



NEW YORK  
CITY BAR

COMMITTEE ON FEDERAL COURTS

IRA M. FEINBERG  
**CHAIR**  
875 THIRD AVENUE  
NEW YORK, NY 10028  
Phone: (212) 918-3509  
Ira.feinberg@hoganlovells.com

TASK FORCE ON NATIONAL SECURITY & THE  
RULE OF LAW

JONATHAN L. HAFETZ  
**CHAIR**  
1 NEWARK CENTER  
NEWARK, NJ 07102-5210  
Phone: (973) 642-8492  
jonathan.hafetz@shu.edu

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Hon. Mitch McConnell  
Majority Leader  
U.S. Senate  
317 Russell Senate Office Building  
Washington, DC 20510

Hon. Paul Ryan  
Speaker  
U.S. House of Representatives  
1233 Longworth House Office Building  
Washington, DC 20515

Hon. Mike Lee  
U.S. Senate  
361A Russell Senate Office Building  
Washington, DC 20510

Hon. James Sensenbrenner  
U.S. House of Representatives  
2449 Rayburn House Office Building  
Washington, DC 20515

**Re: Recommendations for Further Reforms Concerning the Operation of the Foreign Intelligence Surveillance Court and the USA FREEDOM Act**

Dear Majority Leader McConnell, Speaker Ryan, Senator Lee & Representative Sensenbrenner:

On behalf of the New York City Bar Association (the “City Bar”), we respectfully write to urge Congress to enact further reforms concerning the operation of the Foreign Intelligence Surveillance Court (“FISC”), in addition to those adopted in the USA FREEDOM Act enacted in June of last year. We congratulate Congress for its enactment of the USA FREEDOM Act, which amended the Foreign Intelligence Surveillance Act of 1978 (“FISA”) and adopted several significant reforms in the operations of the FISC. However, more work remains to be done. Although public interest in FISA and the FISC may have subsided in light of the USA FREEDOM Act’s termination of the bulk telephony metadata program, we urge Congress to continue to direct its legislative attention to certain aspects of the FISC and its procedures—including the one-sided nature of FISC proceedings, the limited process for appellate review of

FISC orders, and the vulnerability of FISC court appointments to personal or political bias—that were not addressed in full by the USA FREEDOM Act.

## **INTRODUCTION**

Founded in 1870 and comprising 25,000 members from throughout the United States and abroad, the City Bar is one of the oldest and largest associations of lawyers in the United States. Through its many standing and special committees and task forces, the City Bar reviews legal and public policy issues, educates the Bar and the public on developments in the law, and prepares reports and recommendations for legislative bodies, regulatory agencies and rule-making committees. The Federal Courts Committee is charged with studying and addressing substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Task Force on National Security and the Rule of Law oversees and coordinates the City Bar's efforts to ensure that a robust national security policy conforms to our nation's deep and abiding commitment to the rule of law.

## **EXECUTIVE SUMMARY**

The USA FREEDOM Act is an important milestone in the history of the FISC, marking a significant step forward toward greater transparency and openness of what has been, and still remains, an exceptionally closed and secretive court. While the reforms achieved through the USA FREEDOM Act are real and substantial, the City Bar believes that further progress can and should be made. The City Bar respectfully writes to draw the attention of Congress to certain aspects of the FISC that remain of continuing concern, and to propose specific ways in which the provisions of the USA FREEDOM Act may be meaningfully strengthened and expanded. The City Bar recommends the following changes:

1. The declassification provisions of the USA FREEDOM Act should be enhanced by a requirement for periodic and retroactive reassessment of significant FISC opinions that have not been disclosed to the public in order to ensure that access restrictions or redactions are not maintained longer than necessary to safeguard national security interests.
2. The provisions for *amici curiae* under the USA FREEDOM Act should be strengthened by limiting the discretion of the FISC to forego the participation of *amici curiae* and to allow the *amici curiae* to play a more proactive role as advocates for privacy and civil liberties.
3. Congress should consider and implement provisions to promote more robust appellate review of FISC decisions.
4. Multi-judge panels should be created for the adjudication of FISC applications that implicate issues of constitutional significance.

5. Measures should be adopted to expand the power to appoint FISC judges beyond placing this authority exclusively in the hands of the Chief Justice of the United States.

## BACKGROUND

The Foreign Intelligence Surveillance Court is a specialized Article III court, established under the Foreign Intelligence Surveillance Act of 1978 for the purpose of reviewing government applications for orders authorizing foreign intelligence gathering activities, including physical searches and electronic surveillance operations.<sup>1</sup> The FISC is composed of eleven district court judges drawn from at least seven of the federal judicial circuits.<sup>2</sup> Each FISC judge is designated by the Chief Justice of the United States to serve for a maximum term of seven years.<sup>3</sup> The presiding judge of the FISC is also designated by the Chief Justice.<sup>4</sup>

Under certain circumstances, decisions of the FISC are subject to review by the Foreign Intelligence Surveillance Court of Review (“FISCR”). The FISCR is composed of three judges drawn from the district courts or the courts of appeal.<sup>5</sup> Like the judges of the FISC, the judges of the FISCR are selected by the Chief Justice and serve for terms of no more than seven years.<sup>6</sup> One of the three FISCR judges is designated by the Chief Justice to serve as the presiding judge.<sup>7</sup>

The surveillance operations subject to FISC authorization have undergone considerable evolution in the decades following the establishment of the court. The global revolution in electronic communications vastly expanded the potential scope and reach of the electronic surveillance authorized by the FISC, while statutory changes diluted the standard required to support a court order compelling production of records, broadened the scope of records subject to such compulsory production, and, as construed by the FISC, conferred authority upon the FISC to approve not only case-specific surveillance of identified targets, but also programmatic surveillance encompassing an almost unimaginable volume of communications data.<sup>8</sup> Most

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<sup>1</sup> See 50 U.S.C. §§ 1803(a), 1822(c), 1842(a)(1), 1861(a)(1).

