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Searching for Federal Judicial Power: Article III and the Foreign Intelligence Surveillance Court

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ABSTRACT

The Foreign Intelligence Surveillance Court ("FISC") has an Article III problem. Under section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("FAA"), which brought the Bush administration's Terrorist Surveillance Program under the rule of law, the FISC typically proceeds ex parte, hearing only from one party: the government. FISC proceedings under section 702 therefore lack the benefit of adverse parties clarifying the issues, which the Supreme Court has linked with sound adjudication and judicial self-governance.

The FISC's section 702 role does not fit neatly into the established categories of cases, such as search warrants, where ex parte proceedings are permissible. The broad surveillance practices that the FISC reviews under section 702 lack the individualized facts of warrant requests or a direct link to criminal prosecutions. Under Article III of the United States Constitution, the FISC's section 702 role may be neither fish nor fowl.

Closer examination reveals that although the FISC's role under section 702 is novel, it fits within Article III's space for the exercise of judgment by independent courts. This Article makes that case via the congruency test, which the Supreme Court invoked in Morrison v. Olson to uphold a statute requiring judicial appointment of an independent counsel to investigate allegations of executive misconduct in the wake of the Watergate scandal. Building on Morrison, it argues that the test for compliance of statutes with Article III must be pragmatic, affording Congress a measure of flexibility. Two Article III cases from October Term 2015—Bank Markazi v. Peterson *and* Spokeo, Inc. v. Robins—*demonstrate that Congress is entitled to deference when it seeks to promote operational values such as speed and accuracy in dynamic domains such as national security, foreign relations, and emergent technology. The importance of timely responses to cyber threats fits the FAA within that rubric.*

The FISC's section 702 role also serves important structural values, by deterring executive branch surveillance abuses. Moreover, in the USA FREEDOM Act, passed after Edward Snowden's disclosures about National Secur-

* Professor of Law, Roger Williams University School of Law; B.A., Colgate University, 1978; J.D., Columbia Law School, 1981. I served as co-counsel for amici curiae in a case discussed in this Article. *See* Brief of Current U.S. Senators Sheldon Whitehouse, Lindsey O. Graham, Ted Cruz, and Christopher A. Coons as Amici Curiae in Support of Respondents, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 14-770). I thank Laura Donohue for comments on a previous draft.

ity Agency surveillance, Congress established a panel of amici curiae to assist the FISC. Robust arguments by amici curiae, possibly augmented by a public advocate opposing government surveillance requests, can replicate most of the virtues of adversarial combat. Combining the virtues of adversarial argument with the operational and structural benefits of the FAA demonstrates the statute's congruence with the history and practice of federal courts.

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INTRODUCTION

The Foreign Intelligence Surveillance Court ("FISC") has an uneasy relationship with Article III of the U.S. Constitution. Under section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("FISA Amendments Act" or "FAA"),[1] the FISC at first blush appears to be neither fish nor fowl. Article III's tenure and salary protections safeguard the independence of FISC judges, who typically conduct ex parte proceedings in which the gov-

1 Foreign Intelligence Surveillance Act (FISA) of 1978 Amendments Act of 2008 (FAA), Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438 (codified as amended at 50 U.S.C. § 1881a (2012)).

ernment is the only party to the litigation. The absence of adverse parties raises a red flag under Article III.[2] While federal courts routinely proceed ex parte on matters such as requests for search warrants, under the FAA the FISC adjudicates broad legal questions. Those questions lack the individualized facts and links to criminal prosecutions of warrant requests.[3] This apparent ill fit spurs fears that Congress, in enacting the FAA, has commandeered the federal courts to serve purposes unsuited to the exercise of judicial power. Despite these concerns, courts and scholars have devoted more attention to whether the warrantless surveillance authorized by the FAA violates the Fourth Amendment than they have conferred on the interaction of Article III and the FISC.[4] This Article aims to both redress the balance and provide the FISC with a coherent Article III justification.

