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The New FISA Court Amicus Should Be Able to Ignore its Congressionally Imposed Duty

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The New FISA Court Amicus Should Be Able to Ignore its Congressionally Imposed Duty

Keywords

FISA, FISC, amici, separation of powers, individual privacy interests

THE NEW FISA COURT AMICUS SHOULD BE ABLE TO IGNORE ITS CONGRESSIONALLY IMPOSED DUTY

BEN COOK*

After the Edward Snowden disclosures regarding the National Security Agency's surveillance activities under the Foreign Intelligence Surveillance Act (FISA), Congress reformed both the substantive FISA surveillance laws and the procedural rules of the FISA Court (FISC)—the court Congress established in FISA to adjudicate government surveillance requests—to better protect privacy interests and increase the representation of privacy interests before the court. Previously, the court very rarely heard opposition to the government's arguments supporting surveillance requests. The reform legislation—the USA FREEDOM Act—requires the court to hear from one of five pooled amici when it is presented with novel or significant interpretations of law. The statute also requires those pooled amici to support arguments that advance individual privacy and civil liberties.

The statute, however, risks violating separation of powers principles if the amicus and FISC interpret the statute narrowly as preventing an amicus from advancing arguments that support intelligence collection or conflict with individual privacy interests. While Congress retains total authority to control the jurisdiction and procedures of the FISC, the judicial power inherent in any court includes the authority to decide the law, administer justice, and control the amicus process. By interfering with the court's ability to consider which arguments it hears from an amicus that the court has appointed to materially

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assist in deciding the law, the statute would violate the separation of powers doctrine. So, even if such a broad reading would render the amicus duty superfluous and insignificant, the court should interpret the amicus duty broadly to allow virtually any legal argument that the court deems helpful and appropriate. A broad interpretation would allow the court to fulfill its constitutional obligations while avoiding the need to declare the statute in violation of the separation of powers.

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INTRODUCTION

In 2013, Edward Snowden revealed classified information regarding the U.S. government’s surveillance activities.¹ These disclosures shocked the public because they contained evidence that the government’s surveillance included the collection of U.S. citizens’ communications.² The Snowden disclosures prompted a national conversation about both the scope of the government’s substantive surveillance authority under the Foreign Intelligence Surveillance Act of 1978 (FISA)³ and the Foreign Intelligence Surveillance Court’s (FISC) historically non-adversarial proceedings to adjudicate government surveillance requests.⁴

In June 2015, Congress passed the USA FREEDOM Act (FREEDOM Act),⁵ which reformed some of the substantive surveillance authorities and created an amicus curie (“amicus”) pool for the FISC judges to use when considering novel or significant legal interpretations. This amicus pool is a watered-down version of prior proposals that would have created an independent office to litigate before the FISC against the government.⁶ Even though Congress did not choose to house the amicus in a federal office, did not authorize funds to pay the amicus, and left control and oversight of the amicus pool to the FISC judges, Congress still mandated that the amicus pool advocate in a specific way when discussing privacy and civil liberties

1. Barton Gellman et al., *Edward Snowden Comes Forward as Source of NSA Leaks*, WASH. POST (June 9, 2013), https://www.washingtonpost.com/politics/intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff80160-d122-11e2-a73e-826d299ff459_story.html.

2. *Id.*

3. Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1803 (2012)).

4. Evan Perez, *Secret Court’s Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013, 7:11 PM), <http://www.wsj.com/articles/SB10001424127887324904004578535670310514616>.

5. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (codified at scattered sections of 50 U.S.C.) [hereinafter FREEDOM Act].

6. *See infra* Section I.C.

concerns.⁷ As a “friend of the court,” the amicus pool should only be responsive to the FISC judges, who should be entitled to hear an unvarnished view from the amici that they have appointed to help them consider novel or significant interpretations of law. The congressionally imposed limitation on potential amicus arguments is unconstitutional to the extent that it prevents an amicus from making an otherwise helpful argument to the court that has solicited that amicus’s assistance. The FISC should interpret the mandate as broadly as possible to avoid having to declare it unconstitutional even if this interpretation ignores the legislative history and renders statutory phrases superfluous.

Courts have inherent authority and broad discretion to control the nature and extent of an amicus’s participation in a proceeding.⁸ But Congress and the courts are both entrusted with distinct but overlapping constitutional powers under the Constitution to operate the judicial system, and when Congress legislates regarding the courts, the courts retain their powers over their essential constitutional functions, minus those powers exercised by Congress.⁹ Thus, Congress has “broad power to regulate the structure, administration, and jurisdiction of the courts,” but its power is limited by the constitutional doctrine of separation of powers.¹⁰

7. USA FREEDOM Act § 401, 129 Stat. at 279 (to be codified at 50 U.S.C. § 1803(i)(4)(A)) (requiring that the amicus provide arguments that “advance the protection of individual privacy and civil liberties”).

8. See *Hard Drive Prods., Inc. v. Does 1-1495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012) (affirming that it is “solely within the Court’s discretion to determine ‘the fact, extent, and manner’ of participation by the amicus”) (quoting *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002)); *Martinez v. Capital Cities/ABC-WPVI*, 909 F. Supp. 283, 286 (E.D. Pa. 1995) (stating that “[a] district court has inherent authority to appoint amicus curiae to assist in a proceeding”); *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 15-75, slip op. at 8 n.7 (FISA Ct. June 29, 2015) (“Courts have broad discretion to determine the nature and extent of the participation of an amicus curiae.”); Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 397 (2015) (stating that “[r]egardless of what the rules say, courts always retain inherent power to appoint amicus curiae”).

9. See Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 40 n.9 (2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (explaining the separation of powers “zone of twilight” when two branches share concurrent authority and the ebb of power when one branch affirmatively acts in an area shared with another branch).

10. ELIZABETH B. BAZAN ET AL., CONG. RESEARCH SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS I (2005).

The FREEDOM ACT highlighted this exact tension between Congress and the judicial power. It required the FISC to appoint five individuals to serve in an amici pool, imposed on that amici pool the mandate to advocate in support of privacy and civil liberties, and then required the FISC to appoint a pooled amicus when an application or order “in the opinion of the court, *presents a novel or significant interpretation of the law*, unless the court issues a finding that such appointment is not appropriate.”¹¹ When Congress requires a court presented with a “novel or significant interpretation of the law” to hear from an amicus,¹² it risks interfering with the court’s inherent judicial powers to decide the law and control the nature of amicus participation, especially when it restricts the legal arguments that the amicus can provide.

Congress established the FISC, an Article III court¹³ with jurisdiction over government applications for surveillance authority under FISA and the USA PATRIOT Act (PATRIOT Act).¹⁴ After Edward Snowden disclosed previously classified details of the Federal Bureau of Investigation’s (FBI) and National Security Agency’s (NSA) surveillance activities under FISA and the PATRIOT Act in 2013, the President, Congress, privacy advocates, and members of the public all called for reform.¹⁵ Subsequently, in 2015, Congress and the President enacted the FREEDOM Act, which included substantive reforms to surveillance laws and procedural reforms to the FISC’s operations.¹⁶ The FREEDOM Act required the FISC to appoint an

11. USA FREEDOM Act § 401, 129 Stat. at 279 (to be codified at 50 U.S.C. § 1803(i)) (emphasis added).

12. See *infra* text accompanying note 17.

13. See *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (illustrating that FISC judges have Article III status, that the FISC proceedings’ *ex parte* nature is consistent with Article III, and that the FISC structure is a “careful effort to provide constitutional structure to electronic surveillance”); FISA Ct. R. P. 5(a) (providing that FISC judges may exercise authority consistent with Article III).

14. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter PATRIOT Act]. Both FISA and the PATRIOT Act have been amended numerous times since their enactments. The pertinent sections of each statute that regard intelligence activities, surveillance, and the FISA court are codified at 50 U.S.C. §§ 1801–1885c.

15. See *infra* notes 78–81 and accompanying text.

16. FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015) (codified at scattered sections of 50 U.S.C.) (ending bulk collection of phone records, requiring specific selection terms for records searches, limiting the government’s use of information obtained through intelligence collection, and increasing transparency of FISA court decisions).

amicus when presented with a “novel or significant interpretation of the law.”¹⁷ The FREEDOM Act further required those appointed amici to provide “legal arguments that advance the protection of individual privacy and civil liberties.”¹⁸

This statute, creating the amicus pool, walks a fine line between Congress’s and the FISC’s respective constitutional powers. The statute does give the court broad discretion to control whether the amicus participates, but then the statute interferes with the court-amicus relationship by restricting the amicus’s available arguments when discussing privacy and civil liberties. This restriction is especially concerning because the court is necessarily appointing the amicus to help it interpret novel or significant questions of law.¹⁹ Whether this restriction is truly an impermissible interference with an inherent court power—in violation of the separation of powers doctrine—depends on whether the FISC applies a broad or narrow interpretation of that amicus duty. If the restriction prevents the amicus from supporting government surveillance efforts and pro-surveillance arguments because those arguments are inapposite to its duty to support individual privacy, then the restriction could interfere with the court’s ability to hear diverse and pertinent arguments from the amicus.

Congress passed the FREEDOM Act, in part, to address the non-adversarial nature of FISC proceedings.²⁰ While Congress added adversarial mechanisms before 2008,²¹ the FISC’s empirical record revealed almost unanimous approval of government requests.²² After the Snowden disclosures, the calls from privacy advocates, congressional representatives, and President Obama for FISC reform

17. *Id.* § 401, 129 Stat. at 279 (to be codified at 50 U.S.C. § 1803(i)(2)(A)).

18. *Id.* (to be codified at 50 U.S.C. § 1803(i)(4)(A)).

19. *Id.* (to be codified at 50 U.S.C. § 1803(i)(2)(A)).

20. Andrea Peterson, *Patriot Act Author: “There Has Been a Failure of Oversight”*, WASH. POST (Oct. 11, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/10/11/patriot-act-author-there-has-been-a-failure-of-oversight>.

21. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments Act), Pub. L. No. 110-261, sec. 101, § 702(h)(4), 122 Stat. 2436, 2441–42 (codified as amended at 50 U.S.C. § 1881a(h)(4)) (creating a mechanism for companies to challenge foreign surveillance communication record requests); Protect America Act of 2007, Pub. L. No. 110-55, § 105B(h), 121 Stat. 552, 554 (same), *repealed and replaced by* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(f), 120 Stat. 192, 198 (2006) (same).

22. Perez, *supra* note 4 (reporting that, according to the U.S. Department of Justice, the FISA court “rejected only 11 of the more than 33,900 surveillance applications by the government” from 1979 to 2012).

included proposals to make the FISC more adversarial so that it would hear arguments countering the government's position.²³ Therefore, the legislative history of the FREEDOM Act demonstrates that establishing the FISA amicus pool was an effort to heed those calls for reform by providing FISC judges with alternative arguments.²⁴

This congressional reform effort presents a conflict between two judicial doctrines: the doctrine of constitutional avoidance and the statutory construction doctrine that legislative language is non-superfluous.²⁵ Specifically, if the congressionally-imposed, pro-privacy amicus duty restricts the amicus from providing an appropriate pro-surveillance argument to the court, then Congress arguably has interfered with the court's inherent power to act as the

23. See, e.g., 161 CONG. REC. S3429 (daily ed. June 2, 2015) (statement of Sen. Leahy) (claiming that before the Snowden disclosures, the FISC only heard the government's arguments); President Barack Obama, Press Conference (Aug. 9, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference> (proposing steps to make the FISC more adversarial); Cyrus Farivar, *America's Most Secretive Court Invites Its First Outsider*, ARS TECHNICA (Sept. 26, 2015, 3:30 PM), <http://arstechnica.com/tech-policy/2015/09/americas-most-secretive-court-invites-its-first-outsider> (“[T]here’s no other side [in the FISC]. . . . [I]t’s not adversarial. The judge hears [the government’s case,] but there’s nobody else to argue the other side.” (quoting former Sen. Gary Hart)); Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html (“This is a court that meets in secret, allows only the government to appear before it, and publishes almost none of its opinions. It has never been an effective check on government.” (quoting Jameel Jaffer, Deputy Legal Director, American Civil Liberties Union)); Dia Kayyali, *What You Need to Know About the FISA Court—and How It Needs to Change*, ELEC. FRONTIER FOUND. (Aug. 15, 2014), <https://www.eff.org/deep-links/2014/08/what-you-need-know-about-fisa-court-and-how-it-needs-change> (stating that FISC is not adversarial and operates in secret, and arguing that a special advocate would make it more adversarial); Raffaella Wakeman, *An Overview of FISA Reform Options on Capitol Hill*, LAWFARE (Nov. 3, 2013, 10:08 AM), <https://www.lawfareblog.com/overview-fisa-reform-options-capitol-hill> (explaining that telecommunications companies generally do not appeal FISC orders, and that no one argues before the court representing the civil liberties concerns because the system only has “one party”).

24. *Infra* notes 113–14 and accompanying text.

25. See generally ANDREW NOLAN, CONG. RESEARCH SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW (2014) (detailing the rationale behind the constitutional avoidance doctrine, which stands for the proposition that a court should avoid broad constitutional rulings unless it is unavoidable); LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2011) (explaining the tools used by courts when interpreting and applying statutes).

gatekeeper for the provision of legal arguments and control the amicus process.²⁶ Congress did acknowledge such power by codifying the court's pre-existing discretion to appoint or remove an amicus,²⁷ but discretion to appoint or remove an amicus does nothing to free the appointed amicus from the congressional restriction to support pro-privacy arguments. This relief requires a separate court action: either instructing the amicus to disregard any statutory constraint on its arguments or interpreting the statutory constraint so broadly as to render it superfluous. And, if the amicus duty to support privacy and civil liberties is read so broadly as to allow the amicus to support an intrusive government surveillance request,²⁸ then that statutory language is superfluous because it would have no real or practical meaning. The constitutional avoidance concern should prevail over the non-superfluous words canon, and the statute should be read as broadly as possible. Even though this preference would render certain terms of the statute superfluous, it would allow the court to avoid the need to order the amicus to disregard the statute's amicus mandate for unconstitutionally violating the separation of powers. And it would preserve Department of Justice (DOJ) resources and promote judicial efficiency by avoiding needless litigation over the statute's constitutionality. Otherwise, to read the mandate clause strictly, giving every word purpose, would interfere with the court's inherent authority to control the amicus process.

There is a counterargument that the use of "or" to separate the three categories of amicus duties in the statute somehow alleviates the amicus of the enumerated requirement to support privacy and civil liberties.²⁹ But Congress is speaking about three different elemental categories in those subsections, and the use of "or" simply functions to prevent an amicus from needing to satisfy all three elements. Regardless, Congress speaks clearly in the subsection that

26. See *infra* notes 234–37.

27. FREEDOM Act, Pub. L. No. 114-23, § 401, 129 Stat. 268, 280 (2015) (to be codified at 50 U.S.C. § 1803(i)(9)).

28. In this hypothetical, the presumably intrusive request would still be legally appropriate in the eyes of the amicus, and obviously, the government attorneys who first made the request. But naturally, there are many government surveillance requests that logically conflict with the amicus priority to support "individual privacy and civil liberties," especially in context of the stated congressional purpose to better protect privacy interests before the FISA court. See *infra* notes 113–14 and accompanying text.

29. See *infra* text accompanying notes 216–18.

regards privacy and civil liberties by directing the amicus to support arguments in advance of those priorities.