<sup>2</sup> See 50 U.S.C. § 1803(a)(1).

<sup>3</sup> See 50 U.S.C. §§ 1803(a)(1), 1803(d).

<sup>4</sup> See United States Foreign Intelligence Surveillance Court Rules of Procedure (“FISC Rules”), Rule 4(b).

<sup>5</sup> See 50 U.S.C. § 1803(b).

<sup>6</sup> See 50 U.S.C. §§ 1803(b), 1803(d).

<sup>7</sup> See 50 U.S.C. § 1803(b).

<sup>8</sup> See H.R. Rep. No. 114-109, pt. 1, at 6-7 (2015); Privacy & Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court 13, 174-77 (Jan. 23, 2014) (hereinafter “PCLOB Report”) (describing the evolution of the FISC’s role and the expansion of its remit beyond “individualized FISA warrants” to include approval of programmatic surveillance and “bulk collection”); Marty Lederman & Steve Vladeck, The Constitutionality of a FISA ‘Special Advocate,’ Just Security (Nov. 4, 2013), *available at* <https://www.justsecurity.org/2873/fisa-special-advocate-constitution/> (“Unlike in the original FISA . . . production orders under section 215 and certifications under section 702 don’t so closely resemble traditional warrants . . .”). Statistics compiled by the Electronic Privacy Information Center indicate that the FISC is bearing an increasingly

recently, however, the USA FREEDOM Act curbed to some extent the scope of FISA surveillance and brought an end to bulk collection of data under Section 215 of the PATRIOT Act.<sup>9</sup>

As you are aware, the recent FISC reforms were not enacted in a vacuum. Rather, legislative action followed in the wake of disclosures that cast a sharp spotlight on the FISC. Through a series of leaks reported in the news media, the American public learned in 2013 that the National Security Agency (“NSA”) had been engaged for years in the wholesale collection and aggregation of telephonic metadata.<sup>10</sup> The revelation of this far-reaching and unprecedented surveillance initiative engendered considerable public debate about the powers of the FISC, and set the stage for the USA FREEDOM Act, signed into law on June 2, 2015, which introduced several key FISC reforms.<sup>11</sup>

Perhaps the most well-known feature of the USA FREEDOM Act, characterized by Senator Leahy as the core of the legislation, is its prohibition of the bulk collection of telephony metadata under Section 215 of the USA PATRIOT Act.<sup>12</sup> In bringing an end to this controversial surveillance program, the USA FREEDOM Act defused much of the public debate over the FISC, and the national news media has to a large extent moved on. However, the City Bar believes that certain aspects of the structure and procedures of the FISC remain of continuing concern and, as explained in detail below, warrant further legislative attention.

### **FISC Secrecy**

The FISC is—as the FISC itself has acknowledged—a “uniquely nonpublic” court.<sup>13</sup> While “[o]ther courts operate primarily in public, with secrecy the exception,” the FISC

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heavy workload, with “traditional” FISA approvals soaring from 207 in 1979 to 1456 in 2015. Electronic Privacy Information Center, “Foreign Intelligence Surveillance Act Court Orders, 1979-2015,” *available at* [https://epic.org/privacy/wiretap/stats/fisa\\_stats.html](https://epic.org/privacy/wiretap/stats/fisa_stats.html).

<sup>9</sup> See Rainey Reitman, Electronic Frontier Foundation, *The New USA FREEDOM Act: A Step in the Right Direction, but More Must Be Done*, Apr. 30, 2015), *available at* <https://www EFF.org/deeplinks/2015/04/new-usa-freedom-act-step-right-direction-more-must-be-done> (noting that the USA FREEDOM Act would effect a “small but real institutional reform to the FISA Court”).

<sup>10</sup> See *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 795 (2d Cir. 2015) (“Americans first learned about the telephone metadata program . . . when the British newspaper *The Guardian* published a FISC order leaked by former government contractor Edward Snowden.”).

<sup>11</sup> See *id.* at 793 (disclosure of the telephone metadata program “generated considerable public attention and concern about the intrusion of government into private matters”); *Klayman v. Obama*, No. 13-851 (RJL), 2015 WL 6873127, at \*3, \*12 (D.D.C. Nov. 9, 2015) (noting “significant public outcry regarding the existence of the Bulk Telephony Metadata Program,” and characterizing the program as one which “was, and continues to be, shrouded in secrecy”); PCLOB Report, *supra* note 8, at 1 (The public disclosures “caused a great deal of concern both over the extent to which they damaged national security and over the nature and scope of the surveillance programs they purported to reveal.”).

<sup>12</sup> See 161 Cong. Rec. S3427 (daily ed. June 2, 2015) (statement of Sen. Leahy). The prohibition went into effect on November 30, 2015. See *In re Application of the FBI for Order Requiring Production of Tangible Things*, No. BR 15-75 (FISC June 29, 2015).

<sup>13</sup> See *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 491 n.18 (FISC 2007).