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2 *See* United States v. Muhtorov, 187 F. Supp. 3d 1240, 1250–53 (D. Colo. 2015) (order denying motion to suppress evidence obtained or derived under FAA or for discovery; discussing Article III questions raised by FAA but declining to strike down statute); Walter F. Mondale et al., *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2298–2301 (2016) (arguing that the FISC violates Article III); Nadine Strossen, *Beyond the Fourth Amendment: Additional Constitutional Guarantees that Mass Surveillance Violates*, 63 DRAKE L. REV. 1143, 1166 (2015) (same); *see also* Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1539–40 (2014) (suggesting that the FISC does not operate like a "regular court," and is ill-equipped for both evaluating policy and performing judicial role); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1170–80 (2015) (acknowledging that the FISC's role under section 702 raises Article III issues, but arguing that provisioning for a public advocate who would oppose government surveillance requests would address adverse parties concern and therefore ameliorate constitutional difficulties). Other authorities have noted the existence of potential Article III conflicts, even in finding the issue of limited concern. *See In re* Sealed Case, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (asserting, with respect to other, pre-FAA provisions of the FISA that authorize government to seek a court order permitting surveillance of suspected agent of a foreign power, that "there is [not] much left" to Article III objections); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1353–57, 1362, 1375, 1384, 1386 (2015) (arguing that history and values underlying Article III support recognition of a category of "non-contentious jurisdiction," including naturalization, warrant requests, default orders, and remedies such as receivership for business organizations).

3 *But cf.* Pfander & Birk, *supra* note 2, at 1462–65 (suggesting that the FISC fits within larger claimed category of "non-contentious jurisdiction" without adverse parties, although not specifically addressing special features of the FISC's role under section 702).

4 *See* United States v. Mohamud, 843 F.3d 420, 438–44 (9th Cir. 2016) (holding that section 702 was consistent with Fourth Amendment of U.S. Constitution); United States v. Hasbajrami, No. 11-CR-623 (JG), 2016 WL 1029500, at *12 (E.D.N.Y. Mar. 8, 2016) (same); Name Redacted, at 77 (FISA Ct., Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf (same); *see also In re* Directives [redacted text] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1015 (FISA Ct. Rev. 2008) (holding that the Protect America Act of 2007, a predecessor of the FAA, was consistent with the Constitution); *Mohamud*, 843 F.3d at 444 n.28 (finding that role of FISC did not violate Article III). *But see* LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLI-

The absence of adverse parties at the FISC deprives those proceedings of a hallmark of Article III's "case or controversy requirement."[5] In most litigation, the presence of adverse parties is integral to the nature of the judicial function.[6] Adverse parties ensure that issues in a dispute will be sharply delineated, and that the court will decide concrete disputes that a judicial remedy can resolve.[7] With adverse parties clarifying the issues, the court will avoid issuing advisory opinions untethered to specific facts. Both the case or controversy formulation and the preference for adverse parties keep the judiciary in its "lane" and prevent intrusions on the domain of the political branches, ensuring that federal courts remain the distinctive and independent check that the Framers envisioned.[8]

While courts regularly use ex parte proceedings to review warrant requests in ordinary criminal investigations, the FAA contemplates review that is far broader.[9] Pursuant to section 702, the FISC reviews an annual certification by the Justice Department regarding the collection and use by the National Security Agency ("NSA") and other agencies of foreign intelligence information from communications between a U.S. person[10] and a person reasonably believed to be located abroad ("one-end foreign" communications).[11] In its review, the FISC

GENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 68–72 (2016) (arguing that FAA threatens privacy and clashes with Fourth Amendment).

5 United States v. Windsor, 133 S. Ct. 2675, 2685 (2013) (suggesting that a strong preference for adverse parties is a key aspect of "judicial self-governance").

6 *See* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (cautioning that without requirement of concrete dispute between adverse parties "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights").

7 *See id.* at 500.

