for them to do so).

⁴¹ 50 U.S.C. § 1803(j).

discretion. This follows the model of some administrative agencies' adjudicatory mechanisms, like the Federal Trade Commission.⁴²

By expanding *sua sponte* powers, Congress can broaden FISC review of controversial warrant approvals and thereby turn FISC into a bulwark for due process. Letting amici flag important cases and giving FISC discretion to review would guard against standing concerns and preserve the non-adversarial nature of the system.

B. Overcoming Structural Barriers: Adverse Incentives

But how would amici become aware of controversial decisions in the first place? Amici curiae only receive access to “legal precedent, application, certification, petition, motion, or such other materials *that the [FISC] determines are relevant.*”⁴³ Amici are only invited to participate in individual cases at the discretion of FISC: they may intervene in cases that, “*in the opinion of the court, present[] a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate.*”⁴⁴

If an amicus is empowered to flag controversial cases for FISC review, their participation might lead to the reversal of FISC's decision. Granted, this may not be a big deal for judges who sit on a secret court. But assuming judges would rather not get overturned on appeal, FISC would be incentivized to *decline* amicus participation. The decision to allow amicus intervention in FISC, then, ought to be out of the hands of the decisionmaker who might get overturned on appeal thanks to amici participation. So, where should Congress seat this initial decision for amici participation?

A FISC judge or panel *not* presiding over the given case could determine whether the case permits intervention. This would guard against the adverse incentives a judge might have to refuse amicus participation. Thus, it would enable amici to flag to FISC cases they were involved in that they believe were wrongly decided. Such a proposal also conforms with the current framework of law by leaving the decision to permit intervention with FISC.

C. Addressing Pushback to Expansions of Amici Powers

Critics might worry that compelling FISC judges to read dockets of cases over which they are not presiding introduces prohibitive administrative costs, as would encouraging more appellate review. To limit these costs, review by

⁴² 15 U.S.C. § 45 (“[T]he Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.”).

⁴³ § 1803(i)(6)(A)(i) (emphasis added).

⁴⁴ *Id.* § 1803(i)(2)(A) (emphasis added).

other FISC judges can be done only upon petition by the amici (since amici already may petition to intervene).⁴⁵

Amici are unlikely to become overzealous and petition for review in infinitely more cases. Petitioning to intervene too frequently and flagging excessive cases risks eroding amici's credibility. In a closed system of just eleven FISC judges and three FISCR judges, where judges, government lawyers, and amici are repeat players, credibility is crucial.⁴⁶ Overwhelming the courts with petitions and flags, furthermore, makes it unlikely for the judges to listen to the amici at all. The amici are thereby incentivized to limit the number of cases they petition for and flag.

Critics may further resist the proposal as a whole because FISA already empowers FISC to rehear cases en banc when addressing questions of "exceptional importance."⁴⁷ However, as the Committee Report on FISA makes clear, the government may only seek review in the "special court of review . . . ; it cannot apply to another district judge."⁴⁸ In theory, though, the amici could *also* flag important cases for FISC judges to hear en banc in addition to flagging cases for FISCR. But as of 2017, the en banc provision had only been exercised twice.⁴⁹ Finally, even though circuit courts can rehear cases en banc, the Supreme Court is still permitted to hear and overturn such cases. Having one protection does not preclude the other.

Finally, some commentators might suggest that creating a permanent institutional special advocate against the government would advance due process more vigorously than expanding amici powers.⁵⁰ This piece did not seek to contest this; instead, I aimed to consider the fact that Congress hoped to preserve the non-adversarial nature of the FISA court system.

As the debate over FISA Reauthorization rages on in Congress, it ought to consider allowing FISA amici to flag cases for FISCR as a method of advancing procedural protections in this secret legal system. At the same time, it would preserve its non-adversarial structure, comply with

⁴⁵ See *id.* § 1803(i)(2)(B) (explaining that the court may "upon motion, permit an individual or organization leave to file an amicus curiae brief").

⁴⁶ See *id.* §§ 1803(a)-(b) (establishing that the Chief Justice shall nominate eleven judges to sit on the FISC and three to sit on the FISCR).

⁴⁷ *Id.* § 1803(a)(2)(A)(ii).

⁴⁸ S. REP. NO. 95-701, at 48 (1978).

⁴⁹ Michael Linhorst, *In Rare En Banc Session, Surveillance Court to Reconsider Whether ACLU Can Seek Release of Documents*, LAWFARE (Mar. 28, 2017, 9:56 AM), <https://www.lawfareblog.com/rare-en-banc-session-surveillance-court-reconsider-whether-aclu-can-seek-release-documents> [https://perma.cc/H4HB-MQEK]

⁵⁰ See, e.g., Chin, *supra* note 8, at 713 ("A permanent FISA special advocate, by virtue of its institutional standing and resources, would offer far more robust oversight than the current FISA amici over the categories of FISA cases that Congress has singled out for additional oversight.").

constitutional standing requirements, and guard against adverse incentives that would otherwise discourage amici participation.