“operates primarily in secret, with public access the exception.”<sup>14</sup> Even after enactment of the USA FREEDOM Act, the FISC continues to be an extraordinarily secretive court, with proceedings held not only “behind closed doors,” but in a “secure facility.”<sup>15</sup>

Prior to passage of the USA FREEDOM Act, the secrecy of the FISC extended not only to the proceedings themselves but also to the rulings and records of the court, and publication of FISC rulings was the exception rather than the rule.<sup>16</sup> The first barrier to publication of FISC rulings was—and still remains—the fact that the “overwhelming majority” of the court’s rulings are classified.<sup>17</sup> In addition, the FISC Rules of Procedure provide for the release of court rulings—whether classified or not—under only limited circumstances.<sup>18</sup> The predictable result has been that FISC rulings and records were, almost without exception, “maintained in a secure and nonpublic fashion.”<sup>19</sup>

The USA FREEDOM Act implemented several key reforms aimed at increasing the transparency of the FISC. While the USA FREEDOM Act preserves the closed nature of FISC *proceedings*, it sets forth a statutory framework for the declassification and dissemination of FISC *rulings*, marking a significant shift in policy. Under Section 402, the Director of National Intelligence, “in consultation with the Attorney General,” is required to undertake a “declassification review” of every FISC decision that “includes a significant construction or interpretation of any provision of law,” with the objective of making such decisions “publicly available to the greatest extent practicable.”<sup>20</sup> To achieve this end, important FISC decisions

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<sup>14</sup> See *id.* at 488; see also *Clapper*, 785 F.3d at 793 (“Unlike ordinary Article III courts, the FISC conducts its usually *ex parte* proceedings in secret . . .”); *American Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 731 (S.D.N.Y. 2013) (“Congress created a secret court that operates in a secret environment to provide judicial oversight of secret Government activities.”).

<sup>15</sup> See *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 488.

<sup>16</sup> See *Clapper*, 785 F.3d at 793 (FISC decisions “are not, in the ordinary course, disseminated publicly”).

<sup>17</sup> See *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487-88. In a March 15, 2012 letter, Senators Ron Wyden and Mark Udall remarked that FISA-related records are often “so highly classified that most members of Congress do not have any staff who are cleared to read them,” with the consequence that many members of Congress are “unfamiliar with these documents” and “would be surprised and angry to learn how the Patriot Act has been interpreted in secret.” See Letter from Senators Ron Wyden and Mark Udall to Eric Holder, Attorney General (March 15, 2012), available at <https://www.scribd.com/doc/85512347/Senators-Ron-Wyden-Mark-Udall-Letter-to-Attorney-General-Holder>.

<sup>18</sup> Under Rule 62(a), requests for the publication of a FISC order, opinion or other decision may be made *sua sponte* by the authoring judge or on motion by a party. See FISC Rules, Rule 62(a). Such requests are considered by the presiding judge, who has sole discretion to grant the request. See *id.* The presiding judge and the Executive Branch also have discretion to provide FISC orders, opinions, records and decisions to Congress. See FISC Rules, Rule 62(c). The term “party” under Rule 62(a) has been narrowly construed. See *In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064, at \*5 (FISC Sept. 13, 2013) (holding that the term “party” under Rule 62(a) refers narrowly a “party to the proceeding that resulted in the ‘opinion, order, or other decision’ being considered for publication,” and does not embrace any other party who seeks disclosure of a FISC order, opinion or decision).

<sup>19</sup> See *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 490.

<sup>20</sup> See 50 U.S.C. § 1872(a).

may be published in full or in redacted form; as an alternative, in those instances where redaction would not adequately protect national security interests, an unclassified summary of the decision may be issued instead.<sup>21</sup>

The City Bar broadly supports the declassification provisions of the USA FREEDOM Act, which bring FISC procedures more closely in conformity with the presumption in favor of public access to judicial records recognized by the United States Supreme Court.<sup>22</sup> In particular, the City Bar believes that the targeted redaction of FISC decisions, orders and opinions, in accordance with Section 402 of the USA FREEDOM Act, strikes a reasonable balance between secrecy and transparency, affording protection to sensitive national security information while enabling the general public to be informed, even if only in broad outlines, of the surveillance activities being conducted in its name.

The City Bar remains concerned, however, that the declassification procedures set forth under the USA FREEDOM Act may not suffice to give full effect to the legislative mandate that significant FISC interpretations of law be made “publicly available to the greatest extent practicable.”<sup>23</sup> As an initial matter, the declassification provisions of the USA FREEDOM Act appear to be exclusively prospective in nature: The USA FREEDOM Act does not expressly require that decisions issued prior to the effective date of the legislation be subjected to the declassification review outlined in Section 402, and absent such a congressional mandate, we think it unlikely that retroactive review, to the extent it is performed at all, will be performed comprehensively and systematically.<sup>24</sup> Moreover, Section 402 includes no provision for revisiting the results of a declassification review once such a review has been completed. The City Bar believes that the declassification provisions of Section 402 should be extended to FISC decisions issued prior to the passage of the USA FREEDOM Act, in order to ensure that all FISC decisions of significance—whether issued before or after enactment of the USA FREEDOM Act—are made available for public review to the fullest extent practicable. The City Bar further believes that Congress should adopt legislation to require that these classification determinations be re-assessed periodically, in order to ensure that disclosure restrictions are not maintained indefinitely if and when they are no longer necessary for the protection of national security or to preserve the secrecy of classified information, sources or methods.

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<sup>21</sup> See 50 U.S.C. §§ 1872(b), 1872(c).

<sup>22</sup> See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978); see also *Clapper*, 785 F.3d at 828 (“[M]ost Article III courts . . . operate under a strong presumption that their papers and proceedings are open to the public.”) (Sack, J., concurring).