8 *See* THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that, in contrast with the political branches, the judiciary has "neither FORCE nor WILL but merely judgment"); *id.* at 470 (linking distinctive judicial judgment with courts being "bound down by strict . . . precedents which . . . define and point out their duty in every particular case that comes before them"); *see also* Stern v. Marshall, 564 U.S. 462, 483 (2011) (citing assertion in THE FEDERALIST NO. 78, *supra*, at 466 (Alexander Hamilton) that in turn quoted Montesquieu for proposition that "there is no liberty if the power of judging be not separated from the legislative and executive powers").

9 *See* Redacted, 2011 WL 10945618, at *10 (FISA Ct., Oct. 3, 2011); William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1645–48 (2010); David R. Shedd et al., *Maintaining America's Ability to Collect Foreign Intelligence: The Section 702 Program*, HERITAGE FOUND., May 13, 2016, at 3, http://report.heritage.org/bg3122.

10 A U.S. person, as defined for foreign intelligence collection purposes, is a U.S. citizen or lawful permanent resident. *See* 50 U.S.C. § 1801(i) (2012); Shedd et al., *supra* note 9, at 2. Similar protections cover persons physically located within the United States. *See* 50 U.S.C. § 1881a(b).

11 *See* 50 U.S.C. § 1881a(g); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1145 (2013).

assesses targeting procedures under section 702. These procedures regulate the use of selectors such as email addresses and phone numbers that are reasonably likely to return foreign intelligence information, querying data incidentally collected under section 702, and the purging ("minimization") of U.S. person information.[12] If the FISC approves the certification, private firms must provide the government with access to such communications.[13] The FAA permits challenges by Internet service providers ("ISPs") and other private firms to government directives based on approved certifications.[14] However, such challenges are quite rare.[15] In the vast majority of cases, therefore, no adverse party will appear in the FISC's proceedings.

While courts also use ex parte proceedings for ordinary warrant requests by law enforcement, the FISC's role under section 702 bears little resemblance to a court adjudicating standard warrant requests. Instead of considering specific facts adduced by officials investigating alleged criminal activity, the FISC has a function that recalls administrative law: reviewing proposed administrative rules for conformity with the agency's governing statute.[16] However, because FISC proceedings are so heavily ex parte, the FISC typically lacks input from persons and entities most affected by the rules it reviews.[17] This lack of input distinguishes the FISC's process from most administrative law cases.[18]

To present a coherent case for the consistency of the FISC's section 702 role with Article III, this Article turns to the congruency test

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12 *See* Shedd et al., *supra* note 9, at 3–4.

13 *See id.* at 3.

14 50 U.S.C. § 1881a(h)(4).

15 *See* Vladeck, *supra* note 2, at 1174.

16 *See* Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 627–28 (2010) (discussing regulatory conception of FISC's role); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1103–08 (2016) (same); *see also* Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1758–60 (2014) (suggesting the courts use administrative law doctrines to cabin government surveillance). *But see* DONOHUE, *supra* note 4, at 69–72 (arguing that FISC has not provided robust constraints); Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 161–63 (2016) (same).

17 *See generally* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (discussing how providing for notice and comment by regulatory stakeholders echoes the Framers' views about deliberative dialogue).

18 *See, e.g.*, Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011) (holding that the Transportation Security Administration had failed to comply with the Administrative Procedure Act in not initiating notice and comment procedures prior to implementation of full-body airport screening).

that the Supreme Court invoked in *Morrison v. Olson*.[19] In *Morrison*, the Court held that Article III did not bar a statute providing for judicial appointment of an independent counsel.[20] Congress enacted the independent counsel statute to resolve conflicts of interest that became apparent during Watergate, when an official appointed and later fired by the president had to investigate misconduct by the president and his senior aides. Similarly, Congress granted the FISC authority to review collection of one-end foreign communications after disclosure of President George W. Bush's Terrorist Surveillance Program, which bypassed the restraints Congress had imposed in the Foreign Intelligence Surveillance Act ("FISA").[21] While *Morrison* addressed the interaction of Article III and the Appointments Clause, the congruency test furnishes a useful lens to examine the FISC's section 702 role.