When presented with a pro-surveillance amicus argument,³⁰ notwithstanding the legal precedent on proper statutory interpretation methods, the FISC should interpret the amicus duty as broadly as required to permit the court to hear any arguments it deems appropriate to assist with interpreting novel and significant legal issues. The importance of the court's need to discharge its constitutional duties by deciding the law, and the preference to avoid declaring a statute unconstitutional, outweigh the statutory interpretation canon that language is not superfluous. Mechanically, the court already has broad discretion to control when and whether to hear from the amicus. In exercising that control, the court should simply allow the amicus to provide any legal arguments it deems appropriate and helpful even if those arguments conflict with or violate the congressionally imposed amicus duty to support individual privacy and civil liberties.

Part I of this Comment provides background on the FISC's jurisdiction, structure, activities, and reform; the Snowden disclosures and subsequent calls for an adversarial FISC presence; and the FREEDOM Act's text and legislative history. Part II then outlines the Supreme Court's separation of powers jurisprudence regarding the boundary between legislative actions that impact court proceedings and inherent judicial powers. Part II also explains the traditional role of an amicus in court proceedings, highlights the characteristics of federal officers and other statutorily created entities that could compare to the FISA amicus pool, and provides background on the statutory interpretation jurisprudence regarding superfluous words, the separation of statutory elements with "or," and the canon of constitutional avoidance. Part III of this Comment then compares the enacted FISA amicus pool provision, which retained statutory language from prior proposals to create standing federal entities, to the statutory framework of other federal officer positions that must comply with the Appointments Clause of the U.S. Constitution.³¹ This analysis supplements the argument, based on the separation of powers doctrine, that the amicus should be responsive only to the judicial branch and should not be beholden to congressionally imposed duties like other federal officers. Part IV concludes that to avoid this constitutional conflict, the FISC should interpret the scope

30. See *infra* note 220 and accompanying text.

31. U.S. CONST. art. II, § 2, cl. 2.

of the amicus's role to be as broad as necessary to allow the court to hear any arguments it deems appropriate even if the interpretation renders the statutory language superfluous.

I. FISA COURT JURISDICTION, STRUCTURE, BACKGROUND, AND REFORM

A. *FISC Jurisdiction and Structure*

FISA created the FISC to hear *domestic* applications and grant order requests for electronic surveillance under FISA.³² The court is composed of eleven sitting U.S. district court judges appointed by the Chief Justice of the U.S. Supreme Court.³³ The judges operate under the authority of the FISA statute, and like the judges of the federal district and circuit courts established by Congress, they are empowered under Article III of the Constitution.³⁴ FISA also established a FISA Court of Review (FISC-R), composed of three judges designated by the Chief Justice.³⁵ The FISC can certify a case for FISC-R review when such certification would provide uniformity or would serve the interests of justice.³⁶

The purpose of the court is to hear applications, certifications, petitions, and motions³⁷ from the government under various sections of FISA and the PATRIOT Act; these range from requests for electronic surveillance,³⁸ physical searches,³⁹ pen register and trap and trace surveillance,⁴⁰ PATRIOT ACT section 215 requests for production of tangible business records,⁴¹ and FISA section 702

32. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, § 103(a), 92 Stat. 1783, 1788 (codified as amended at 50 U.S.C. § 1803(a)).

33. 50 U.S.C. § 1803(a)(1). FISA originally required only seven judges. FISA § 103(a)(1), 92 Stat. at 1788.

34. *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985).

35. FISA § 103(b), 92 Stat. at 1788 (codified as amended at 50 U.S.C. § 1803(b)).

36. 50 U.S.C.A. § 1803(j) (West 2015).

37. FISA Ct. R. P. 6.

38. 50 U.S.C. § 1803(a).

39. § 1822(c).

40. § 1843(a)(1).

41. PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272 (2001) (codified as amended at 50 U.S.C. § 1861(b)(1)). The FISC has interpreted “tangible” business records to be a very broad term that includes phone records.

certifications regarding the targeting of non-U.S. persons reasonably believed to be outside the United States.⁴²

FISC proceedings differ in form. Some resemble proceedings before a magistrate where the government is seeking a warrant,⁴³ whereas the most scrutinized requests, those under section 215 and section 702, by definition can be adversarial.⁴⁴ The persons or companies receiving surveillance orders can challenge them by filing petitions with the FISC.⁴⁵ Some proceedings are by necessity *ex parte* due to the inclusion of classified information.⁴⁶ But where a person or company is being required to comply with an order under sections 215 or 702, that person or company may challenge the order.

Congress has modified FISC's jurisdiction in several ways. First, after the events of September 11, 2001, Congress expanded the FISC's jurisdiction to include the adjudication of enhanced surveillance activities, including requests for the production of "tangible things" ("section 215" orders), under the PATRIOT Act,⁴⁷ and certifications of warrantless surveillance of non-U.S. persons reasonably believed to be abroad ("section 702" certifications), authorized by the FISA Amendments Act of 2008.⁴⁸ Congress also expanded FISC jurisdiction with structural reforms creating the potential for an adversarial element. Congress first created a statutory mechanism for an adversary in 2006 when it authorized persons receiving production orders under section 215 to challenge the order by filing a petition with the FISC.⁴⁹ Finally, Congress authorized communication service providers to challenge foreign

42. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 702(i)(1), 122 Stat. 2436, 2439 (codified at 50 U.S.C. § 1881a(i)(1)) (providing review by the FISC of government certifications under § 1881a(g)). These Section 702 requests are warrantless because they target non-U.S. persons reasonably believed to be overseas.

43. *See* 50 U.S.C. § 1861(b)(1).

44. *See* § 1803(a)(2)(A) (authorizing procedures for other parties to petition to challenge orders under § 1861(f)(2)(A) and § 1881a(h)(4)); FISA Ct. R. P. 7–8 (outlining submissions in adversarial proceedings).

45. 50 U.S.C. § 1803(a)(2)(A).

46. FISA Ct. R. P. 7(j) (requiring the government to file and serve an unclassified or redacted version of an *ex parte* submission on the other party).

47. PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified as amended at 50 U.S.C. § 1861(b)(1)).

48. FISA Amendments Act of 2008, Pub. L. No. 110-261, sec. 101, § 702(g), 122 Stat. 2436, 2439 (codified as amended at 50 U.S.C. § 1881(i)(1)(A)).

49. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(f)(2), 120 Stat. 192, 197 (2006) (codified as amended at 50 U.S.C. § 1861(f)(2)).

intelligence directives⁵⁰ in 2007⁵¹ and again in 2008 when it codified FISA section 702.⁵² Besides individuals whose communications have in fact been collected during surveillance activities,⁵³ only the government and telecommunications companies have established standing to litigate FISA requests.⁵⁴

Congress has also maintained oversight of FBI and NSA operations under section 215 and 702. It has required intelligence community annual reports for section 215 activities since 2001⁵⁵ and for section 702 activities since 2008.⁵⁶ While some members of Congress may not be privy to the operations of the FISC because they do not sit on the House of Representatives Permanent Select Committee on Intelligence or the Senate Select Committee on Intelligence, all members possess the requisite access to intelligence for ongoing U.S. intelligence operations.⁵⁷

50. Foreign intelligence directives are FISC orders to service providers to provide electronic communications records.

51. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552, 554, *repealed and replaced* by FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

52. FISA Amendments Act sec. 101, § 702(h), 122 Stat. at 2438 (codified at 50 U.S.C. 1881(h)(4)).

53. *See, e.g.*, *ACLU v. Clapper*, No. 14-42-cv, slip op. at 27 (2nd Cir. May 7, 2015) (rejecting the argument that a plaintiff's standing depended on the government reviewing, not just collecting, their communication records); *Klayman v. Obama*, No. 13-851, slip op. at 20 (D.D.C. Nov. 9, 2015) (differentiating between theoretical harm and the harm associated with the actual collection of a communication record).

54. *Compare* *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013) (holding that Amnesty International did not have standing to litigate under FISA based on the *possibility* of communication interceptions in the future), *with In re Directives to Yahoo! Inc.* Pursuant to Section 105B of the FISA, No. 08-01, 2008 WL 10632524, at *3 (FISA Ct. Rev. Aug. 22, 2008) (holding that Yahoo had standing to litigate under FISA because of its burden in responding to the government's requests), *and In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 14-01, 2014 WL 5463097, *1, *3 (FISA Ct. Mar. 20, 2014) (finding that a telecommunications company would have standing due to the burden of providing call records to the government).

55. PATRIOT Act, Pub. L. No. 107-56, sec. 215, § 502, 115 Stat. 272, 287 (2001) (codified as amended at 50 U.S.C. § 1862).

56. FISA Amendments Act of 2008 sec. 101, § 707, 122 Stat. at 2457 (codified as amended at 50 U.S.C. 1881a(l)(1)).

57. Members of Congress "have access to intelligence by virtue of their elected positions. They do not receive security clearances per se." *III. How Intelligence—Sharing Works at Present*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/3.htm> (last updated July 7, 2008) (adding that "individual Members who do not serve on national security committees may request intelligence support," and that for votes on intelligence

B. FISC Operations Before the 2013 Snowden Disclosures Were Potentially Adversarial in Theory but Often Non-Adversarial in Practice

Even though Congress had access to information regarding the activities of the U.S. intelligence community, the 2013 Edward Snowden disclosures about the FBI's and NSA's intelligence collection activities, and the FISC's approval of those activities under FISA and the PATRIOT Act, caused understandable public shock.⁵⁸ This shock soon focused on how and why the FISC had approved such surveillance in the first place, which highlighted the fact that many people were unfamiliar with the FISC itself, let alone its structure and procedures. Snowden's main disclosures were about the pervasive nature of the surveillance activities and intelligence collection related to the PRISM program and the section 215 phone records program. The PRISM program, authorized by section 702 of FISA, allowed the NSA to collect emails, videos, voice calls, social network data, and login information from telecommunications firms.⁵⁹ Further, under PATRIOT Act section 215, the government collected millions of domestic phone records, including numbers and call lengths but not call content.⁶⁰

After the Snowden disclosures, public scrutiny focused on the FISC, which had approved virtually all of the government's surveillance requests. While the FISC technically had the authority since 2006⁶¹ and 2007⁶² to oversee adversarial-type proceedings when considering section 215 and section 702 surveillance requests, respectively, records indicate that the FISC approved nearly every government surveillance request.⁶³ For example, from "1979 through 2012, the [FISC] . . . rejected only 11 of the more than 33,900 surveillance applications by the government."⁶⁴ Notably, the FISC

issues, "the Intelligence Community will be asked to provide briefings that are open to the entire body").

58. Gellman et al., *supra* note 1.

59. See Leo Kelion, *Q&A: NSA's Prism Internet Surveillance Scheme*, BBC (June 25, 2013), <http://www.bbc.com/news/technology-23027764>.

60. See Ariane de Vogue, *Court Rules NSA Program Illegal*, CNN (May 7, 2015, 3:45 PM), <http://www.cnn.com/2015/05/07/politics/nsa-telephone-metadata-illegal-court>.

61. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(f), 120 Stat. 192, 198 (2006) (codified as amended at 50 U.S.C. § 1861(f)(2) (2012)).

62. Protect America Act of 2007, sec. 2, § 105B, Pub. L. No. 110-55, 121 Stat. 552, 554, *repealed and replaced* by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

63. Perez, *supra* note 4.

64. *Id.*

can also modify an order instead of rejecting it, but statistics show that it does so sparingly. In 2012, the FISC modified 40 of the 1856 FISA applications it received, and rejected none.⁶⁵ FISC critics cite these statistics as evidence that the court was simply a rubber stamp for government requests, while supporters point out that the court was always more likely to grant the requests because the DOJ only submitted requests that it knew the court would grant.⁶⁶

Interestingly, one company went to great lengths to oppose a government surveillance request by litigating before the FISC. Yahoo! Inc. (“Yahoo”) litigated an extended case from 2007 to 2008 with the government before the FISC and FISC-R regarding FISC intelligence directives under the Protect America Act,⁶⁷ which was a one-year authorization of foreign intelligence acquisition.⁶⁸ The FISC ordered arguments from both parties after Yahoo refused to comply with a court directive; Yahoo then appealed the FISC decision to the FISC-R and successfully argued appellate jurisdiction under the extant statutory mechanism for service providers to oppose compulsion orders.⁶⁹ Clearly, the Yahoo litigation proves wrong any

65. *Id.*

66. *Id.*; see also Herb Lin, *On the FISA Court and “Rubber Stamping”*, LAWFARE BLOG (Apr. 13, 2015, 2:07 PM) <https://www.lawfareblog.com/fisa-court-and-rubber-stamping> (noting that observers respond to the rubber stamp accusation by arguing that the government “take[s] special care” when applying to the FISC).

67. See Brief of Appellant at 8, *Yahoo! v. United States*, No. 08-01 (FISA Ct. Rev. May 29, 2008) [hereinafter *Yahoo Brief*], <https://cdt.org/files/2014/09/1-yahoo702-brief.pdf>. In September 2014, Yahoo and the government reached an agreement allowing the company to release forty-nine FISA court litigation documents, including many briefs from both parties and some court opinions. *Yahoo v. U.S. PRISM Documents*, CTR. FOR DEMOCRACY & TECH. (Sept. 12, 2014), <https://cdt.org/insight/yahoo-v-u-s-prism-documents>; see also Ron Bell, *Shedding Light on the Foreign Intelligence Surveillance Court (FISC): Court Findings from Our 2007–2008 Case*, YAHOO! (Sept. 11, 2014), <https://yahoopolicy.tumblr.com/post/97238899258/shedding-light-on-the-foreign-intelligence> (announcing the release of court documents).

68. Protect America Act of 2007, sec. 2, § 105B, Pub. L. No. 110-55, 121 Stat. 552, 552, *repealed and replaced* by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

69. *In re Directives to [redacted text]** Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1008–09 (FISA Ct. Rev. 2008) (holding that Yahoo had standing to challenge a compulsion order and appeal the FISC decision to the FISC-R, agreeing with Yahoo that its response was the functional equivalent to a petition under the statute, and explaining that Congress “expressly declare[d]” that a service provider had a “right of action” and could seek relief through a statutory mechanism); Letter from Reggie B. Walton, FISC Presiding

statements that claimed the FISC did not have a functioning adversarial mechanism prior to the FREEDOM Act.

While Yahoo's case was the only pre-Snowden service provider challenge, the FISC-R and the FISC's judges have reinforced that the FISC already contained an adversarial framework.⁷⁰ In response to the question of whether the FISC had previously invited or heard the views of non-government parties, Judge Reggie B. Walton, the former Presiding FISC Judge, explained that, as of July 29, 2013, only Yahoo had substantively challenged a government directive.⁷¹ While this was true in 2013, at least one other company exercised its right to challenge government orders in 2014, which was after the Snowden disclosures and before passage of the USA FREEDOM Act.⁷² Regarding an amicus, Judge Walton did state that FISA "does not provide a mechanism for the Court to invite the views of nongovernmental parties" and reiterated that several sections of the statute require *ex parte* proceedings, but he also acknowledged that the FISC-R invited amicus briefs in 2002, and he did not specifically mention any reason why the FISC or FISC-R would have been prevented from appointing other amici.⁷³ Both an adversarial framework providing for substantive litigation and the potential for amicus appointments existed long before the FREEDOM Act.