<sup>23</sup> See Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251, 2290 n.190 (2016) (suggesting that the language of the declassification provisions may be “ambiguous enough to open the door to unnecessary (and harmful) secrecy”), available at [http://www.minnesotalawreview.org/wp-content/uploads/2016/08/MondaleSteinFisher\\_Online.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2016/08/MondaleSteinFisher_Online.pdf).

<sup>24</sup> See Privacy & Civil Liberties Oversight Board, *Recommendations Assessment Report 9* (Feb. 5, 2016), available at [https://www.pclob.gov/library/Recommendations\\_Assessment\\_Report\\_20160205.pdf](https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf) (hereinafter “PCLOB Recommendations Assessment”) (noting that the “Intelligence Community” had expressed a commitment to “continue to conduct declassification reviews of both older and more recent opinions.”).



## Ex Parte Proceedings

In addition to being closed to the public, FISC proceedings are distinctively one-sided, and this remains so under the USA FREEDOM Act. Rulings on FISC applications have been, and continue to be, rendered largely on an *ex parte* basis, without the knowledge or participation of the surveillance target(s), and often in reliance on unilateral briefings by the government. This aspect of FISC proceedings, while necessary and understandable with respect to many of the issues the court must address, nevertheless stands in marked contrast with the characteristically adversarial system of American justice, which generally “rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present.”<sup>25</sup> We recognize that the *ex parte* nature of FISC proceedings is supported in many contexts by an analogy to traditional warrant hearings,<sup>26</sup> but the power of the FISC to authorize wide-scale, programmatic surveillance—a power which the FISC retains notwithstanding discontinuation of the bulk telephony metadata collection program—separates FISC proceedings from the individualized warrant application hearings that serve as the procedural model for the FISC.<sup>27</sup>

In response to concerns arising from the *ex parte* nature of FISC proceedings, the USA FREEDOM Act included provisions for the appointment of *amici curiae* to assist the FISC. Under Section 401, the presiding judges of the FISC and the FISCR were required to designate

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<sup>25</sup> *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting the “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”); *Franks v. Delaware*, 438 U.S. 154, 169 (1978) (“The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous.”).

<sup>26</sup> See *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982) (noting that “courts often conduct *ex parte* proceedings, as in the case of Title III wiretap applications”); *Matter of Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (“The *ex parte* nature of FISC proceedings is also consistent with Article III. Government applications for warrants are always *ex parte*.”).

<sup>27</sup> See PCLOB Report, *supra* note 8 at 183-84 (noting the “growing consensus that the *ex parte* approach is not the right model for review of novel legal questions or applications involving broad surveillance programs that collect information about the communications of many people who have no apparent connection to terrorism”); Mondale *et al.*, *supra* note 23, at 2297 (“It was that similarity to warrant proceedings that justified the creation of a completely *ex parte* court. That fundamental premise no longer holds now that the court also engages in bulk adjudication of programmatic surveillance, which does not resemble the individualized determinations made by a judge issuing a warrant.”). FISC continues to have the authority to review and approve certifications and procedures in connection with surveillance conducted under Section 702 of the FISA Amendments Act, providing for the “targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” 50 U.S.C. §§ 1881a(a), 1881a(i); see also Edward C. Liu, Cong. Research Serv., R44457, *Surveillance of Foreigners Outside the United States Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)* 2-3 (April 13, 2016), available at <https://www.fas.org/sgp/crs/intel/R44457.pdf>; Privacy & Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 113 (July 2, 2014) (concluding that “programmatic surveillance” under Section 702 does not “resemble traditional domestic surveillance conducted pursuant to individualized court orders based on probable cause”); Laura K. Donohue, *Section 702 and the Collection of International Telephone & Internet Content*, 38 Harv. J. L. & Pub. Pol’y 117, 153-202 (2015) (describing the potential for programmatic surveillance under Section 702).

“not fewer than 5 individuals” to serve as *amici curiae*.<sup>28</sup> Each *amicus curiae* must be an individual who has relevant expertise and who is, in addition, eligible to access classified information to the extent such access is “necessary” for participation in the matter at issue.<sup>29</sup> The USA FREEDOM Act contemplates that the *amici curiae* will function as technical or legal advisers, presenting “legal arguments that advance the protection of individual privacy and civil liberties” or providing the FISC with “information related to intelligence collection or communications technology.”<sup>30</sup>

However, under the USA FREEDOM Act, the FISC not only controls the selection of the *amici curiae*, but it also has full discretion to decide whether an *amicus curiae* will be called upon to assist with any given application. While the USA FREEDOM Act requires the FISC to appoint an *amicus curiae* where an application “presents a novel or significant interpretation of the law,” it is left to the FISC to determine whether a “novel or significant interpretation of the law” is in fact at issue.<sup>31</sup> In addition, even in those instances where the FISC so concludes, the FISC is authorized under the USA FREEDOM Act to dispense with an *amicus curiae* upon a unilateral “finding that such appointment is not appropriate.”<sup>32</sup> The FISC has already given this provision an expansive reading, holding that appointment of an *amicus curiae* is not appropriate, even where an *amicus curiae* may concededly “help to develop and refine arguments and to clarify the reasoning of the court,” if the court concludes that the legal question at issue is “relatively simple or is capable of only a single reasonable or rational outcome.”<sup>33</sup> The FISC has also raised the possibility that the “potential expense or delay of appointing an *amicus curiae*” may suffice to make the appointment of an *amicus curiae* inappropriate. While some FISA applications will undoubtedly be time-sensitive, requiring urgent adjudication, this will not always be the case, and the FISC’s reference to “potential expense” in particular suggests that the bar for justifying the FISC’s decision to decline appointment of an *amicus curiae* could be set very low indeed.<sup>34</sup>

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<sup>28</sup> See 50 U.S.C. § 1803(i)(1). Five individuals were designated to serve as *amicus curiae* effective November 25, 2015, and a sixth was designated effective March 31, 2016. See <http://www.fisc.uscourts.gov/amici-curiae>. Prior to the designation of these individuals, an individual was appointed to serve as *amicus curiae* with respect to a discrete matter pursuant to 50 U.S.C. § 1803(i)(2)(B). See *Order Appointing an Amicus Curiae, In re Application of the FBI for an Order Requiring the Production of Tangible Things*, No. BR 15-99 (FISC Sept. 17, 2015).