The congruency test asks whether the task that Congress has assigned to the federal courts is consistent with the judicial branch's purpose and practice. This inquiry is informed both by *Morrison*'s view of the independent counsel statute as a reaction to executive branch conflicts of interests and the Court's invitation to Congress in *United States v. United States District Court (*Keith*)*[22] to provide for a "specially designated court" to review national security surveillance requests.[23] To refine *Morrison*'s teaching on the deference due Congress's view of Article III, this Article turns to two Supreme Court Article III decisions from October Term 2015—*Bank Markazi v. Peterson*[24] and *Spokeo, Inc. v. Robins*.[25] Taken together, *Bank Markazi* and *Spokeo* suggest that Congress should receive a measure of deference under Article III when it addresses dynamic contexts such as national security, foreign affairs, or emerging technology.[26] Informed by this premise, the Article suggests that the congruency of a legislatively assigned task with Article III hinges on five factors: (1) the nexus with operational goals, such as speed, secrecy, and accuracy; (2) promotion of structural goals, such as accountability; (3) the

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19 487 U.S. 654 (1988).

20 *Id.* at 679.

21 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered titles of U.S.C.); *see* Banks, *supra* note 9, at 1645–47.

22 407 U.S. 297 (1972).

23 *Id.* at 323.

24 136 S. Ct. 1310, 1317 (2016) (holding that Article III did not bar Congress from empowering federal courts to designate specific Iranian assets as subject to attachment by victims of Iran-sponsored terrorist attacks).

25 136 S. Ct. 1540, 1549 (2016) (suggesting that Congress has some leeway in defining the types of intangible harm that confer standing to sue).

26 *See Spokeo, Inc.*, 136 S. Ct. at 1549–50; *Bank Markazi*, 136 S. Ct. at 1328.

fit between the task and courts' history and practice; (4) the availability of alternatives; and, (5) appropriate limits on the legislatively assigned role.

Examination of these factors reveals that the FISC's section 702 role meets the congruency standard. Consider operational factors. As in *Bank Markazi*, in which the Court upheld a statute designating specific assets as subject to execution of judgment by victims of Iran-sponsored terrorism,[27] the FISC reviews certifications that play out in the volatile arena of foreign affairs. Indeed, as *Spokeo* suggests, Congress is also entitled to deference when it balances interests affected by emergent technologies.[28] Just as the deluge of online information in *Spokeo* triggered a measure of deference to Congress's conferral of standing on victims of errant credit data aggregators,[29] Congress merits deference for streamlining intelligence collection by rejecting cumbersome ex ante judicial review of all foreign targets.[30] This balancing also has structural ramifications. In enacting section 702, Congress not only made intelligence collection more effective, it also positioned the FISC to curb the government's online intrusions on U.S. person data.[31]

Moreover, despite the novelty of the FISC's role, the FAA preserves many of the attributes of ordinary federal litigation. Case law

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27 *See Bank Markazi*, 136 S. Ct. at 1317.

28 *See Spokeo, Inc.*, 136 S. Ct. at 1549.

29 *See id.* at 1549–50.

30 *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143–44 (2013) (noting in dicta of case holding that plaintiffs lacked standing to challenge FAA, that FAA was enacted after the President asked Congress to amend the FISA to "provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism").

31 *See* Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1207–16 (2016) (arguing that the FISC has fulfilled its gatekeeper responsibilities). Some argue that the FISC has not always fulfilled this function. For example, Edward Snowden's 2013 disclosures about the FISC's authorization of the NSA's collection of U.S. landline metadata under the USA PATRIOT Act led to wide public debate, and eventually to enactment of the USA FREEDOM Act, which put metadata collection under the aegis of private telecommunications firms. *See* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM) Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (codified at various sections of title 50 of the U.S. Code); DONOHUE, *supra* note 4, at 45–53 (describing evolution of metadata program); *see also* ACLU v. Clapper, 785 F.3d 787, 824 (2d Cir. 2015) (holding that metadata program exceeded scope of statute). The FISC's interpretation of the NSA's authority under the PATRIOT Act does not demonstrate that the FISC's role under the FAA, a different statute, violates Article III. Even assuming its reading of the PATRIOT Act was incorrect, analysis of the FISC's compliance with Article III transcends the merits of its decisions on any one issue. However, the metadata episode does affirm Congress's wisdom in the USA FREEDOM Act in appointing a panel of amici curiae to assist the FISC.