Notwithstanding Yahoo's extensive litigation against the government and the clear existence of an adversarial framework for other companies, the DOJ's high success rate in its surveillance requests fed the narrative that the FISC was only hearing one side's argument.⁷⁴ While the FISC-R heard alternative arguments from amicus curiae as far back as 2002,⁷⁵ the only other appearances by

Judge, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (July 29, 2013), at 7–9 [hereinafter Walton Letter].

70. *In re Directives to [redacted text]*, 551 F.3d at 1008–09; *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 14-01, 2014 WL 5463097, at *3 (FISA Ct. Mar. 20, 2014) (holding that a company had the "right to bring a challenge in this Court to enforce the rights of its customers" under 50 U.S.C. § 1861(f)(2)(A)(i)); Walton Letter, *supra* note 69, at 7–9 (explaining that FISA and the FISC's procedural rules "provide multiple opportunities for the recipients of Court orders or government directives to challenge those orders or directives").

71. Walton Letter, *supra* note 69, at 7–8.

72. *In re Application of the FBI*, 2014 WL 5463097, at *3.

73. Walton Letter, *supra* note 69, at 7–8.

74. *See Perez*, *supra* note 4 (reporting that critics argued the government was subject to little oversight in the FISC process).

75. *See, e.g., In re Sealed Case Nos. 02-001, 02-002*, 310 F.3d 717, 717 (FISA Ct. Rev. 2002) (*per curiam*) (accepting amicus briefs from the American Civil Liberties

non-governmental parties before the FISC or FISC-R—other than Yahoo—before the Snowden disclosures were related to court disclosure issues and were not direct challenges to intelligence directives or orders.⁷⁶ The debate over FISC structure suffered from a lack of context: privacy advocates wanted more adversarial challenges to the government, and they promoted vast structural changes under the argument that the FISC was not, at all, adversarial. The Yahoo litigation demonstrates that these claims were on their face untrue. Admittedly, on the other side, privacy advocates are correct that service providers have used the adversarial mechanism very rarely. But there is a difference between a mechanism existing at all and a mechanism's frequency of use. As the next section explains, the proposals for reform never focused on improving the existing mechanism that had already provided for a substantive and adversarial litigation on important privacy issues. Instead, they proposed fundamental and novel structural reforms to the FISC, which were fed by the misleading narrative that the FISC had no existing adversarial mechanism and was somehow incapable of appointing amici on its own accord.

C. After the Snowden Disclosures: Calls for FISC Reform to Make the Proceedings More Adversarial

After the Snowden disclosures, the narrative about FISC proceedings acting as a “rubber-stamp” stuck with privacy advocates and congressional policy makers. One aspect that they found particularly concerning was the non-adversarial nature of the court's proceedings.⁷⁷ Soon thereafter, varied proposals to create a standing federal entity or independent group that would advocate against the government and defend public privacy rights came from many commentators, including President Obama,⁷⁸ major newspaper

Union and the National Association of Criminal Defense Lawyers in an appeal from the FISC).

76. Walton Letter, *supra* note 69, at 7–10.

77. See, e.g., ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 4 (2014) (finding that the FISC “operate[s] largely in secret and in a non-adversarial fashion”); Kayyali, *supra* note 23 (stating that the FISC depended “on one-sided information from the government”); sources cited *supra* note 23.

78. President Barack Obama, Press Conference, *supra* note 23 (proposing steps to make the FISC more adversarial); see also RICHARD A. CLARKE ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 204 (2013),

editorials,⁷⁹ former FISA judges,⁸⁰ and privacy advocates.⁸¹ Members of Congress included these concerns in many different proposals to create an adversarial public advocate before the FISC.

The congressional proposals for this adversarial public advocate differed in style and structure. The original version of the FREEDOM Act, introduced in the prior Congress and proposed by Representative James Sensenbrenner, would have created an “Office of the Special Advocate” with litigation powers within the *judicial branch* that would “vigorously advocate . . . in support of legal interpretations that protect individual privacy and civil liberties.”⁸² Another proposal from a FISA reform advocate, Senator Richard Blumenthal, would have created an “Office of the Special Advocate” with litigation powers in the *executive branch* that would “have standing as a party” and vigorously advocate for “legal interpretations that minimize the scope

https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (recommending a “Public Interest Advocate,” which could be invited to participate in matters by a FISC judge or intervene on their own authority).

79. See, e.g., Editorial, *Ideas for Reforming the FISA Court*, WASH. POST (July 23, 2013), https://www.washingtonpost.com/opinions/ideas-for-reforming-the-fisa-court/2013/07/23/9a3f35e4f31b-11e2-bdae-0d1f78989e8a_story.html (identifying several ways to make the FISC more adversarial); Editorial, *Privacy and the FISA Court*, L.A. TIMES (July 10, 2013), <http://articles.latimes.com/2013/jul/10/opinion/la-ed-fisa-court-20130710> (advocating for a mechanism by which a government lawyer should be appointed to oppose cases that raise a novel legal question).

80. James G. Carr, Opinion, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html> (explaining former FISC judge James G. Carr’s suggestion that Congress authorize FISC judges to appoint independent lawyers to challenge government applications); Dan Roberts, *US Must Fix Secret FISA Courts, Says Top Judge Who Granted Surveillance Orders*, GUARDIAN (July 9, 2013, 5:15 PM), <http://www.theguardian.com/law/2013/jul/09/fisa-courts-judge-nsa-surveillance> (describing the support for an adversary from former FISC judge James Robertson).

81. Orin Kerr, *A Proposal to Reform FISA Court Decision Making*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), <http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking> (proposing to add an adversarial role in the FISC to the responsibility of the Oversight Section of the National Security Division of the Department of Justice); Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, LAWFARE (July 8, 2013, 11:46 PM), <https://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr> (suggesting that private lawyers with security clearances should serve as adversaries in FISC cases); Benjamin Wittes, *My Statement Today Before the Senate Intelligence Committee*, LAWFARE (Sept. 26, 2013, 2:00 PM), <https://www.lawfareblog.com/my-statement-today-senate-intelligence-committee> (arguing that the FISC should have the flexibility to choose an adversarial process in a given case).

82. H.R. 3361, 113th Cong. § 401 (2013).

of surveillance and the extent of data collection.”⁸³ Yet another proposal, by Representative Stephen Lynch, envisioned an independent executive branch office for a “Privacy Advocate General,” who would have been required to “*serve as opposing counsel* with respect to any application by the Federal Government,” and to “*oppose* any Federal Government request for an order.”⁸⁴ Many members of Congress introduced similar proposals in 2013.⁸⁵

The Congressional Research Service (CRS) analyzed the many proposals and found that the suggestions for a permanent, federal, adversarial advocate presented numerous potential constitutional issues: (1) the advocate could lack standing to litigate under the case or controversy requirement of Article III of the Constitution; (2) the advocate would likely be considered a government officer and would need to comply with the Appointments Clause; and (3) housing the advocate in the judicial branch might violate the separation of powers by providing the judicial branch with a political power or by undermining the neutrality of the judiciary.⁸⁶ CRS instead suggested that placing adversarial interests in a limited amicus position with no practical litigation powers would be the safest constitutional proposal because the amicus would not need standing, would not be a federal officer, and would not litigate.⁸⁷ Such a scheme would also comport with the traditional role of an amicus simply to provide the court with helpful legal arguments and not to accede to the level of a party with litigation powers.⁸⁸ After the CRS report, the public advocate proposals lost steam. When the initial 113th Congress’s version of the FREEDOM Act eventually passed the House in May 2014, the independent advocate position had been removed.⁸⁹ While the

83. S. 1467, 113th Cong. §§ 3–4 (2013).

84. H.R. 2849, 113th Cong. (2013) (emphasis added).

85. See S. 1551 § 402(d), 113th Cong. (2013) (proposing an “Office of the Constitutional Advocate” in the judicial branch); H.R. 3159 § 2(b), 113th Cong. (2013) (allowing for the appointment of “public interest advocates”); H.R. 3228 § 3, 113th Cong. (2013) (establishing an “Office of the Constitutional Advocate” in the judicial branch).

86. ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R43260, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 10, 17–19, 21, 44–45 (2014).

87. *Id.* at 25–26.

88. See *infra* text accompanying notes 158–78 (outlining the traditional role of amici in federal courts).

89. H.R. 3361, 113th Cong. (as passed by House of Representatives, May 22, 2014).

Senate did not vote on that version of the FREEDOM Act,⁹⁰ when Representative Sensenbrenner reintroduced the FREEDOM Act in the 114th Congress, the bill then contained no creation of an “office” but instead included the amicus provision and duty that would eventually be signed into law.⁹¹ While Congress appears to have heeded CRS’s concerns about the standing of the special advocate office, it still tried to preserve in the amicus pool the adversarial language contained in the prior special advocate proposals.

D. USA FREEDOM Act Creates Amicus Pool

The FREEDOM Act created an amicus pool of five amici, at least one of which the FISC must appoint when presented with novel or significant legal questions. The FREEDOM ACT passed the House of Representatives by a vote of 338-88 on May 13, 2015, and passed the Senate by a vote of 67-32 on June 2, 2015.⁹² The Constitutional Authority Statement⁹³ for the FREEDOM Act stated that the power to enact the legislation was under the Commerce Clause and the Necessary and Proper Clauses of Article I of the Constitution.⁹⁴ President Obama subsequently signed the FREEDOM Act into law on June 2, 2015.⁹⁵ The FREEDOM Act codified the pooled amici provision and required the presiding FISC and FISC-R judges to designate, within 180 days, at least five individuals “to be eligible to serve as amicus curiae, who shall serve pursuant to rules the presiding judges may establish.”⁹⁶ The provision requires the court to appoint one of the pooled amici when an application or order “in the opinion

90. *Actions Overview: H.R. 3361*, CONGRESS.GOV <https://www.congress.gov/bill/113th-congress/house-bill/3361/actions> (last visited Nov. 30, 2016).

91. H.R. 2048, 114th Cong. (2015) (enacted).

92. *Actions Overview: H.R. 2048*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2048/actions> (last visited Nov. 30, 2016).

93. Clause 7 of House Rules XII requires that such a statement accompany each bill or joint resolution introduced in the House, citing the power(s) granted to Congress in the Constitution to enact the proposed law. RULES OF THE HOUSE OF REPRESENTATIVES, R. XII, cl. 7(C)(1), 114th Cong. (2015), <http://clerk.house.gov/legislative/house-rules.pdf>.

94. *Constitutional Authority Statement of H.R. 2048*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2048> (follow “Constitutional Authority Statement” link) (last visited Nov. 30, 2016).

95. *Action Overview: H.R. 2048*, *supra* note 92.

96. FREEDOM Act, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279 (2015) (to be codified at 50 U.S.C. § 1803(i)).

of the court, *presents a novel or significant interpretation of the law*, unless the court issues a finding that such appointment is not appropriate.”⁹⁷

To qualify under the statute for the amicus pool, the amici must (1) be experts in “privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise” to the court⁹⁸ and (2) have a security clearance that allows them access to relevant classified information.⁹⁹ The statute also requires that the appointed amici have access to FISC precedent and prior orders.¹⁰⁰ Finally, the amici provision establishes the following duties:

If [the FISC or FISC-R] appoints an amicus curiae under paragraph (2)(A), the amicus curiae *shall* provide to the court, as appropriate—

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

(B) information related to intelligence collection or communications technology; or

(C) legal arguments or information regarding any other area relevant to the issue presented to the court.¹⁰¹

Thus, the statute allows amicus duties covering three topics: (1) privacy and civil liberty concerns, (2) intelligence collection and technology, and (3) a catch-all for other subject matter areas that leaves deference to the court. When arguing privacy and civil liberty concerns, the statute requires the amicus to support those issues.

Further, the legislative history of the FREEDOM Act reveals that the above-cited amicus duty to advance pro-privacy arguments was one of Congress’s key motivations in creating the amicus pool. Representative Sensenbrenner described how congressional proposals in the 2013 version of the FREEDOM Act would have created “an office of [the] public advocate to represent the public and privacy interests . . . allow[ing] a judge to be a judge *rather than hearing one side of the argument.*”¹⁰² Even though the provision creating the “Office of the Special Advocate” was removed, Congress’s intent to add an adversarial entity to the FISC remained in the form of the

97. *Id.* (emphasis added).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added); *see infra* text accompanying notes 252–54 (explaining the two interpretations for the use of “or” to separate the statutory amicus duties).

102. Peterson, *supra* note 20 (emphasis added).

amicus provision.¹⁰³ Moreover, the statutory language that would have imposed a duty on the Special Advocate to provide legal arguments advancing privacy and civil liberties is the same language as that included in the enacted bill, imposing the same duty on the amicus curiae.¹⁰⁴ The drafters' attempt to preserve the adversarial role of an advocate is evinced by their use of the same language as the prior proposal. This language directs the amicus to support privacy protection—the side of the argument that they lamented was previously unrepresented and is logically opposite to the government's surveillance requests.

Throughout the legislative process, the merit, scope, and interpretation of the amicus duty have been controversial. James C. Duff, Director of the Administrative Office of the United States Courts,¹⁰⁵ submitted a letter that a congressman entered into the congressional record. That letter expressed concern that the “rank-and-file government personnel” could “[perceive] . . . that the FISA process involves a ‘panel of experts’ *officially charged with opposing the government’s efforts,*” which “could risk deterring the necessary and critical cooperation and candor.”¹⁰⁶ It further expressed concern that “imposing the mandatory ‘duties’ . . . could create such a perception within the government that a *standing body exists to oppose* intelligence activities.”¹⁰⁷ The letter concluded that “the ‘panel of experts’ . . . may prove counterproductive,” and that true amici without such a mandate would be free from “any implication that such experts *are expected to oppose* the intelligence activities proposed by the government.”¹⁰⁸

103. See *supra* text accompanying note 101.

104. Compare H.R. 3361 § 902(c)(3), 113th Cong. (2013) (providing the Special Advocate the duty to advocate “in support of legal interpretations that protect individual privacy and civil liberties”), with FREEDOM Act § 401, 129 Stat. at 279 (requiring amicus curiae to advocate, if appropriate, in support of “legal arguments that advance the protection of individual privacy and civil liberties”).

105. The Administrative Office of the United States Courts is a judicial branch office; the Director is appointed and subject to removal by the Chief Justice. 28 U.S.C. § 601 (2012). The Director supervises the administrative matters related to federal dockets. § 604. All officers and employees of the office are prohibited from practicing law in any court. § 607. The employees of the agency are federal officers. *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (per curiam).

106. 161 CONG. REC. S3420 (daily ed. June 2, 2015) (letter from Administrative Office of the United States Courts dated May 4, 2015) (emphasis added).

107. *Id.* (emphasis added).

108. *Id.* (emphasis added).