<sup>29</sup> See 50 U.S.C. § 1803(i)(3).

<sup>30</sup> See 50 U.S.C. § 1803(i)(4).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*; see also *Mondale et al.*, *supra* note 23, at 2296 (“[T]his is exactly the kind of ambiguous language that can be used to further the intelligence community’s preference for operating in a cloak of secrecy at the expense of personal liberties.”).

<sup>33</sup> See *In re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Nos. 15-77, 15-78 (FISC June 17, 2015) (declining to appoint an *amicus curiae*). More recently, the FISC declined to appoint an *amicus curiae* notwithstanding the fact that the application at issue presented, as a matter of first impression, a “potential statutory conflict” between two provisions of FISA. See *In re Application of the FBI for Orders Requiring the Production of Call Detail Records* (FISC Dec. 31, 2015), available at [https://www.eff.org/files/2016/04/28/12312015br\\_memo\\_opinion\\_for\\_public\\_release.pdf](https://www.eff.org/files/2016/04/28/12312015br_memo_opinion_for_public_release.pdf).

<sup>34</sup> See *In re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Nos. 15-77, 15-78 (FISC June 17, 2015). As the Brennan Center for Justice has noted, the FISC had discretion to appoint *amicus*



Moreover, the ability of an *amici curiae* to serve as an effective, independent advocate for privacy interests and civil liberties under the USA FREEDOM Act may also be attenuated by the fact that the *amicus curiae* may not be afforded full access to all materials which may be relevant to the legal question at issue. While the USA FREEDOM Act requires that an *amicus curiae* be given access to any relevant “legal precedent, application, certification, petition, motion, or such other materials,” it is the FISC itself that determines which materials are relevant, effectively empowering the FISC to restrict the materials which the *amicus curiae* may see.<sup>35</sup>

The City Bar believes that the provisions for the appointment of *amici curiae* under the USA FREEDOM Act represent significant progress in opening FISC deliberations to additional voices and perspectives. However, the City Bar urges Congress to consider further measures to ensure that the *amici curiae* are used in all appropriate cases and are empowered to offer independent and unfettered guidance to the FISC.<sup>36</sup> The provisions for appointment of *amici curiae* could be meaningfully enhanced, for example, by making *amici curiae* mandatory in all “novel” or “significant” cases, and by limiting the discretion of the FISC to decline to appoint an *amicus curiae*, including by adopting specific guidance on the standard for determining when it is “not appropriate” to appoint an *amicus curiae*. The role of the *amicus curiae* could be further strengthened by the establishment of procedures enabling an appointed *amicus curiae* to request materials that he or she believes to be relevant to the legal question at issue and/or to challenge the FISC’s determination to withhold such materials.

While some have proposed the establishment of an independent office led by a “special advocate” to represent the civil liberties interests of the general public, the City Bar is mindful of the constitutional questions posed by proposals to install a mandatory special advocate in the FISC.<sup>37</sup> Depending on the nature of the office and the scope of its authority, such a special

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*curiae* even prior to the USA FREEDOM Act, but “with few exceptions. . . preferred to rely on the government’s submissions alone.” See Elizabeth Goitein & Faiza Patel, Brennan Center for Justice, *What Went Wrong with the FISA Court* 2015, at 46, available at [https://www.brennancenter.org/sites/default/files/analysis/What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf); see also Mondale *et al.*, *supra* note 23, at 2296-97 (suggesting that some FISC judges may use the ambiguity of the USA FREEDOM Act to “preclude the appointment of an *amicus*”). When a warrant application is time sensitive, it may make recourse to an *amicus* impracticable. In those circumstances, a more robust appeals process, discussed *infra* at 12, is critical to ensuring the proper application of the law.

<sup>35</sup> See 50 U.S.C. § 1803(i)(6).

<sup>36</sup> See Goitein & Patel, *supra* note 34, at 46 (“Article III would be best served by strengthening the special advocate concept to the greatest extent possible, including by ensuring that special advocates are notified of cases pending before the court, have the right to intervene in cases of their choosing, and are given access to all materials relevant to the controversy in which they are intervening.”).

<sup>37</sup> See Andrew Nolan, Richard M. Thompson II & Vivian S. Chu, Cong. Research Serv., R43260, *Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate* (March 21, 2014), available at <http://fas.org/sgp/crs/intel/R43260.pdf>; see also PCLOB Report, *supra* note 8, at 184-87 (recommending that “Congress amend FISA to authorize the FISC to create a pool of ‘Special Advocates’ who would be called upon to present independent views to the court in important cases”); Lederman & Vladeck, *supra* note 8; Mondale *et al.*, *supra* note 23, at 2297-98 (recommending expansion of the role of the *amicus curiae* to the capacity of an “ombudsman”).

advocate could be deemed a public officer whose appointment would be required to comport with the Appointments Clause.<sup>38</sup> Moreover, in order to appeal an unfavorable ruling, it may be necessary for a special advocate to establish standing by showing, among other things, that he or she personally suffered an “actual or threatened injury” that was not merely conjectural or hypothetical, but “concrete and particularized” and “actual or imminent.”<sup>39</sup> This Article III standing requirement could prove to be an obstacle for a special advocate designated to represent the generalized interests of privacy and civil liberties of the public at large.<sup>40</sup>

Nevertheless, the City Bar believes that, in the absence of a true party adverse to the government, legislative measures like those discussed above can and should be taken to ensure that the *amicus curiae* may fulfill the function of a special advocate in the FISC to the fullest extent possible within the bounds of Article III.