indicates that possible adverse parties may satisfy Article III standards.[32] Under the FAA, while actual adverse parties are rare, the statute allows challenges by ISPs that receive directives to transfer data to the government.[33] Moreover, Congress has established a panel of amici curiae to oppose the government, even when no actual adverse party is participating in the proceeding.[34] The amici supply alternative perspectives, although a more institutionalized public advocate at the FISC would be better still.[35]

The FAA includes further indicia of fealty to venerable Article III attributes. The individuals whose privacy interests the FISC protects would have suffered what looks like an injury in fact, because the government's intelligence efforts result in the collection of data that many individuals would like to keep to themselves.[36] Moreover, the FISC under section 702 generates final judgments, as does any other Article III tribunal.[37] FISC rulings on FAA certifications are not mere recommendations or idle wish lists, to be revisited or ignored based on executive fiat. Rather, the FISC's decisions have the full force of law.[38]

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32 *See* Tutun v. United States, 270 U.S. 568, 576–78 (1926); *In re* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (Field, J.). *But see* Pfander & Birk, *supra* note 2, at 1393–1402 (questioning centrality of possible adverse parties to compliance with Article III, and arguing instead that Article III permits wide spectrum of non-contentious litigation not requiring either actual *or* possible adverse parties).

33 50 U.S.C. § 1881a(h)(4)(A) (2012).

34 *See* 50 U.S.C. § 1803(i) (2015). *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (discussing importance of vigorous amicus curiae participation to holding that Article III and prudential principles permitted adjudication of challenge to federal Defense of Marriage Act ("DOMA"), which was uncontested by executive branch and thus lacked actual adverse parties).

35 *See* Peter Margulies, *Dynamic Surveillance: Evolving Procedures in Metadata and Foreign Content Collection After Snowden*, 66 HASTINGS L.J. 1, 51–55 (2014) (arguing that public advocate would aid FISC in achieving deliberative ideal envisioned by Hamilton); Vladeck, *supra* note 2, at 1179 (noting that robust public advocate would serve as "meaningful adversary" to executive branch and thus transform judicial review of FAA issues into litigation that "more closely resembles" administrative law disputes).

36 *See Clapper*, 133 S. Ct. at 1147–50 (assuming collection of content of communications without individuals' consent would constitute injury in fact, while holding that plaintiffs lacked standing because they had not demonstrated either that collection had occurred or that any such collection was due to statute that plaintiffs had challenged).

37 *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792); *see also* Bank Markazi v. Peterson, 136 S. Ct. at 1310, 1325–26 (holding that Congress did not impermissibly interfere with final judgment when it designated additional assets as subject to execution or attachment by plaintiffs who had already obtained tort judgment against Iran for state-sponsored acts of terrorism). *But see id.* at 1332 (Roberts, C.J., dissenting) (dissenting, based not on interference with final judgment, but because of concern that Congress had unduly inserted itself into outcome of specific dispute).

38 *See* 50 U.S.C. § 1881a(i)(1)–(4) (2012) (authorizing the FISC to issue orders subject to judicial review).

In addition, there are few, if any, feasible alternatives to the FISC's FAA role. Other potential forums for review, such as an executive agency or an Article I court that lacks the protections furnished by Article III, do not possess the independence and institutional credibility that an Article III court commands.[39] Congress has also cabined the FISC's role: the FISC's only section 702 function concerns one-end foreign communications.[40] The FISC does not adjudicate ordinary warrant requests in criminal investigations, or second-guess the policy judgments made by the political branches. Those limits preserve the distinctive exercise of independent judgment by Article III tribunals that Hamilton celebrated more than two centuries ago.