In considering the FREEDOM Act, several senators agreed with Director Duff's interpretation that the amicus pool existed to oppose the government. For instance, Senate Majority Leader Mitch McConnell introduced Amendment No. 1451, a failed amendment to the version of the FREEDOM Act that Congress ultimately enacted, which would have removed the amicus provision.¹⁰⁹ During consideration of this amendment, Senator John Cornyn also questioned the language of the bill and called the mandate a "strange provision . . . [that] essentially . . . put[s] a defense attorney in the grand jury room and create[s] an adversarial process at the early stages of an investigation."¹¹⁰ Similarly, Senator Orrin Hatch then added that the approach "threatens to insert leftwing activists into an incredibly sensitive . . . process, a radical move that would stack the deck against our law enforcement and intelligence communities."¹¹¹ Finally, Senator Richard Burr expressed his understanding that "'shall' is an indication of 'you must,'" which would require specific action rather than simply permit it.¹¹²

In support of the amicus duty, Senator Richard Blumenthal explained that "to have *only one side* represented skews . . . the operations of that court because we know that judges make better decisions when they hear both sides and rights are better protected."¹¹³ He stated that the amici would protect "our rights and liberties because [they] *would be public advocates protecting public constitutional rights*" and would "[present] *the side opposing the*

109. 161 CONG. REC. S3374 (daily ed. June 1, 2015) (Senate Amendment No. 1451); 161 CONG. REC. S3340 (daily ed. May 31, 2015) (Senate Amendment No. 1451); Benjamin Wittes, *Legislative Staff Memo on USA Freedom Act Amendments*, LAWFARE (June 1, 2015, 11:38 PM), <https://www.lawfareblog.com/legislative-staff-memo-usa-freedom-act-amendments> (republishing an internal Senate Republican staff memorandum, which expressed separation of powers concerns over the amicus appointment mechanism, and describing the amicus's role as "not a dispassionate aide to the court's work, but rather a third party given a specific substantive argument to make before the court").

110. 161 CONG. REC. S3428 (daily ed. June 2, 2015) (statement of Sen. Cornyn).

111. 161 CONG. REC. S3440 (daily ed. June 2, 2015) (statement of Sen. Hatch).

112. 161 CONG. REC. S3385, S3389 (daily ed. June 1, 2015) (statement of Sen. Burr). Senator Burr was referring to the language requiring the court to hear from an amicus rather than the language requiring the amicus to support individual privacy; however, his interpretation of "shall" as a restrictive word is instructive for statutory interpretation and congressional intent. *See infra* Sections II.B & IV.

113. 161 CONG. REC. S3431 (daily ed. June 2, 2015) (statement of Sen. Blumenthal) (emphasis added).

government[, which] is important to the [FISC]; that is, everybody makes better decisions when they hear *both sides of the argument*.”¹¹⁴

But, eventually, Senator Blumenthal and Senator Patrick Leahy, in supporting the amicus provision, admitted the vulnerabilities in the amicus’s abilities to oppose the government. Senator Leahy, for example, acknowledged that the appointment of an amicus would be entirely left to the court, an acknowledgement that the amicus should be a court-controlled entity.¹¹⁵ Senator Blumenthal similarly softened his prior statements and explained that the amicus provision

*does not direct an amicus to oppose intelligence activity or to oppose the government’s view or position. In fact, it is to enlighten the court. In some instances it may oppose the government, but it is as part of that process of constructively arriving at the correct legal interpretation—not as a kind of knee-jerk reaction to oppose the government.*¹¹⁶

These statements show that even the supporters of the provision did not vigorously defend the pro-privacy language when challenged.

E. The FISA Amicus Pool After Enactment

The amicus pool consists of non-government amici.¹¹⁷ These “private amici” do not sit in a federal office, and the pool has no director.¹¹⁸ All five amici are appointed by the presiding judge of the FISC.¹¹⁹ They do not have litigation powers, and they appear only at the discretion of the judge in the proceedings.¹²⁰ The FISC has declared amici, for purposes of handling classified information, as “court personnel.”¹²¹ Still, the amicus has been referred to as a

114. 161 CONG. REC. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal) (emphasis added) (asserting that the amicus would “help safeguard essential liberties not just for the individuals who might be subjects of surveillance . . . but for all of us”).

115. 161 CONG. REC. S3430 (daily ed. June 2, 2015) (statement of Sen. Leahy).

116. 161 CONG. REC. S3431 (daily ed. June 2, 2015) (statement of Sen. Blumenthal) (emphasis added).

117. *See infra* text accompanying notes 172–78 (describing “public amici,” which are government amici).

118. 50 U.S.C.A. § 1803(i) (West 2015).

119. § 1803(i)(1).

120. *See* § 1803(i) (containing no powers for the amicus to request relief from the court and only the opportunity to provide briefs to help interpret law); § 1803(i)(9) (the court has power to designate, appoint, remove, and train the amici).

121. *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things, No. BR 15-99, slip op. at 4 (FISA Ct. Sept. 17, 2015).

“‘public interest’ privacy advocate.”¹²² While many privacy commentators supported the adversarial nature of the amicus provision,¹²³ others noted the already nominal and weak nature of amici, highlighting that they lacked any true litigation powers.¹²⁴ Notably, the statute does not outline how or whether the amici should be compensated.¹²⁵ Congress’s decision to make the amicus position unpaid allowed Congress to avoid the annual decision of whether to fund the amicus pool through the appropriations process. It also allowed Congress to avoid deciding which branch of government the

122. Del Quentin Wilber, *U.S. Spy Court Judge Dismissed Privacy Advocate’s Concerns About Data Use*, L.A. TIMES (Apr. 19, 2016, 2:24 PM), <http://www.latimes.com/nation/la-na-fisa-court-records-20160419-story.html>; see Yael Grauer, *Senate Shoots down All Bad Amendments to the NSA Reform Bill*, WIRED.COM (June 2, 2015, 3:47 PM), <http://www.wired.com/2015/06/senate-shoots-bad-amendments-nsa-reform-bill> (discussing the dangers of Sen. McConnell’s amendments to the bill’s “amicus advocate” scheme).

123. See Letter from Michael W. Macleod-Ball & Neema Singh Guliani, ACLU, to Senators (June 1, 2015) [hereinafter ACLU Letter], https://www.aclu.org/sites/default/files/field_document/usaf_amendment_vote_rec_6-1.pdf (opposing Amendment 1451, explaining that to repeal the amicus provision would make FISA court amici “less likely to serve the important role of protecting privacy and civil liberties”); Elizabeth Goitein, *The FISC’s Newest Opinion: Proof of the Need for an Amicus*, JUST SECURITY (June 23, 2015, 9:43 AM), <https://www.justsecurity.org/24134/fiscs-newest-opinion-proof-amicus> (criticizing a judge who refuses to hear from amici as not acknowledging “any possible argument on the other side,” and stating that judges would have heard opposing argument if amici were there); Farivar, *supra* note 23 (stating that “[p]reviously, hearings before the FISC were *ex parte*, or one sided,” and referring to amici as an “ombudsman or public advocate”).

124. See Chad Squitieri, Comment, *The Limits of the Freedom Act’s Amicus Curiae*, 11 WASH. J.L. TECH. & ARTS 197, 203–04 (2015) (arguing that the FREEDOM Act “falls short” in permitting amici to “meaningfully participate” in decision making because they serve at the discretion of the court); Letter from David Cole et al., Constitution Project, to Senate Leadership (June 2, 2015), <http://www.constitutionproject.org/wp-content/uploads/2015/06/Letter-to-Leadership-re-Opposition-to-Amendment-1451-to-USAF.pdf> (calling the amicus position “already modest”); ACLU Letter, *supra* note 123, at 1 (analyzing the lack of litigation powers of the amici, noting that the full discretion remains with the court, and describing the amici position as modest).

125. *In re Applications of the FBI for Orders Requiring the Prod. of Tangible Things*, Nos. BR 15-77, BR 15-78, slip op. at 5 n.7 (FISA Ct. June 17, 2015) (noting the FREEDOM Act does not outline whether the amicus should be compensated but does direct the court to act “expeditiously”); see also Steve Vladeck, “Expense,” “Delay,” and the Inauspicious Debut of the USA FREEDOM Act’s Amicus Provision, JUST SECURITY (June 23, 2015, 1:19 PM), <https://www.justsecurity.org/24152/expense-delay-inauspicious-debut-usa-freedom-acts-amicus-provision> (noting that the act of switching the public advocate from a governmental entity to an amicus had the effect of removing the financial burdens from the government).

taxpayer-funded entity sits in, as that decision would have to be answered before Congress appropriated any funds for the amicus pool.¹²⁶

Considering the quasi-governmental, and untraditional, nature of the amicus provision, it is not necessarily clear how the FISC might interpret the proper role of the amicus. The FISC has already interpreted some sections of the amicus statute since its enactment in 2015, however, and one can look to those decisions to see how the FISC might interpret the proper role of the amicus. While it has not ruled on the appropriateness of the amicus duty, the FISC has declined to involve an amicus, even when the court was presented with a “novel or significant” interpretation of law, because the conclusion was “obvious” and the appointment would be unnecessary and “not appropriate.”¹²⁷ In another decision in which the FISC did appoint an amicus, the judge explained that courts “have broad discretion to determine the nature and extent” of amicus participation.¹²⁸

These FISC decisions reinforce that the court considers itself the ultimate arbiter regarding any amicus participation; even when the court found a novel legal question as contemplated by the statute, it nonetheless declined to involve an amicus by exercising judicial discretion.¹²⁹

Pursuant to the statute, the presiding judge of the FISC appointed five amici on November 25, 2015, and a sixth amicus effective March 31, 2016¹³⁰:

126. See MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44078, JUDICIARY APPROPRIATIONS FY2016 5–8 (2015) (listing the types of funds Congress provides within the judicial branch). See generally JESSICA TOLLESTRUP & JAMES V. SATURNO, CONG. RESEARCH SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2014) (describing the process by which Congress appropriates federal funds).

127. *In re Applications of the FBI*, Nos. BR 15-77, BR 15-78, slip op. at 5–6. This case occurred prior to the FISC’s appointment of the amicus pool.

128. *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 17-75, slip op. at 7–8 (FISA Ct. June 29, 2015) (finding a novel and significant interpretation of law was presented, and appointing an amicus curiae, while also noting that the court had not yet appointed the amicus pool).

129. Goitein, *supra* note 123 (arguing that the FISC’s decision to not involve an amicus in that case was in violation of the statute and Congress’s intent because Congress did not mean to make the use of amici optional in all situations).

130. Cyrus Farivar, *America’s Super-Secret Court Names Five Lawyers as Public Advocates*, ARS TECHNICA (Nov. 28, 2015, 7:00 AM), <http://arstechnica.com/tech-policy/2015/11/americas-super-secret-court-names-five-lawyers-as-public-advocates>; *Amici Curiae*, FISC.GOV, <http://www.fisc.uscourts.gov/amici-curiae> (last visited Nov. 30, 2016).

<i>Name</i>	<i>Title</i>	<i>Organization</i>
Jonathan G. Cedarbaum ¹³¹	Partner	Law Firm of WilmerHale (Washington D.C. office)
John D. Cline ¹³²	Office of John D. Cline	Law Office of John D. Cline (San Francisco)
Laura Donohue ¹³³	Professor of Law	Georgetown Law
Amy Jeffress ¹³⁴	Partner	Law Firm of Arnold & Porter (Washington D.C.)
Marc Zwillinger ¹³⁵	Managing Member	ZwillGen PLLC (Washington D.C.)
David S. Kris ¹³⁶	General Counsel	Intellectual Ventures

Mr. Jameel Jaffer of the American Civil Liberties Union (ACLU), who appeared before the FISC-R as an amicus in 2002,¹³⁷ called the initial five amici appointees “[a]n impressive list.”¹³⁸

131. Mr. Cedarbaum worked at the Department of Justice (DOJ); he served as the Obama Administration’s Acting Assistant Attorney General in the Office of Legal Counsel. Farivar, *supra* note 130.

132. Mr. Cline is a criminal defense attorney. *Id.*

133. Ms. Donohue has “written extensively on national security law, privacy, Executive Order 12333, and [FISA].” *Id.*

134. Ms. Jeffress is a criminal defense lawyer; she previously worked for the DOJ as an Embassy Attaché and was a prosecutor with the U.S. Attorney’s Office for the District of Columbia. *Id.*

135. A press statement on Mr. Zwillinger’s firm’s website states that he is a “long-standing proponent of providing the [FISC], and the Court of Review with an alternative perspective to the government’s view.” Marc Zwillinger, *FISC Appoints Marc Zwillinger as One of Five Amici Curiae*, ZWILLGEN BLOG (Dec. 3, 2015), <http://blog.zwillgen.com/2015/12/03/fisc-appoints-marc-zwillinger-as-one-of-five-amici-curiae>. Zwillinger previously represented Yahoo and appeared before the FISC as a private lawyer; as of November 2015, he represented Apple in its attempts to resist government pressure to extract data from a seized iPhone in a drug case. Farivar, *supra* note 130.

136. Mr. Kris is a former DOJ attorney experienced in national security issues, having served as Assistant Attorney General for National Security, and previously as Associate Deputy Attorney General, where he focused on issues “including supervising the government’s use of [FISA] . . . and assisting the attorney general in conducting oversight of the intelligence community.” David S. Kris, COLUM. L. SCH., <http://web.law.columbia.edu/hertog-program/events/past-events/david-s-kris> (last visited Nov. 30, 2016).

137. *In re Sealed Case Nos. 02-001, 02-002*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (per curiam).

138. Farivar, *supra* note 130.

The FISC-R appointed the first representative from the amicus pool to argue in a case that it decided in April 2016.¹³⁹ The question presented to the court concerned the interpretation of another section of the U.S. criminal code concerning a FISA judge's authorization for a surveillance order.¹⁴⁰ The FISC-R explained that the FISC judge below considered "the competing privacy interests" and concluded that the privacy interests did not warrant a rejection of the surveillance application due to the narrow privacy exposure and ability to mitigate the information collected.¹⁴¹ The amicus advocated pro-privacy arguments, arguing that technology existed that could allow the government to limit information collection, and that there should be a more expansive definition of "content"—the FISC-R rejected both arguments.¹⁴² Expressing disappointment about part of the FISC-R's holding, a pro-privacy commentator stated that the court "dismissed the argument of *Special Advocate* . . . Marc Zwillinger."¹⁴³

II. SEPARATION OF POWERS, STATUTORY INTERPRETATION, AND INHERENT COURT AUTHORITY OVER AMICUS

The FISC amicus pool is the first time that Congress has directed a federal court to hear from a private, non-government amicus. This novelty makes it difficult to identify the line between Congress's authority to establish and control the procedures of lower courts under Article III and each court's inherent authority to conduct its own affairs as part of an independent judiciary. However, an examination of the separation of powers doctrine, the language of the statute itself, the Appointments Clause, and the inherent power of the courts help establish that boundary.

139. *In re* Certified Question of Law, No. FISCR 16-01, slip. op. at 1 (FISA Ct. Rev. Apr. 14, 2016) (per curiam). The FISC-R announced that it appointed the amicus, Mr. Marc Zwillinger, under "50 U.S.C. § 1803(i)," *id.* at 2, so it is unclear whether the Court appointed the amicus under § 1803(i)(2)(A), in which amicus mandate applies, or § 1803(i)(2)(B), in which amicus mandate does not apply.

140. *Id.* at 3, 5–7.

141. *Id.* at 6–7.

142. *Id.* at 7–8 n.4, 12 n.6.

143. Jake Laperruque, *A Problematic Pseudo-Category of Surveillance Information and Promising Post-Collection Policy*, JUST SECURITY (Aug. 25, 2016, 1:38 PM), <https://www.justsecurity.org/32556/problematic-pseudo-category-surveillance-information-promising-post-collection-policy> (emphasis added) (referring to Marc Zwillinger as a "Special Advocate" instead of as merely an amicus).