### **Limited Appeals**

Under the USA FREEDOM Act, the process for appealing decisions of the FISC remains tilted sharply in favor of the government. If a government application for an electronic surveillance order is denied, the FISC is required to “provide immediately for the record a written statement of each reason for [its] decision.”<sup>41</sup> Upon motion of the government, the FISC must submit its written decision to the FISCR for consideration.<sup>42</sup> If the FISCR agrees that the government application was properly denied, the FISCR must “immediately provide for the record a written statement of each reason for its decision” and, upon petition of the government for a writ of certiorari, submit such record to the Supreme Court, “which shall have jurisdiction to review such decision.”<sup>43</sup>

By contrast, if a government application for an electronic surveillance order is *granted*—and such applications have historically been granted in overwhelming numbers—the decision may be submitted for consideration by the FISCR only if the FISC itself concludes that the

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<sup>38</sup> See Nolan, Thompson & Chu, *supra* note 37.

<sup>39</sup> See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing further requires a causal connection between the injury and the conduct in question, and it must be at least likely that the injury could be redressed by a decision of the court. See *id.*

<sup>40</sup> See The Constitution Project, *The Case for a FISA 'Special Advocate'* 12 (May 29, 2014) (For a special advocate “given a more general charge to defend civil liberties and privacy and/or oppose the government, it may be far more difficult to satisfy the Article III requirement that she have a personal stake in the outcome sufficient to allow an appeal from an adverse FISC decision.”), available at [http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf). The Association expresses no view here as to whether a special advocate could constitutionally be granted standing by an Act of Congress. See *generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

<sup>41</sup> See 50 U.S.C. § 1803(a)(1).

<sup>42</sup> See *id.*

<sup>43</sup> See 50 U.S.C. § 1803(b).

decision implicates a “question of law” that warrants review because of a “need for uniformity” or because such review would “serve the interests of justice.”<sup>44</sup>

The City Bar believes that this one-sided appeals process—which generally subjects FISC orders to appellate review only where the issuing court itself determines that such review is warranted—may unduly shield FISC orders from the benefits of appellate scrutiny.<sup>45</sup> The difficulty is inherent in the structure of the FISC: Given the *ex parte* nature of FISC proceedings, there is no adverse party to pursue an appeal, and the court-appointed *amici curiae* may lack Article III standing to serve as substitute appellants. The City Bar urges Congress to consider measures to establish a more robust process for appellate review of FISC decisions, including measures to restrict the discretion of the FISC to avoid such appeals, to empower the *amicus curiae* to petition the FISC to certify questions of law to the FISCR, or to *require* appellate review of any decision that “presents a novel or significant interpretation of the law” or where the FISC has ratified significant programmatic surveillance.<sup>46</sup> As discussed below, procedural adjustments requiring multi-judge or *en banc* review may also help to promote broader examination of constitutionally significant issues in the absence of appellate review.

### **Single Judge Decision-Making**

In enacting FISA into law in 1978, Congress was guided in large measure by the analogy to search warrant proceedings in the criminal context, in which an individual judge reviews and rules on warrant applications on a case-by-case basis. In the decades since, however, the communications revolution has provided law enforcement and national security agencies with previously unimaginable tools to track the whereabouts and communications of targeted individuals. Thus, while applications considered by the FISC in FISA’s early years may have been generally comparable to petitions for wiretapping and other surveillance applications submitted by law enforcement agencies to courts across the country on a daily basis, the FISC has more recently been called upon to hear cases that implicate “novel, substantial, and very difficult issue[s] of law,” far beyond the kinds of issues typically raised by Title III petitions for wiretapping heard in federal district courts.<sup>47</sup> Indeed, today, “the surveillance that FISA deals

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<sup>44</sup> See 50 U.S.C. § 1803(j). In addition, the FISCR may certify questions of law for review by the Supreme Court. See 50 U.S.C. § 1803(k)(1); 28 U.S.C. § 1254(2). There is a statutory right to challenge production orders and associated nondisclosure orders issued under Section 215, and a corollary right of appeal to the FISCR. See 50 U.S.C. §§ 1803(e)(1), 1861(f)(2)-(3). Similarly, an “electronic communication service provider” has a statutory right to challenge directives issued under Section 702 and to appeal rejections of such challenges to the FISCR. See 50 U.S.C. §§ 1803(e)(1), 1881a(h)(4), 1881a(h)(6)(A). In both instances, decisions of the FISCR are appealable to the United States Supreme Court. See 50 U.S.C. §§ 1861(f)(3), 1881a(6)(B).

<sup>45</sup> See PCLOB Report, *supra* note 8, at 187 (“Virtually all proponents of FISC reform, including judges who have served on the court, agree that there should be a greater opportunity for appellate review of FISC decisions by the FISCR and for review of the FISCR’s decisions by the Supreme Court of the United States.”).

<sup>46</sup> See PCLOB Recommendations Assessment; *supra* note 24, at 6 (noting that FISC and FISCR rules of procedure could be revised to provide mechanisms for *amici curiae* to “request certification of a FISC or FISCR decision” or to “challenge the FISC’s decision not to certify a legal question for appellate review.”).