A. *Separation of Powers: The Inherent Judicial Power and Congressional Power in Relation to the Courts*

While Congress has never before legislated to place a non-government, private amicus with a mandated duty into court proceedings, jurisprudence exists that draws the line between Congress's authority to establish and control the procedures of lower federal courts under Article III and each of those court's retained, inherent authority as a judicial branch entity.¹⁴⁴ The FISA amicus pool is a legislative creation.¹⁴⁵ An analysis of important separation of powers conflicts shows that the judicial branch's retention of the tools it needs to discharge its duties limits Congress's ability to control court procedures, such as defining an amicus's duty.

The Constitution, under Article III, vests the judicial power with the Supreme Court and the lower courts established by Congress.¹⁴⁶ The Constitution also vests Congress with the authority to control the lower courts' size, location, organization, jurisdiction, and procedural rules.¹⁴⁷ But the judicial power, in essence, is the duty to "say what the law is."¹⁴⁸ In fulfilling their obligations, the courts retain the inherent judicial powers rooted in the history and the nature of the judiciary,¹⁴⁹ which are "essential to the administration of justice."¹⁵⁰

144. See NOLAN & THOMPSON, *supra* note 77, at 7–8 (explaining that courts retain certain inherent powers which "broadly allow a federal court to properly function as an institution"); Anclien, *supra* note 9, at 37–39 & n.1 (explaining that the judicial power is self-executing, that some powers are inherent in the federal courts by virtue of their being judicial bodies, and that the judicial power vests from the Constitution and not Congress).

145. See 50 U.S.C.A. § 1803 (West 2015) (authorizing the creation of the FISC and FISC-R and, in subsection (i), permitting them to create an amicus pool).

146. U.S. CONST. art. III, § 1.

147. Anclien, *supra* note 9, at 39; see also NOLAN & THOMPSON, *supra* note 77, at 8 (noting that Congress's power over the judiciary's procedures has been described as "plenary" in nature).

148. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Anclien, *supra* note 9, at 38 n.2 (defining the judicial power as the "judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case" (quoting James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 771 (1998))).

149. Anclien, *supra* note 9, at 38 n.3 (explaining that powers that "inhere" to the judiciary are those which, if absent, would prevent courts from accomplishing "the work with which they are entrusted" (quoting Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924))).

150. *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65–66 (1924) (explaining that the power to hold a party in

Congressional and judicial powers regarding the courts are well described by Justice Robert Jackson’s separation of powers analysis: where Congress is silent on an issue in which it shares authority with another branch, that “zone of twilight” invites the other branch to act independently; but if Congress has spoken, then the other branch’s power is at its “lowest ebb,” only relying “upon [its] own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁵¹ So, if Congress “expressly foreclose[s] a procedural tack,” “courts are generally not empowered to disregard Congress’s pronouncement.”¹⁵²

But, when legislating on the courts, “Congress may not act to denigrate the authority of the judicial branch.”¹⁵³ While the three branches do not operate in complete isolation, Congress violates the separation of powers doctrine when it seeks to increase its own powers at the expense of another branch by “unduly interfering” with that branch’s role.¹⁵⁴ Congress can unduly interfere by exercising power, control, or supervision over an entity that falls under the constitutional authority of another branch of government.¹⁵⁵ However, Congress should preserve the functions that are “well within the traditional power of the Judiciary[,]” and it should not prevent another branch from retaining “sufficient control” to accomplish its “constitutionally assigned duties.”¹⁵⁶ Essentially, the

contempt is one such inherent judicial power, but qualifying that this power can be “regulated within limits not precisely defined”).

151. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that “Congress cannot grant to an officer under its control what it does not possess”).

152. Anclien, *supra* note 9, at 40 n.9.

153. BAZAN ET AL., *supra* note 10, at 9; *see* NOLAN & THOMPSON, *supra* note 77, at 8–9 (“Congress’s authority to prescribe procedural rules for federal courts is not absolute. Specifically, Congress’s power over procedure cannot extend so far as to erode functions of the federal judiciary that are at the heart of the Article III judicial power—namely the ability to independently and impartially resolve a case-or-controversy with finality.” (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)) (footnotes omitted)).

154. *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *see also* *INS v. Chadha*, 462 U.S. 919, 965–66 (1983) (Powell, J., concurring) (stating that Congress cannot assume another branch’s constitutionally entrusted function and exercise powers that are not within the legislative function); BAZAN ET AL., *supra* note 10, at 8 (explaining that the Supreme Court tests whether one branch impinges on the core power and function of another branch).

155. *Morrison*, 487 U.S. at 694–97.

156. *Id.* at 695–96.

“legislature cannot exercise . . . judicial power.”¹⁵⁷ Courts have reinforced that there is a difference between a legislature that proscribes procedural rules and one that meddles with a judicial function that affects the court’s ability to decide the law.

B. Inherent Court Authority over the Amicus and the Traditional Role of an Amicus

The cases surrounding the proper amicus role are more an effort of judicial self-restraint rather than a separation of powers analysis because there are so few statutes that specifically outline amici positions in federal courts. Courts have historically retained inherent authority and broad discretion to control the amicus process.¹⁵⁸ At first, courts hesitated to hear from adversarial amici, viewing them as a friend for court advice and not an advocate for one side; but by the 1990s, “an adversary role of an amicus curiae [had] become accepted.”¹⁵⁹ Judge Posner outlined a popular list of three circumstances when it is appropriate for a court to hear from amici: (1) when one party “is not represented competently or is not represented at all,” (2) when the amicus “has an interest in some other case that may be affected by the decision in the present case,” and (3) “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”¹⁶⁰

The “bright line test” is another test that many courts employ when deciding the appropriate amicus role. It examines whether the amicus can control the litigation, and participation must be “solely within the broad discretion of the district court.”¹⁶¹ Lacking any

157. *Springer v. Gov’t of the Philippine Islands*, 277 U.S. 189, 201 (1928).

158. See sources cited *supra* note 8.

159. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (citing *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)).

160. *Id.*; see also *Michigan*, 940 F.2d at 164–65 (acknowledging that an amicus provides information “necessary to the administration of justice”); *Miller-Wohl Co. v. Comm’r of Labor & Indus., Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (observing that the classic role of amicus is to assist in a case of general public interest, supplement efforts of counsel, and bring the court’s attention to law that was not considered); *New England Patriots Football Club, Inc. v. Univ. of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (noting that the amicus aids the court in a matter of law in which it is unsure or mistaken (citing 1 JOHN BOUVIER, *BOUVIER’S LAW DICTIONARY* 188 (Francis Rawle ed., 8th ed. 1914))).

161. *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) (citing *Wyatt ex rel. Rawlins v. Hanan*, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994)).

control over the litigation prevents the amicus from rising to the level of a named party—it “cannot initiate, create, extend, or enlarge issues . . . [and has] no right to appeal or dismiss issues”; however, the concept is flexible, and some amici can be more active than others, such as participating in discovery and examining and presenting witnesses.¹⁶² An adversarial amicus is appropriate as long as the discretion over the process remains with the court.¹⁶³

Further, the Supreme Court held in *Universal Oil Products Co. v. Root Refining Co.*¹⁶⁴ that a federal court may, when investigating a fraudulent judgment, “avail itself . . . of amici to represent the public interest in the administration of justice.”¹⁶⁵ But the Court noted that although “[a]s a matter of law” the relevant parties in that case were only amici, they “stated quite candidly that they were also concerned with the interests of their clients.”¹⁶⁶ The Court did not find a problem with the circuit court appointing the amici to help discover fraud, but it warned that the amici “selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests.”¹⁶⁷ The Court also noted that “a federal court can always call on law officers of the United States to serve as amici.”¹⁶⁸

The Supreme Court’s jurisprudence approves of the appointment of amici to undertake courts’ inherent duties and to help preserve “the usual safeguards of adversary proceedings.”¹⁶⁹ But the Court also clearly acknowledged that the amici serve the court, and that their duties to private, interested clients can cloud the traditional function and duty of

162. *Wyatt*, 868 F. Supp. at 1358–60 (allowing a more active amici role for a government amici). Other cases have held that the amici cannot “raise issues not advanced by the parties themselves,” *United States v. Mullet*, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012), and that the primary purpose of amici is to advise the court and not “to collaterally attack the results or reasoning of a case decided adversely to the proposed *amicus*.” *Dow Chem. Co. v. United States*, No. 00-CV-10331-BC, 2002 WL 33012185, at *2 (E.D. Mich. May 24, 2002).

163. *See Michigan*, 940 F.2d at 163 (condoning amici that have similar rights to traditional parties subject to the court’s discretion).

164. 328 U.S. 575 (1946).

165. *Id.* at 581.

166. *Id.* at 578.

167. *Id.* at 581 (explaining that when the amici formally serve the court and are in the pay of private interests, the court should not award fees and costs when the amici have already been compensated by private clients).

168. *Id.*

169. *Id.* at 580; *see also Williams v. Georgia*, 349 U.S. 375, 380–81 (1955) (appointing an *amicus curiae* to present oral arguments on behalf of a criminal defendant when the defendant’s attorney could not present oral arguments).

an amicus.¹⁷⁰ And courts always retain “broad discretion to determine the nature and extent of the participation of an amicus curiae.”¹⁷¹

Congress has rarely legislated regarding amici in federal courts, and when it has, it has legislated regarding public, government amici—not private amici. Government amici are fairly prevalent because Rule 29(a) of the Federal Rules of Appellate Procedure (FRAP) allows the federal government, a federal officer, an agency, or a state to file amicus briefs in any case without permission of the parties or the court.¹⁷² But Rule 29(a) does not say anything about private amici, leaving appointment discretion for those amici squarely with the federal judge. One example of Congress legislating for a federal amici is in the Commodity Exchange Act (CEA), which provides the Commodity Futures Trading Commission (CFTC) with the right to appear as amicus in federal court cases brought under the CEA.¹⁷³ The CFTC is a federal entity—Congress established the CFTC as an agency and provided the statutory duties for its officers.¹⁷⁴ Another example is the Office of Special Counsel (OSC), which protects federal employees from prohibited personnel practices. The OSC may also appear as an amicus in limited circumstances, and Congress authorized specific duties for the OSC when appearing as an amicus.¹⁷⁵ As with the CFTC, Congress created the OSC as an independent executive branch agency and gave that entity statutory duties.¹⁷⁶ When Congress has codified amicus provisions for federal courts, it has previously only legislated to create access for potential non-private, government amici who are already under its supervision, such as federal entities, agencies, and officers.¹⁷⁷ It also has not substantively constrained the legal arguments

170. *Universal Oil*, 328 U.S. at 581; *see supra* text accompanying notes 165–67. Lower federal courts have also accepted a more adversarial amici role. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (citing *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)).

171. *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 15-75, slip op. at 8 n.7 (FISA Ct. June 29, 2015); *see also* *Order Appointing Amicus Curiae*, No. BR 15-99, slip op. at 4 (FISA Ct. Sept. 17, 2015) (explaining that for security purposes, amicus curiae are “court personnel”).

172. FED. R. APP. P. 29(a).

173. 7 U.S.C. § 13a-2(8)(B) (2012).

174. § 2(a)(2).

175. 5 U.S.C. § 1212(a)(1), (h)(1) (authorizing the Special Counsel to present its views with respect to the statutes related to the OSC’s authority).

176. §§ 1211–1212; *see also* *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 162 (D.C. Cir. 1982) (concurring that the duties of Special Counsel come from the statutory language and legislative history of the authorizing act).

177. *See* NOLAN & THOMPSON, *supra* note 77, at 17–18 (noting that the very few rules and statutes that mandate that a court hear from an amicus, such as Federal

that the amicus could provide other than to authorize a government amicus to demonstrate its own views.¹⁷⁸

C. Characteristics of Federal Officers and the Appointments Clause

To help frame a FISA amicus's role in FISC proceedings, it is instructive to analyze other statutory creations for compliance with the Appointments Clause. Positions that comply with the Appointments Clause are federal officer positions, and the analysis helps to place the FISA amicus in its proper position between all the relevant bodies: Congress, the FISA Court, and the DOJ. The analysis of different statutory creations of positions demonstrates that where Congress creates an entity and imposes on it a specific duty, that entity is usually an executive branch office that contains a full framework of statutory provisions—an office within a department, officer positions, an appropriations funding regime, duties, and limitations.¹⁷⁹

The Appointments Clause of the Constitution provides for two types of federal officers: “principal” officers, who are appointed by the President and confirmed with the advice and consent of the Senate,¹⁸⁰ and “inferior” officers, who may be appointed by the President, courts, or the heads of executive departments.¹⁸¹ An “inferior” officer has “certain, limited duties” that are restricted, temporary, or purposed to accomplish a single task.¹⁸² U.S. officers that require compliance with the Appointments Clause exercise “significant authority” on behalf of the federal government.¹⁸³ This

Rule of Appellate Procedure (FRAP) 29(a) and the amicus statutes regarding the CFTC, OSC, and Senate legal counsel, regard *government amici* and have not been judicially accessed, “leaving the constitutional status of a mandatory amicus statute judicially unresolved”). FRAP 29(a) also provides access for states to federal circuit courts, but obviously the federal government does not control or seek to control the arguments a state would make in an amicus brief. Neither FRAP 29(a), the CFTC amicus provision, nor the OSC amicus provision mention or contemplate non-governmental amici.

178. 5 U.S.C. § 1212(h)(1).

179. See *infra* text accompanying notes 187–95 (examining the statutory framework of the DOJ's National Security Division, which litigates FISA cases before the FISC).

180. U.S. CONST. art. II, § 2, cl. 2.

181. *Id.*

182. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

183. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (recognizing that the officer definition is meant to include “all persons who can be said to hold an office under the government” (quoting *United States v. Germaine*, 99 U.S. 508, 510 (1879)). See generally *Officers of the United States Within the Meaning of the Appointments Clause*, DOJ OFF. LEGAL COUNS. (Apr. 16, 2007), <https://www.justice.gov/sites/default>

authority includes conducting litigation, as Congress has empowered some U.S. officers, both principal and inferior, to control litigation on behalf of the government.¹⁸⁴

The DOJ attorneys who represent the FBI and NSA and advocate before the FISC are federal officers—Congress created the divisions of the DOJ in which they sit, which are subject to the Appointments Clause.¹⁸⁵ FISA requires applications for orders to be “made by a Federal officer in writing.”¹⁸⁶

Additionally, attorneys from the DOJ’s National Security Division (NSD) represent the U.S. government before the FISC.¹⁸⁷ Congress established the NSD within the DOJ to “support . . . the intelligence and intelligence-related activities of the United States Government.”¹⁸⁸ Congress also outlined the duties, powers, and resources of the DOJ lawyers who argue before the FISC.¹⁸⁹ At the head of the NSD is the Assistant Attorney General for National Security.¹⁹⁰ DOJ alone conducts litigation on behalf of the United States, an agency, or its officers.¹⁹¹ Congress also appropriated funds,¹⁹² set procedures for removing officers and employees,¹⁹³ and established congressional oversight procedures for DOJ.¹⁹⁴ Finally,

/files/olc/opinions/2007/04/31/appointmentsclausev10.pdf (explaining that U.S. officers exercise authority in a way that can bind the rights of others).

184. See, e.g., 28 U.S.C. § 516 (2012) (providing that DOJ officers, under the direction of the Attorney General, control the “conduct of litigation” in which the government is involved).

185. See 28 C.F.R. § 77.2(a) (2015) (defining an “attorney for the government” to include Assistant Attorneys General and DOJ-employed attorneys, among others); *infra* notes 187–95 and accompanying text.

186. 50 U.S.C. § 1804(a).

187. Report Describing the Government’s Assessment Whether the End of Bulk Collection Has Mooted Claims of Certain Plaintiffs at 17, No. BR 15-99 (FISA Ct. Jan. 8, 2016) (listing attorneys representing the government in the DOJ’s National Security Division and Civil Division, Federal Programs Branch).

188. 28 U.S.C. § 509A.

189. 28 U.S.C. § 518 (authorizing the Attorney General discretion to conduct and argue any case in which the United States is interested, or to delegate such responsibility to a DOJ officer); 28 U.S.C. § 530C (authorizing the DOJ to use available funds in its own reasonable discretion); 50 U.S.C. §§ 1804, 1823 (setting out the requirements for federal officers when filing FISC order applications).

190. 28 U.S.C. § 507A. Assistant Attorneys General are principal officers, appointed by the President and confirmed by the Senate. § 506.

191. § 516.

192. § 524.

193. § 528.

194. § 522.

DOJ lawyers are bound by the same ethical standards as the other lawyers in the forum in which they are advocating.¹⁹⁵

Some inferior officers in the executive branch can be appointed by the courts but under restrictive conditions. In *Morrison v. Olson*,¹⁹⁶ the Court analyzed whether the Ethics in Government Act—which allowed the Attorney General to refer a case to a special division of judges, who then appointed an independent counsel—created a principal or inferior officer.¹⁹⁷ The Court concluded that Congress logically placed the appointing authority for the executive branch office being analyzed (an office of independent counsel) in the judicial branch because of the concern that it might be called upon “to investigate its own high-ranking [executive branch] officers”¹⁹⁸ The Court noted, however, that the appointing judges would be “ineligible to participate in any matters relating” to the office they had appointed to ensure the process did not “run afoul of the constitutional limitation on ‘incongruous’ interbranch appointments.”¹⁹⁹ As a result, the judiciary can appoint inferior officers in the executive branch, but those officers cannot then participate in the same proceedings as the judges who appoint them.

While there are no other instances of Congress creating a private amicus pool, there are some examples of legislatively-created entities that are not necessarily under the control of that legislature. When acting under the False Claims Act (FCA), qui tam relators²⁰⁰ are *not* U.S. officers because there is no legislatively created office, they are not entitled to benefits or salary, and they are not subject to the Appointments Clause or other notions of tenure or duties conferred on federal officers.²⁰¹ Thus, qui tam relators—whether they begin the

195. § 530B.

196. 487 U.S. 654 (1988).

197. *Id.* at 660, 670–71.

198. *Id.* at 677.

199. *Id.*

200. Qui tam relators are “private citizens” who “come forward with information about entities defrauding federal programs to allow the government a chance to recover stolen funds” and file lawsuits “on behalf of the government.” *What Does Qui Tam Mean?*, WHISTLEBLOWER ATT’YS, <https://www.whistleblowerattorneys.com/whistleblower-faqs/qui-tam> (last visited Nov. 30, 2016) (explaining that the relators are also entitled to receive a financial reward).

201. U.S. *ex rel.* Stone v. Rockwell Int’l. Corp., 282 F.3d 787, 805–06 (10th Cir. 2002) (further holding that the qui tam relators do not violate the separation of powers because the executive branch retains the ability to intervene in the lawsuit, and thus it preserves sufficient control to fulfill its constitutional duties in

whistleblowing process as federal employees, contractors, or in another role—are not federal officers when acting under the FCA. The statute does not impose on them substantive duties—only procedural restrictions.²⁰²

Another example comes from the state court level. A Texas Family Code statute authorizes courts to appoint attorneys to assist the court as amici in child custody cases.²⁰³ The statute creates duties and instructions for the amicus, which include advocating for the child's best interest.²⁰⁴ But an appellate court held that the amicus's role was only to provide legal services necessary to assist *the court* in protecting the child's best interest—not to provide legal services to *the child*.²⁰⁵ This holding reiterates the role of the amicus when it is supposedly representing the rights of non-participating parties: the amicus is not appointed to represent *the child* or parents—it is responsible *to the court, not the parties*, and owes a duty of competent representation only *to the court*.²⁰⁶ Even though the state legislature codified a specific amicus position, role, and duty to a non-present and interested party in the litigation, the court held that the amicus still only owed a duty to the court.²⁰⁷ These cases demonstrate that non-party participants in legal proceedings need clear, specified roles, and that there is a difference between a statute for a public amicus who is already a federal officer responsive to Congress and a private amici responsive only to the court.

D. Statutory Interpretation: The Rule of Non-superfluous Language, the Disjunctive “Or,” and the Canon of Constitutional Avoidance

Finally, three theories of statutory construction help guide the interpretation of the ambiguous FISA amicus provision. The FISC can read the amicus-duty provision of the statute broadly, so as not to restrict the amicus in any way, or narrowly, so as to require the amicus to follow the direction to support pro-privacy arguments. First, the statutory interpretation canon encourages courts to read legislative language non-superfluously. Second, the canon of constitutional avoidance explains how courts deal with ambiguous language that implicates constitutional

compliance with *Morrison*), *rev'd*, 92 F. App'x 708 (10th Cir. 2004), *rev'd sub nom*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

202. 31 U.S.C. § 3730 (2012).

203. TEX. FAM. CODE ANN. §§ 107.003, 107.005 (West 2015).

204. § 107.005.

205. *Zeifman v. Nowlin*, 322 S.W.3d 804, 808 (Tex. Ct. App. 2010).

206. *Id.*

207. *Id.*; see *Anderson*, *supra* note 8, at 397 (“Regardless of what the rules say, courts always retain inherent powers to appoint amicus curiae.”).

concerns with a statute. Third, this section explains the different uses of the word “or” when listing items in a statute.

A fundamental principle in statutory interpretation is the rule that language should be construed to be non-superfluous.²⁰⁸ This principle requires courts to “give effect, if possible, to every clause and word of a statute, avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed.”²⁰⁹ Courts look to the legislative history of the statute to guide their interpretation of questionable language.²¹⁰ They should also consider the congressional language in context,²¹¹ and they should assume that Congress used the distinct terms “very deliberately” by intending to add something to the meaning and purpose of the statute.²¹² Consequently, when Congress amends a statute, “it must intend to change the statute’s meaning.”²¹³

The canon of non-superfluous words, however, is in tension with the canon of constitutional avoidance when a statute implicates a constitutional concern and the only constitutional reading might

208. *EIG*, *supra* note 25, at 13–14.

209. *Id.* (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). The statute should be read to give effect “to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Id.* at 13–14 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

210. *See* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704–06 (1995) (relying on committee transcripts from both the House and Senate for the meaning of “take” under the Endangered Species Act); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 515 (1990) (referring to a Senate report for evidence of the primary intent of the Boren Amendment to the Medicaid Act); *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19, 26 (1988) (looking only to the legislative history of the Outer Continental Shelf Lands Act to determine the purpose of that act).

211. *Hibbs*, 542 U.S. at 101 (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004)).

212. *Corley v. United States*, 556 U.S. 303, 315 (2009). The FISC-R has recently provided instruction on statutory interpretation, looking at “[b]oth the text and the legislative history” of a statute, including the congressional record statements of the statute’s author. *In re Certified Question of Law*, No. FISC-R 16-01, slip op. at 14–16 (FISA Ct. Rev. Apr. 14, 2016) (per curiam). The FISC-R added “where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.” *Id.* at 15 (quoting *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (internal quotation marks omitted)). The FISC-R stated that its duty is to construe statutes in context with their overall statutory structure, and it is “to avoid interpreting one statutory provision in a manner that would render another provision superfluous.” *Id.* at 16 (citing *Corley*, 556 U.S. at 314).

213. *EIG*, *supra* note 25, at 14 (quoting *United States v. Wilson*, 503 U.S. 333, 336 (1992)).

render some statutory language to be meaningless. The constitutional avoidance canon “comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the [constitutional avoidance] canon functions as *a means of choosing between them*.”²¹⁴ When a statute may be interpreted in more than one plausible way, courts should defer to a reading assuming that the legislature intended for it to be constitutional.²¹⁵

Another component to statutory interpretation is the effect of the word “or” when used to separate elements in a list. The use of an “or” might mean that only one of the listed elements must be satisfied,²¹⁶ but “or” can also be disjunctive and create “mutually exclusive” elements that prevent “mixing and matching.”²¹⁷ Courts do not “inexorably” apply the different effects of a legislature’s choice of “or” versus “and”; rather, courts are flexible to avoid frustrating “evident legislative intent” and statutory context.²¹⁸ Considering congressional intent and the relevant statutory canons of construction, the amicus duty provision of FISA should be read broadly to allow amici from the pool to advance *any* view that might be helpful to the court, not just pro-privacy views.

III. CONGRESSIONAL ENCROACHMENT ON THE FISC’S INHERENT AUTHORITY TO CONTROL THE AMICUS DUTY WOULD VIOLATE THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS

A. *Proscribing Procedural Rules Is Properly Within Congress’s Constitutional Authority, but Acting as the Gatekeeper for Which Arguments the Court Can Consider When Deciding Novel and Significant Interpretations of Law Is Purely a Judicial Power Function*

If Congress cannot grant powers to an executive officer that it does not itself possess,²¹⁹ then it logically follows that Congress cannot grant to a private, non-government amicus powers it does not possess.

214. *Clark v. Martinez*, 543 U.S. 371, 385 (2005). *But see id.* at 400 (Thomas, J., dissenting) (noting a “disturbing number” of cases in which the Supreme Court has applied the doctrine of constitutional avoidance to statutes that “were on their face clear”).

215. *Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting).

216. *EIG*, *supra* note 25, at 9.

217. *Id.* at 9 n.43 (citing *United States v. Williams*, 326 F.3d 535, 541 (4th Cir. 2003)).

218. *Id.* at 9.

219. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

The amicus duty to support arguments that advance privacy and civil liberties, if narrowly interpreted, functions to curtail the court-amicus relationship by preventing the amicus from providing the court with potentially helpful pro-surveillance arguments.²²⁰ The court appoints a FISA amicus to help it interpret novel and significant legal issues,²²¹ and the court's essential constitutional function is to interpret the law and effectually decide the case or controversy.²²² To do so, the court must properly determine the legal issues in question.

Congress possesses significant and important authority over the FISC, but this authority is limited²²³ and should track the same authority that Congress possesses over other Article III tribunals that it has established. Congress created the FISC, and in many instances before the FREEDOM ACT, it properly prescribed substantive and procedural rules for the court's operations. For example, the FISA statute contains procedural rules for government applications for orders;²²⁴ issuance of orders; determination of probable cause; specifications and directions of orders; duration, review, and extensions of orders; and issuance of emergency orders.²²⁵ These rules properly exercise congressional power to create the substantive law and to outline the jurisdiction and procedural rules for a court. They resemble the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence. Because Congress has spoken, it would be improper for the court to ignore those rules.²²⁶

Accordingly, the FISA amicus provision should align with jurisprudence on the appropriate role of an amicus in an Article III court and, in many ways, it does so align. First, there is nothing inappropriate about an adversarial amicus.²²⁷ The potential for a FISA amicus to be adversarial to the government is thus proper and

220. The potential that a FISA amicus would present a pro-surveillance argument is real, considering that Mr. Davis S. Kris, the former DOJ Assistant Attorney General for National Security, is now a FISA pooled amicus. *See supra* note 136.

221. 50 U.S.C.A. § 1803(i)(2) (West 2015).

222. *See supra* text accompanying notes 146–50.

223. NOLAN & THOMPSON, *supra* note 77, at 8 (“Congress’s authority to prescribe procedural rules for federal courts is not absolute.”).

224. 50 U.S.C. § 1804 (2012).

225. § 1805.

226. *See* Anclien, *supra* note 9, at 40 n.9 (explaining that when Congress has “expressly foreclosed a procedural track, courts are generally not empowered to disregard Congress’s pronouncement”).

227. *See* Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (citing United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991)).

was an obvious purpose for enacting the provision.²²⁸ Second, the statute properly prevents the amicus from possessing any litigation powers²²⁹ that would violate the “bright-line” test and make the amicus resemble an involved party.²³⁰ Third, the amicus is appointed to help the court interpret “novel and significant” legal issues, which helps to provide the court with a unique perspective²³¹ in its effort to properly consider law²³² and administer justice.²³³

But there is a difference between a procedural rule and a filter that determines which arguments the court can consider when interpreting the law. Here, Congress did not “foreclose[] a procedural tack”,²³⁴ rather, it established one to appoint amici and then meddled with the scope and contents of the legal arguments the amici can provide to the court. Congress creates the law, but to limit the process of interpreting the law would be an infringement on the power of the judicial branch²³⁵ by unduly interfering²³⁶ with a judge’s consideration of legal arguments. If read narrowly,²³⁷ the amicus duty

228. See 161 CONG. REC. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal) (arguing that the amici would present the “side opposing the government,” functioning to protect “our rights and liberties because [they] would be public advocates protecting constitutional rights” who also defend the liberties of surveillance targets).

229. See Squitieri, *supra* note 124, at 203–10 (criticizing the amicus pool’s weakness because of its lack of participation in litigation).

230. Waste Mgmt. of Pa., Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995) (citing Wyatt *ex rel.* Rawlins v. Hanan, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994)).

231. Ryan, 125 F.3d at 1063.

232. Miller-Wohl Co. v. Comm’r of Labor & Indus., Mont., 694 F.2d 203, 204 (9th Cir. 1982).

233. United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991).

234. Anclien, *supra* note 9, at 40 n.9.

235. BAZAN ET AL., *supra* note 10, at 9.

236. Morrison v. Olson, 487 U.S. 654, 658 (1988).

237. The *narrow* interpretation of “supporting individual privacy and civil liberties,” coupled with the legislative intent to provide opposing arguments to the government’s position, holds that the amicus cannot provide arguments that support intelligence collection and oppose privacy interests. Senator Blumenthal’s statement that the amicus would safeguard the liberties of surveillance targets, 161 CONG. REC. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal), evinces the intention that supporting intelligence collection and defending the privacy of the intelligence targets are logically opposite arguments. Senators Cornyn and Hatch voiced this interpretation during the Senate floor debate. See *supra* text accompanying notes 110–11. The Director of the Administrative Office of the United States Courts also expressed this view in detail, worrying that the amicus would disrupt the court’s function and necessarily be adversarial to the government. 161 CONG. REC. S3420 (daily ed. June 2, 2015) (letter from Administrative Office of the United States Courts dated May 4, 2015). Further, an internal Republican Senate

deprives the court of an argument it might deem appropriate and helpful in considering the interpretation of pertinent law. Even though the FISC retains ultimate discretion over *whether* to hear from an amicus, once it *has decided* to hear from one,²³⁸ it is necessarily doing so as a part of its duty to interpret the law.²³⁹ No legislative branch authority exists under the Constitution to, at that point, interfere with the process.²⁴⁰

Congress reaches the limits of its constitutional powers by prescribing the procedures through which a court can exercise its existing and inherent authority to hear from an amicus.²⁴¹ Once the court decides to hear from a FISA pool amicus to help interpret the law, it exercises a traditional judiciary power to then decide the law.²⁴² Any congressional interference in that process risks depriving the court of the control it requires to accomplish its constitutionally

staff memorandum in support of Senator McConnell's Amendment 1451 to remove the amicus provision interpreted the amicus role as "not . . . dispassionate" but "rather a third party *given a specific substantive argument to make before the court.*" Wittes, *supra* note 109 (emphasis added). The *broad* interpretation of the duty, supported by Senator Blumenthal, holds that the words that "support individual privacy and civil liberties" are so broad as to allow the amicus to make any appropriate argument to the court: pro-surveillance, anti-surveillance, or somewhere in the middle. *See supra* text accompanying note 116. Under the broad reading, the duty would then be superfluous because it would hold no meaning. The amicus and the court would have the exact same relationship as if the statute did not contain the words in question.