<sup>47</sup> Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary, 113th Cong. 1 (2013) (statement of Judge James G. Carr), available at <http://www.judiciary.senate.gov/imo/media/doc/7-31-13CarrTestimony.pdf>.

with necessarily involves secrecy, inherently requires policy judgments, and takes place in the context of the increased powers of the Executive in the national security arena.”<sup>48</sup> As Yale Law School Professor Bruce Ackerman recently noted, “[s]ingle-judge decision[s] made sense in 1978 . . . [a] low-tech era [in which] nobody imagined that the NSA would be sweeping hundreds of millions of telephone and Internet communications into its computers.”<sup>49</sup>

Given the breadth and importance of the FISC’s docket, and the limited opportunities for appeal, the City Bar believes that, in some cases, vesting decision-making authority in a single judge may not be prudent, particularly with respect to non-routine applications implicating significant legal or constitutional issues. Multi-judge panels are generally believed to make more consistently accurate decisions than single judge panels, and recent research suggests that decision-making is significantly influenced by the presence of additional jurists, particularly those who may offer a unique point of view.<sup>50</sup>

Commentators have posited a number of procedural reforms to promote more collaborative decision-making by the FISC. For instance, Professor Ackerman has proposed that “major surveillance issues” should be decided by randomly selected panels of three FISC judges, and that split decisions should be subject to *en banc* appeal.<sup>51</sup> Such proposals would be in line with legislative actions taken by Congress to enable or even mandate multi-judge consideration of special categories of claims, including statutory provisions authorizing three-judge panels in certain actions brought under the Civil Rights Act of 1964, and requiring three-judge panels for the adjudication of constitutional challenges to the apportionment of congressional districts or statewide legislative bodies.<sup>52</sup>

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<sup>48</sup> Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 Harv. L. Rev. 2200, 2208 (2008).

<sup>49</sup> Bruce Ackerman, *Surveillance and the FISA Court*, L.A. Times, Sept. 24, 2014, available at <http://articles.latimes.com/2013/sep/24/opinion/la-oe-ackerman-fisa-reform-20130924>.

<sup>50</sup> See generally Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 Cal. L. Rev. 1493 (2012), available at <http://scholarship.law.berkeley.edu/facpubs/1892>; Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 Yale L.J. 1759 (2005), available at <http://www.yalelawjournal.org/note/female-judges-matter-gender-and-collegial-decisionmaking-in-the-federal-appellate-courts>. The so-called “wisdom of the crowds” theory was expounded by the Marquis de Condorcet as early as 1785 in his famous “Essay on the Application of Analysis to the Probability of Majority Decisions.”

<sup>51</sup> See Ackerman, *supra* note 49. The Congressional Research Service recently concluded that Congress may constitutionally require the FISC to sit *en banc*, “because *en banc* decision-making does not, in and of itself, limit core Article III powers.” Andrew Nolan & Richard M. Thompson II, Cong. Research Serv., R43362, *Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes* 21 (Aug. 26, 2014), available at <http://fas.org/sgp/crs/intel/R43362.pdf>.

<sup>52</sup> See Nolan & Thompson, *supra* note 51, at 21-22; see also Jared P. Cole & Andrew Nolan, Cong. Research Serv., R43451 *Reform of the Foreign Intelligence Surveillance Courts: A Brief Overview* 11 (March 31, 2014), available at <https://www.fas.org/sgp/crs/intel/R43451.pdf>; 28 U.S.C. § 2284(a) (a three-judge district court must be convened in any action challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body); 42 U.S.C. § 2000a-5(b) (authorizing the Attorney General to request a three-judge panel to hear certain civil actions of “general public importance” brought under the “Public Accommodations” subchapter of the Civil Rights Act of 1964); 42 U.S.C. § 2000e-6(b) (authorizing the Attorney General to request a three-judge panel to hear certain civil actions of “general public importance” brought under the “Equal Employment Opportunities” subchapter of the Civil Rights Act of 1964); see also *Shapiro v. McManus*, 136 S. Ct. 450, 454-55

The City Bar urges Congress to consider these and other alternatives to the single-judge decision-making model, including reform proposals that would require applications implicating significant legal issues to be heard by multi-judge panels. In particular, the City Bar recommends that Congress consider legislative measures to mandate adjudication by multi-judge panels of all FISC applications deemed to implicate a “significant construction or interpretation of any provision of law” under the declassification and publication provisions of Section 402.<sup>53</sup>

### **Judicial Appointments**

The insulated character of FISC proceedings is further reinforced by the fact that the power to appoint all FISC judges rests with a single individual, the Chief Justice of the United States. Critics have suggested that this concentration of the power of appointment may result in a bench stacked with politically like-minded judges.<sup>54</sup> A longstanding commentator on the Supreme Court summed up the concerns as follows:

If the [FISC] is now essentially serving as a parallel Supreme Court, in deciding what the Fourth Amendment means in the digital age of metadata-gathering, would it be more in keeping with the Founders’ design to put their selection back into the political realm, where accountability might be more realistic?<sup>55</sup>

The appointment of all FISC judges by a single individual, whoever he or she is and however well-intentioned, may inevitably cause some to question whether the selection process is truly free of the influence, conscious or unconscious, of personal or political bias. The risk of such bias, or even the appearance of such a risk, is of special concern given that FISC proceedings are closed to the public and that FISC orders are generally subject to appeal only at the initiative of the government or the FISC itself. The USA FREEDOM Act does not address this issue.