238. In this situation, the court is expressly asking a specific expert for his or her assistance with a legal question. This demonstrates the unique nature of the relationship between the court and the amicus. *See* Lyle Denniston, *Constitution Check: A Privacy Advocate at the Secret Spying Court?*, CONSTITUTION DAILY (May 7, 2015), <http://blog.constitutioncenter.org/2015/05/constitution-check-a-privacy-advocate-at-the-secret-spying-court> ("The amicus is meant to advocate for the protection of civil liberties and privacy, educate the court on intelligence collection or communications technologies, and answer any questions the court may have . . .").

239. *See id.*; *see also supra* text accompanying note 160 (discussing Judge Posner's three circumstances in which a court hears from an amicus).

240. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

241. *See* NOLAN & THOMPSON, *supra* note 77, at 8–9 (noting how Congress's authority to make procedural rules is not absolute—it cannot work to erode the functions of the federal judiciary).

242. *See* *I.N.S. v. Chadha*, 462 U.S. 919, 965–66 (1983) (asserting that Congress cannot assume another branch's constitutionally entrusted function and exercise powers that are not within its legislative function).

assigned functions.²⁴³ Control of arguments before a court is a purely judicial power within the judge's discretion.²⁴⁴

There are two counterarguments to the statutory interpretation that the amicus duty prevents the amicus from supporting pro-surveillance positions. The first counterargument is as follows: the FISA amicus's mandate is written broadly, requiring the amicus to advocate in support of generalized pro-privacy and civil liberties principles, and such an innocent and non-controversial mandate does not unduly interfere with the court's authority—especially because the court retains authority to appoint and remove the amicus.²⁴⁵ But this argument ignores several key points: (1) the canon of non-superfluous reading of statutes and the context and purpose of the statute's enactment; and (2) the practical sequence of the impact the amicus mandate could have when applied. The second counterargument is that Congress's use of "or" in the statute allows an amicus to couch a pro-privacy argument under other subsections of the amicus duty list, as opposed to the subsection that specifically addresses privacy and civil liberty issues.²⁴⁶

A FISA judge would be presented with two options if an amicus presented arguments that violated the statutory amicus duty to support privacy and civil liberties. First, the judge could decline to consider the arguments because they violate the amicus's statutory duty. Second, the judge could accept consideration of the pro-surveillance arguments under one of two lines of reasoning: (1) by interpreting the statute language so broadly to render the amicus duty superfluous or by rendering the amicus duty irrelevant due to an unrelated statutory catch-all, or (2) by holding that the mandate violates the separation of powers by infringing on the court's authority to control the amicus process. Either way, the judge will need to decide whether to consider the arguments.

243. *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

244. *Cf. United States v. Bohr*, 581 F.2d 1294, 1301 (8th Cir. 1978) (citations omitted) (holding that the trial court has "broad discretion" in controlling closing arguments, and explaining that appeal courts will examine whether the argument in question implicated constitutional concerns); *United States v. Sawyer*, 443 F.2d 712, 713 (D.C. Cir. 1971) (holding that the trial court has "broad discretion in controlling the scope of closing argument"); *Franklin v. Shelton*, 250 F.2d 92, 99 (10th Cir. 1957) (holding that "matters related to final argument" are within the discretion of the judge).

245. 50 U.S.C.A. § 1803(i)(2) (West 2015).

246. *See supra* notes 216–18 and accompanying text.

Neither option is desirable, however, because the first choice ignores congressional intent and the second choice requires declaring a statute unconstitutional, a decision which courts are hesitant to make. But the first choice is less undesirable than the second because the amicus process and the practice of regulating arguments in a proceeding are already so engrained within the judicial power. While this Comment argues the broad reading—that the statutory requirement that the amicus advance arguments in support of privacy and civil liberties could also include a pro-surveillance argument—is incorrect, it does concede that such a reading is, at least, defensible. And the constitutional avoidance canon holds that when two readings are possible, and one reading implicates a constitutional concern, then the court should employ the other interpretation.²⁴⁷ Both counterarguments end-run this analysis by presuming the judge will simply interpret the statute broadly and not even consider the constitutional implications of the statute that Congress enacted. While the broad reading is, in the end, facially acceptable, the separation of powers analysis is still necessary because Congress acted with specific intent and its intrusion on the judicial function should not be overlooked.

The first counterargument is that the words “advance the protection of individual privacy and civil liberties” are so broad that they could include extremely pro-surveillance arguments.²⁴⁸ The argument follows that notwithstanding the plain meaning of the language of that subsection, the court retains the ability to remove an amicus or appoint another. This interpretation is a stretch, however, for two reasons. First, the mandate was clearly added to address the problem of the FISC proceedings’ non-adversarial nature.²⁴⁹ To ignore Congress’s intention that the amicus be adversarial to the government would ignore Senator Blumenthal’s—one of the chief authors of the FREEDOM Act—defense of the amici pool on the Senate floor as individuals who “*would be public advocates protecting public constitutional rights*” and would “*present[] the side opposing the government.*”²⁵⁰ Congress clearly meant for the amicus to argue

247. See *supra* text accompanying note 215.

248. 50 U.S.C.A. § 1803(i)(4)(A). To support this interpretation, the language must cover even the most extreme pro-surveillance arguments because if the language restricts even one argument that a court might consider helpful in deciding the law, then the separation of powers has been infringed.

249. See *supra* text accompanying notes 110–12.

250. 161 Cong. Rec. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal) (emphasis added).

against the government. Second, even though the FISC judge retains the power to appoint and remove the amicus, once appointed, the amicus is still supposedly bound by the statutory duty. The judge may be able to remove the amicus, but if he or she appoints an amicus to hear the amicus's point of view, then removal power does not really solve the problem created by a statutory restriction on the amicus's available arguments. The judge must be able to free the amicus of its restriction if the amicus wants to present an argument that might violate its duty. When a judge considers novel and significant interpretations of the law, he or she wants to hear the amicus's argument.²⁵¹ Such interpretations necessarily impact the court's ability to discharge its judicial function to decide the case. While the broad interpretation is a stretch, in the end, it is defensible enough to avoid declaring the statute unconstitutional in the event that an amicus provided a very pro-privacy argument.

The second counterargument to the interpretation that the statute restricts the amicus's actions is that subsections (A) through (C) of 50 U.S.C. § 1803(i)(4) are separated by a disjunctive "or." Specifically, in the three subsections (A), (B), and (C), Congress speaks clearly about three separate substantive topics in each possible choice that it offers to the amicus: subsection (A) regards "individual privacy and civil liberties";²⁵² subsection (B) regards "intelligence collection or communications technology";²⁵³ and subsection (C) regards "any *other* area relevant to the issue presented to the court."²⁵⁴ Because these subsections are separated with an "or," a possible reading of the statute could interpret it as a disjunctive "or" that allows virtually any pro-privacy argument to fall under subsections (B) or (C), thus not violating subsection (A). Such an interpretation is not, however, obvious.

Regardless, this drafting and structural choice should not be used as a loophole to justify the idea that Congress did not intend the amicus, when arguing privacy issues, to espouse pro-privacy arguments—it clearly did so intend. If the amicus offers arguments regarding the issues of "privacy and civil liberties," then the amicus is squarely within the category, or sphere, of subsection (A) and must follow the requirement to "advance" those interests.²⁵⁵ Subsection

251. See Denniston, *supra* note 238.

252. 50 U.S.C.A. § 1803(i)(4)(A).

253. § 1803(i)(4)(B).

254. § 1803(i)(4)(C) (emphasis added).

255. This interpretation is held by the Republican senators that supported Amendment 1451 and by the Director of the Administrative Office of the United States Courts. See *supra* text accompanying notes 106–12.

(C) should not be seen as a “catch all” because it refers to “any *other* area,”²⁵⁶ signifying that Congress meant to address areas “other” than privacy, civil liberties, intelligence collection, or communications technology, which are enumerated in subsections (A) and (B). The use of “or” to separate the different subsections is logical because not every amicus would necessarily discuss *both* privacy issues under subsection (A) *and* technology issues under subsection (B). The use of “and” instead of “or” would have seemingly disqualified an amicus that did not present arguments under both subsections (A) and (B). Notably, for subsection (A), the statute directs the amicus to “advance” the interests in that category.²⁵⁷ Comparatively, in subsections (B) and (C), the statute uses the less partisan words “related to” and “relevant to,” respectively.²⁵⁸ Accordingly, the subsections of 50 U.S.C. § 1803(i)(4) should be read as mutually exclusive categories because an interpretation that would allow an anti-privacy argument under subsections (B) or (C), in violation of subsection (A), would “frustrate evident legislative intent.”²⁵⁹

If the amicus is going to provide legal arguments on privacy and civil liberties, Congress’s choice of words is clear, and the controlling language is found in subsection (A). The statute distinguishes the priority to “advance” the enumerated topics in subsection (A), as opposed to the purposefully different and less directive language used for the *other topics* in subsections (B) and (C). The broad interpretation of subsection (A), while suspect, is more defensible than the argument that a pro-privacy argument can somehow be couched under subsections (B) or (C).

Ironically, the mandate’s intrusion on the traditional judicial role is best demonstrated by reviewing the original purpose of the FISA amicus and amici roles in general: to provide the court with alternate and diverse points of view.²⁶⁰ There is thus no rationale for Congress to restrict in any way the range of arguments the FISA court may hear from the pool of amici; in fact, hearing divergent arguments from two amici may benefit the court by illuminating a particular controversy. If Congress had not included the amicus duty, each

256. § 1803(i)(4) (emphasis added).

257. § 1803(i)(4)(A).

258. § 1803(i)(4)(B)–(C).

259. See EIG, *supra* note 25, at 9 (explaining that courts will read “or” in a way that does not “frustrate evident legislative intent”).

260. See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (holding that one of three reasons a court should accept an amicus brief is when the amicus provides “unique information or perspective”).

amicus would still be fully able to advocate *for* individual privacy and civil liberties. But they *would also be free* to agree with the government's arguments or even concur and offer different reasoning, which could further the FISA judge's ability to properly discharge his or her judicial function and interpret important legal issues regarding national security and individual privacy. Thus, the statute requires one to ignore the existence of the mandate, to read it so broadly that it is rendered useless, or to hold that it violates the separation of powers doctrine by infringing on the court's relationship with the amicus.

B. The FISA Amicus Only Owes a Duty to the Court

Analyzing the duties of each involved party and branch of government further illuminates the separation-of-powers analysis. Here, Congress has legislated to create a pseudo-court entity, has prescribed procedures for that entity to appear, and has then exercised control over which arguments that entity can provide to the court. But the amicus is not, and should not be, beholden to a congressionally outlined argument restriction.²⁶¹ As Senator Blumenthal eventually stated during congressional consideration of the FREEDOM Act, the amicus's duty "is to enlighten the court."²⁶² Notably, when challenged on the amicus provision, the supporters did not defend the pro-privacy language.²⁶³ The framers essentially hid behind the provision's limited language, claiming the language did not require the amicus to oppose the government. But the framers never made *any* reference to the use of the "or" to separate the amicus duties, never provided any reasons for why they selected the employed pro-privacy language, and never gave any reasons why that language could be ignored.

261. *But see* NOLAN & THOMPSON, *supra* note 77, at 18 (acknowledging that Congress raises "prudential questions" when it defines what an amicus can say to a court, but arguing that a FISA amicus's duty to advance individual privacy and civil liberties "would appear to align with even the most restricted views on the appropriate scope of what an amicus can discuss in briefing to a court"). The Congressional Research Service (CRS) interprets the statutory language very broadly here, essentially rendering the phrase superfluous. *See infra* Part IV. CRS does not cite any authority for defining the proper scope of an amicus briefing. Further, CRS misses the point: the issue is not the appropriate scope of an amicus briefing but *whether* Congress can define and restrict that scope.

262. 161 CONG. REC. S3430-31 (daily ed. June 2, 2015) (statement of Sen. Blumenthal).

263. *See supra* text accompanying note 116.

That the amicus owes no duty to Congress or the executive branch is partially demonstrated by the fact that the amicus is not a federal officer and does not need to comply with the Appointments Clause. That the amicus does not need to comply with the Appointments Clause is not an attack on its constitutionality; rather, it is evidence that this position is unlike similar legislatively-created entities that contain duties and that might appear in federal courts. The amicus is neither a principal nor an inferior federal officer because it does not exercise significant authority on behalf of the federal government, it does not bind the rights of others, and it does not control the litigation.²⁶⁴ Further, if the amicus were an inferior federal officer, it would violate *Morrison* because the FISC judges appoint the amicus, and then the amicus participates in matters directly related to the court that appointed it.²⁶⁵

Comparatively, DOJ's NSD officers are federal officers within the executive branch who are subject to the Appointments Clause²⁶⁶ and to whom Congress properly gave statutory duties. They litigate on behalf of the government and the people,²⁶⁷ operating within specific statutory mandates and subject to congressional oversight.²⁶⁸ Similarly, the judicial employees of the federal courts are federal officers, in offices created by Congress, and subject to congressional oversight and funding.²⁶⁹

DOJ attorneys and the amicus curiae that Congress envisioned to counter the attorneys' arguments before the FISC are thus very

264. See NOLAN & THOMPSON, *supra* note 77, at 14 n.143 (noting that while a court's appointment of an amicus could raise a separation-of-powers question, it does not raise questions regarding the Appointments Clause); see also *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (discussing factors courts consider in determining whether an officer is “inferior” or “principal”); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam) (holding that an appointed officer wielding “significant authority” is deemed an officer); *supra* Section II.C (discussing federal officers).

265. See *Morrison*, 487 U.S. at 677 (implying that a judicial entity considering arguments from an inferior officer that it appointed would “run[] afoul of the constitutional limitation on ‘incongruous’ interbranch appointments”).

266. 28 U.S.C. § 506 (2012).

267. The DOJ's website quotes Thomas Jefferson: “The most sacred of the duties of government [is] to do equal and impartial justice to all its citizens.’ This sacred duty remains the guiding principle for the women and men of the U.S. Department of Justice.” *About DOJ*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/about> (last visited Nov. 30, 2016).

268. § 522.

269. See *supra* note 105 and accompanying text (describing the Administrative Office of the United States Courts and the role of its director, officers, and employees).

different in nature and creation, which is telling about the different duties owed by each. Other than codifying the procedure by which the amicus can be heard, Congress does not possess any enumerated constitutional authority over the amicus through which to exert control over its conversations with the court. Comparatively, Congress's authority over DOJ's NSD is clearly rooted in the Necessary and Proper Clause,²⁷⁰ which allows Congress to create DOJ offices to litigate matters on behalf of the government, such as surveillance orders under a statutory framework. But the constitutional origin of Congress's authority to control the amicus is less clear.