The City Bar urges Congress to consider additional legislation aimed at reforming the process by which judges are appointed to the FISC and the FISCR, with the goal of ensuring that the composition of these courts broadly reflects that of the federal courts overall. The City Bar is aware of a number of legislative proposals to expand the power to appoint FISC judges beyond

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(2015) (holding that 28 U.S.C. § 2284 required reference of case to three-judge court). As the Supreme Court recently observed in *Shapiro*, “three-judge district courts were more common in the decades before 1976, when they were required for various adjudications . . .” *Id.* at 453.

<sup>53</sup> See 50 U.S.C. § 1872(a).

<sup>54</sup> See, e.g., Ackerman, *supra* note 49 (opining that Chief Justice Roberts “has been exercising extreme partisanship in making his choices”).

<sup>55</sup> Lyle Denniston, *Constitution Check: Is the Chief Justice’s power to pick judges of the secret wiretap court a bad idea?*, National Constitution Center (Aug. 6, 2013), available at <http://blog.constitutioncenter.org/2013/08/constitution-check-is-the-chief-justices-power-to-pick-judges-of-the-secret-wiretap-court-a-bad-idea/>.



the Chief Justice. One such proposal, the proposed FISA Judge Selection Reform Act of 2013, would expand the FISC to thirteen judges—one from each federal circuit—and vest the Chief Judge of each circuit with responsibility for nominating a proposed designee to represent that circuit, subject to the approval of the Chief Justice.<sup>56</sup> Another such measure, the FISA Court Accountability Act, would distribute responsibility for judicial appointments among the Chief Justice, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate.<sup>57</sup> The Presidential Appointment of FISA Court Judges Act, by contrast, would vest appointment power for the FISC and the FISCR in the President, subject to the advice and consent of the Senate.<sup>58</sup>

The City Bar agrees with the guiding principle underlying these proposals, that the power to appoint FISC judges should not be reserved to a single decision-maker. While there are various possible mechanisms for achieving this end, the City Bar's view is that in order to avoid unnecessary politicization of the court, appointment of the judges of the FISC should continue to rest within the judicial branch. With this in mind, the City Bar recommends adoption of a variation of the appointment procedure outlined under the FISA Judge Selection Reform Act. Specifically, the City Bar proposes that the Chief Justice's appointment power be confined to only one of the seats on the FISC, leaving the remaining six judges to be appointed by the Chief Judges of the federal circuits on a rotating basis. The City Bar's proposal would preserve the existing structure of the FISC, while ensuring that the power to appoint FISC judges, though confined to the judicial branch, does not rest in the hands of a single decision-maker. The City Bar encourages Congress to consider this and similar legislative proposals to expand responsibility for appointing FISC judges beyond the Chief Justice of the United States.

## CONCLUSION

In view of the foregoing, the City Bar urges Congress to consider the USA FREEDOM Act as the beginning, rather than the end, of substantive FISC reform legislation. The bulk telephony metadata program, only recently discontinued, stands as a warning: That one of the most controversial and far-reaching surveillance operations in American history—a program found likely unconstitutional by one federal district court and held to be unlawful by a federal court of appeals—should have been authorized without the benefit of adversary briefing, public

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<sup>56</sup> The FISA Judge Selection Reform Act of 2013, S.1460, 113th Congress, *available at* <https://www.congress.gov/bill/113th-congress/senate-bill/1460>, was proposed in 2013 by Senator Richard Blumenthal. The legislation would empower the Chief Justice to accept or reject the proposed designee of the Chief Judge. In case of such a rejection, the Chief Judge of the relevant circuit would be required to submit two alternate designees, one of whom the Chief Justice would be required to approve. Judges of the FISCR would continue to be designated by the Chief Justice, subject to the approval of five Associate Justices of the Supreme Court.

<sup>57</sup> FISA Court Accountability Act, H.R. 2586, 113th Congress, *available at* <https://www.congress.gov/bill/113th-congress/house-bill/2586>. The FISA Court Accountability Act was introduced in 2013 by Representative Steve Cohen. This legislation also called for the power to appoint the three judges of the FISCR to be shared between the Chief Justice, the Speaker, and the Majority Leader of the Senate.

<sup>58</sup> Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Congress, *available at* <https://www.congress.gov/bill/113th-congress/house-bill/2761>. The Presidential Appointment of FISA Court Judges Act was introduced in 2013 by Representative Adam Schiff.



debate, appellate review, or even a written opinion, dramatically underscores the perils of empowering individual judges to interpret the law in cloistered secrecy. The City Bar congratulates Congress for its enactment of the reforms contained in the USA FREEDOM Act and in particular in ending the bulk collection of communications data under Section 215 of the USA PATRIOT Act. However, the City Bar urges Congress to remain mindful that many of the structural and procedural deficiencies of the FISC—the same deficiencies that enabled the authorization of the bulk telephony metadata program in the first place—are still firmly in place and merit continued legislative attention.

Respectfully,



Ira M. Feinberg, Chair  
Federal Courts Committee\*



Jonathan Hafetz, Chair  
Task Force on National Security and  
the Rule of Law

Cc: Hon. Harry Reid, Democratic Leader, U.S. Senate  
Hon. Chuck Grassley, Chair, U.S. Senate Judiciary Committee  
Hon. Patrick Leahy, Ranking Member, U.S. Senate Judiciary Committee  
Hon. Nancy Pelosi, Democratic Leader, U.S. House of Representatives  
Hon. Bob Goodlatte, Chair, U.S. House of Representatives Judiciary Committee  
Hon. John Conyers, Ranking Member, U.S. House of Representatives Judiciary Committee  
New York Congressional Delegation

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