The Constitutional Authority Statement submitted with the FREEDOM Act found Congress's authority to enact the statutory provisions under the Commerce Clause and the Necessary and Proper Clause.²⁷¹ While this source of authority may be true for most provisions in the Act, it is unclear why either of those clauses would necessitate a congressional intrusion into the court-amicus relationship. The amicus is a judicial entity, and it necessarily and properly functions to support the judicial branch. The executive branch can advance its judicial objectives through the DOJ, and Congress's role is to create the substantive law and provide for the court structure. Control over the amicus's arguments is not necessary or proper by Congress or by the executive branch. Even further, it is unclear why either of those clauses would be more important than preserving the inherent judicial authority, which includes control of the amicus process and is protected by the separation-of-powers doctrine.

In reality, the FISA amici are comparable to the qui tam relators of the False Claims Act. They are private individuals who are not federal employees or public officers and can participate in a quasi-representational way in federal court proceedings.²⁷² Qui tam relators have been held *not* to be federal officials²⁷³ *because* the FCA preserves the government's right to take control of the litigation for itself if it chooses.²⁷⁴ The preference of the court in *United States ex rel. Stone v. Rockwell International Corp.* was to preserve the executive branch's power to control litigation on *its own behalf*, not to control the qui tam relator's interest or to narrow the court's ability to

270. U.S. CONST. art. I, § 8, cl. 18.

271. See *Constitutional Authority Statement of H.R. 2048*, *supra* note 94.

272. *What Does Qui Tam Mean?*, *supra* note 200.

273. U.S. *ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002), *rev'd*, 92 F. App'x 708 (10th Cir. 2004), *rev'd sub nom, Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

274. *Id.* at 806.

communicate with a qui tam relator.²⁷⁵ The only statutory requirements of the qui tam relators are procedural; there are no substantive restrictions on what arguments they can make to the court.²⁷⁶ The FREEDOM Act similarly preserves the government's ability to be the sole party who can litigate before the court with respect to the rights of the public.²⁷⁷

The statute establishing the FISA amicus differs from other statutes regarding amicus appointments because the other statutes regard government amici who are federal officers already subject to congressional oversight and executive branch control.²⁷⁸ But the FISA amicus should only be subject to judicial control. The provision is more akin to the Texas child welfare amicus statute. The Texas provision's structure is analogous to the amici pool, where a statute requires a court to hear from an amicus and imposes on that private amicus specific duties to advocate for the best interests of a non-present party.²⁷⁹ But a state appellate court made clear that the amicus owes a duty only to *the court* and not to the child or the parents even though in those controversies there are specific and identifiable parties.²⁸⁰ The same relationship applies with the FISA amicus.

The FISA court appoints the amicus, and there is no reason Congress or any other entity should limit the amicus's arguments. The scope of the amicus's arguments should only be guided by the court and the amicus himself or herself. Some amici request to appear on behalf of an interested, non-present client, and others are appointed by the court to help it discharge its duties.²⁸¹ Even when the amicus represents an interested client, there is debate about whether the amicus owes a duty to its client or the court.²⁸² And when the court seeks out and appoints an amicus, no matter the court's reasoning, ultimately the amicus is going to owe a duty to

275. *Id.* at 806–07.

276. 31 U.S.C. § 3730(c) (2012).

277. 50 U.S.C.A. § 1803(i)(4) (West 2015) (identifying no statutory power of the amici to litigate).

278. NOLAN & THOMPSON, *supra* note 77, at 17–18 (noting that the constitutional status of congressional statutes requiring courts to hear from government amici is judicially unsettled).

279. TEX. FAM. CODE ANN. §§ 107.003, 107.005 (West 2015).

280. Zeifman v. Nowlin, 322 S.W.3d 804, 808–09 (Tex. Ct. App. 2010).

281. *See* Anderson, *supra* note 8, at 363 (explaining the difference between amici who request to appear on behalf of clients and those who are specifically requested and appointed by the court).

282. *See id.* at 363–64 (stating that courts sometimes complain that private amici should owe a duty to the court at all times and not to their private clients).

himself or herself—if an individual—or the organization itself—if a company or other association.

For example, when the FISC-R appointed the ACLU and NACDL to proffer arguments in 2002, it did so because the government was the only party to the proceeding, and the case raised “important questions of statutory interpretation, and constitutionality.”²⁸³ Probably, the FISC-R chose those two organizations because they are vocal advocates for privacy, civil liberty, and due process rights, and the court wanted to hear supportive arguments for those interests in that case. But ultimately, only those organizations are going to decide for themselves which arguments to proffer²⁸⁴ and then the court will decide whether it finds those arguments helpful or not. The difference with a FISA amicus is that, unlike an amicus with an interested client, it has no client; unlike advocacy organizations, like the ACLU and NACDL, it has no board of directors and officers; all it has is a questionable duty imposed by Congress and whatever expertise and opinions the amicus himself or herself possesses. There is no reason that Congress should be able to narrow the scope of the argument between the individual, private amicus, and the court. The FISC will have presumably, like the FISC-R did in 2002, selected an amicus for a specific reason and will specifically want to hear his or her opinion. At that point, congressional input on the scope of the argument is improper, and groups such as the ACLU would likely protest a congressional statute that interfered with the scope of arguments it could present to courts as an amicus in typical court proceedings.

Finally, the Supreme Court has cautioned about the dangers of having private amici, with private clients, representing interests before a court seeking to vindicate the truth.²⁸⁵ While there is nothing wrong with having an amicus represent a non-present party’s interest,²⁸⁶ it is clear that when government amici appear before

283. *In re Sealed Case Nos. 02-001, 02-002*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (per curiam).

284. While the ACLU does advocate on behalf of public rights, it is still an incorporated non-profit organization with a board of directors, officers, and staff attorneys who presumably make the decisions regarding which cases to take and which arguments to proffer. *Officers & Board of Directors*, ACLU, <https://www.aclu.org/officers-board-directors> (last visited Nov. 30, 2016). The National Association of Criminal Defense Lawyers (NACDL) also has a governance scheme with a board of directors, officers, and an executive committee. *Governance*, NACDL, <https://www.nacdl.org/governance> (last visited Nov. 30, 2016).

285. *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580–81 (1946).

286. This was, in fact, the reason for the appearance of the amici in *Universal Oil*, *id.* at 578, and was one of Judge Posner’s three reasons for appointing an amicus.

courts, they are acting in their official capacities, and when private amici appear, they may be acting in furtherance of their client's interests.²⁸⁷ But when, as here, the court itself is choosing the amicus and specifically requesting its assistance to interpret the law, the amicus's duty to the court should be unvarnished and unobstructed by any other interest. For example, one of the FISA amici, Mr. Marc Zwillinger, represents Yahoo in a private capacity and filed a FISC brief in that capacity after the FISC appointed him to the pool.²⁸⁸ As an amicus, Mr. Zwillinger should not be entrusted with a duty to "protect[] public constitutional rights,"²⁸⁹ which would be necessarily complicated by his existing and already competing duties to both his private clients and the court. These crossed and conflicting duties demonstrate why Congress should not entrust the responsibility to protect public rights to a judicial entity that owes a duty only to its private clients and the court.

IV. THE FISC SHOULD INTERPRET THE AMICUS DUTY BROADLY TO AVOID DECLARING IT AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS

To read the amicus duty so broadly as to allow the amicus to support intelligence collection would be to "impl[y] that the legislature was ignorant of the meaning of the language it employed."²⁹⁰ Congress's specific intent and choice of words is quite clear. During consideration of the FREEDOM Act, congressional debate focused squarely on whether Congress should act to introduce different and more adversarial arguments to the FISC to counter the government's arguments.²⁹¹ A broad reading of the statute arguably

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers).

287. See, e.g., Williams v. Georgia, 349 U.S. 375, 380–81 (1955) (appointing an amicus to represent a criminal defendant when his appointed attorney could not present oral argument).

288. Yahoo! Inc.'s Unclassified Motion for a Status Conference at 3, *In re Directives Pursuant to Section 105B of the FISA*, No. 105(B)(g) 07-01 (FISA Ct. Feb. 5, 2016). Mr. Zwillinger was also the first of the amicus pool appointed to appear under 50 U.S.C. § 1803(i), and he argued the case decided by the FISC-R in April 2014. *In re Certified Question of Law*, No. FISC-R 16-01, slip op. at 1 (FISA Ct. Rev. Apr. 14, 2016) (per curiam).

289. 161 CONG. REC. S3396 (2015) (daily ed. June 1, 2015) (statement of Sen. Blumenthal).

290. EIG, *supra* note 25, at 13 (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

291. See *supra* text accompanying notes 94–116.

ignores Congress's intent to create a new entity, with mandatory duties, that must present arguments when the judge decides novel and significant legal interpretations.²⁹² It would also assume that Congress's choice to add language did not have a purpose or change the statute's meaning.²⁹³ Nevertheless, such a questionable reading is required to avoid declaring the statute unconstitutional.

For example, if the words "support individual privacy and civil liberties" do not prevent an amicus from supporting intelligence collection or pro-surveillance legal arguments, then the phrase is essentially "inoperative . . . superfluous, void[,] or insignificant."²⁹⁴ The phrase would serve no purpose because if the words were not there, the amicus would be permitted to advance the exact same arguments that it could advance with the words in the statute.

In fact, the FISC has already weighed the competing interests between statutory interpretation and its exercise of inherent functions when interpreting another provision of the amicus section of the statute.²⁹⁵ The court held that "[a]lthough the statutory framework is somewhat tangled," the court will interpret the statute "in a manner that gives meaning to all of its provisions, *or* it can ignore those principles and conclude that Congress passed an irrational statute with multiple superfluous parts."²⁹⁶ The court also demonstrated an exercise of its inherent authority to control the amicus process by declining to hear from an amicus even though the matter presented a "novel or significant" interpretation of the law.²⁹⁷

292. See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (stating that courts interpreting statutory language should consider the context of when the legislature passed the law).

293. See, e.g., *Corley v. United States*, 556 U.S. 303, 318 (2009) (citing legislative history to discredit a bright-line reading of a statutory amendment when that reading rendered the change superfluous and created conflicts with other rules).

294. *Hibbs*, 542 U.S. at 101.

295. The FISC was interpreting the meaning of the statute's requirement to appoint an amicus when "appropriate" to assist with a "novel or significant interpretation of the law." *In re Applications of the FBI for Orders Requiring the Prod. of Tangible Things*, Nos. BR 15-77, BR 15-78, slip op. at 5-6 (FISA Ct. June 17, 2015). The court concluded that although a novel or significant issue was presented, the appropriate outcome was sufficiently clear, and the amicus would not "materially assist the court in making [the] decision." *Id.* at 6. Thus, an amicus's appointment was "not appropriate." *Id.*

296. *Id.* at 6 (emphasis added); see also *In re Certified Question of Law*, No. FISC 16-01, slip. op. at 16 (FISA Ct. Rev. Apr. 14, 2016) (per curiam) ("[W]e are to avoid interpreting one statutory provision in a manner that would render another provision superfluous.").

297. *In re Applications of the FBI*, Nos. BR 15-77, BR 15-78, slip op. at 5-6.

But in the end, this broad, even superfluous reading, while questionable, is at least facially defensible and should be employed as a last resort to avoid declaring the statute unconstitutional. This Comment takes this position for purely pragmatic reasons because the priorities of national security, judicial and DOJ efficiency, and privacy would not be served by any litigation over the constitutionality of this subsection. It is far easier for the FISC judge simply to accept any arguments from the amicus that the judge deems helpful, whether they be pro-privacy or pro-surveillance. Likely, the DOJ lawyers will not be objecting or appealing if a FISA amicus offers a pro-surveillance argument. Moreover, any group that filed with the FISC, or any district court, to object to an amicus violating its statutory duty would probably lack standing.²⁹⁸ But the analysis is important because Congress chose specific words, for specific reasons, with specific intent, and the effects of those words infringe on judicial power. If the priorities listed above were not at stake, this author would argue that the FISC should declare the statute unconstitutional the first time that a FISA amicus proffered a pro-surveillance argument. But the FISC can more easily justify a broad interpretation under the canon of constitutional avoidance and simply allow any potentially helpful amicus arguments under a broad interpretation of the duty.²⁹⁹ Each amicus should know that they are free to provide the court with their honest, unvarnished, and uninfluenced views of the Constitution and the law.

CONCLUSION

While courts should give meaning to every word of a statute, it is more important for a court to retain its inherent powers and discharge its constitutional duty to decide and interpret the law, administer justice, and effectually determine a case's outcome.³⁰⁰ When Congress reformed the FISA statute and the FISC's procedures, it purposefully meant to increase the diversity of the legal arguments before the court.³⁰¹ Previously, the FISC had approved the vast majority of

298. See *supra* note 54 and accompanying text (noting that only the government and telecommunications companies have so far established standing in FISA intelligence collection matters).

299. See *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (invoking the principle that courts should use the statutory interpretation that avoids a constitutional determination when considering two possible interpretations).

300. See *supra* Section II.A.

301. See, e.g., 161 CONG. REC. S3431 (daily ed. June 2, 2015) (statement of Sen. Blumenthal).

government surveillance applications and, even though companies were empowered to oppose compulsion orders, such opposition was either rare or is still classified.³⁰² When Congress required the FISC to hear arguments from an amicus to help it determine novel or significant legal issues, it reached the limit of its enumerated powers to authorize court procedures and substantive law. To preserve the judicial power, Congress must cede control of the process where judicial interpretation begins so the court can retain full authority over the consideration of legal arguments.³⁰³

Further, preventing the court from hearing a potentially helpful legal argument would be at odds with the entire purpose of the amicus provision—to provide more diverse legal arguments to the court. This priority is especially apparent when analyzing the members of the amicus pool. Some individuals are well-known privacy advocates, while others have previously worked for the DOJ.³⁰⁴ If two of these experts have divergent legal arguments, then imposing on both a converging, partisan guiding principle would be illogical and would deprive the court of informed and diverse legal arguments. Even if the government is already promoting one pro-surveillance argument, the court may be requesting the amici pool to provide different or distinguishing legal arguments—be they pro-surveillance, pro-privacy, or something in between. The government’s lawyers owe a duty to their clients, the NSA and the FBI. The amicus pool owes a duty only to themselves and to the court, and thus all of the amici should be fully free to provide the court with legal arguments anywhere on the spectrum of pertinent legal issues for each respective appearance.

The statute should be interpreted, as the FISC rightfully has interpreted it so far, to allow the appearance of an amicus when it “would materially assist the court in making [a] decision,”³⁰⁵ and the FISC should at that point take complete control of the amicus process. To interpret the statute any other way, even if such interpretation would be the only way to give every word meaning, would result in an improper congressional encroachment on the inherent judicial power.

302. See *supra* notes 61–65 and accompanying text.

303. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding it is the duty of the court to effectively “say what the law is”).

304. See *supra* notes 130–36 and accompanying text.

305. *In re Applications of the FBI for Orders Requiring the Prod. of Tangible Things*, Nos. BR 15-77, BR 15-78, slip op. at 6 (FISA Ct. June 17, 2015).