This Article is in three Parts. Part I recounts the history of ex parte proceedings, centering on the use of warrants in criminal investigations and attachments in civil litigation. It links those time-honored ex parte devices to operational virtues such as speed and secrecy, as well as structural values such as preserving courts' ability to adjudicate, to hold officials accountable, and to compensate wronged parties. Part II discusses the evolution of FISA, from Congress's 1978 response to the Nixon-era abuses to the 2008 enactment of the FAA in the wake of the Terrorist Surveillance Program unilaterally initiated by President George W. Bush. It notes the continuing relevance of debates that pitted concern with an unduly expansive judicial role[41] against arguments that a federal court could assure the public that "foreign intelligence collection was being more responsibly administered" than it had been by past presidents.[42] Part III applies the congruency test, concluding that the FISC's section 702 role fits within the rubric established by the Supreme Court in *Morrison v. Olson* and harmonizes with the measure of deference supplied by the Court most recently in *Bank Markazi* and *Spokeo*.

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39 *But see* Renan, *supra* note 16, at 1121–23 (arguing that independent executive agency, such as augmented Privacy and Civil Liberties Oversight Board ("PCLOB"), could perform reviewing function).

40 *See* 50 U.S.C. § 1881a(i)(2)(B) (2012).

41 *See Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 223 (1978) [hereinafter *Subcommittee Hearings*] (statement of Hon. Laurence Silberman); *see also In re* Sealed Case, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (reconsidering 1978 views in light of subsequent precedent); Vladeck, *supra* note 2, at 1167 (discussing testimony).

42 *Subcommittee Hearings*, *supra* note 41, at 228 (testimony of Philip Lacovara, former counsel to Watergate Special Prosecutors); *see also* Zweibon v. Mitchell, 516 F.2d 594, 652–53 (D.C. Cir. 1975) (holding that a warrant was required for national security surveillance of domestic organization sharing no "community of interest" with foreign power).

I. EX PARTE PROCEEDINGS AS STRUCTURAL AND OPERATIONAL REMEDIES

Ex parte factfinding regarding warrant requests and ex parte civil remedies such as attachment developed for overlapping reasons. Both warrants and attachments served structural, institutional purposes: without an arrest warrant authorizing a criminal suspect's seizure, the individual could flee the jurisdiction and frustrate adjudication of his culpability. Operational reasons, such as the need for speed and stealth in apprehending the suspect, also shaped warrant requests' ex parte character. Similar forces drove the development of the remedy of attachment as a device for ensuring that assets at issue in commercial litigation remained in place pending adjudication of the underlying dispute.[43] Safeguards applied to each curbed abuse by either rapacious merchants[44] or government officials seeking to punish political opponents.[45] The judicial role in each played out against the backdrop of concerns that were vital to the Framers: how to structure a modern government that effectively enforced the law without government overreaching.

A. *Warrants and Ex Parte Factfinding in English and Early American History*

Challenges to effective and fair law enforcement emerged in eighteenth-century Britain with increased trade and the growth of government. Britain's imperial commitments and participation in European wars spurred demands for more revenue. Officials sought to generate that revenue through the collection of taxes and tariffs.[46] However, some members of the burgeoning middle class created by increased trade viewed paying taxes as a lifestyle choice, not a legal obligation. They exploited Britain's vibrant economy to move taxable goods, including liquor, one step ahead of the tax collector. To ensure that taxes were paid, government officials needed a way to move as

43 *Compare infra* Section I.A (noting that government officials needed to move quickly and furtively in finding tax dodgers), *with infra* Section I.B (asserting the need for attachment to be both quick and secretive to avoid the sale of a disputed asset).

44 *See* Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (holding that pre-judgement replevin provisions create a deprivation of property without due process of law because there is no opportunity to be heard before the chattels are taken).

45 *See* Entick v. Carrington, 19 How. St. Tri. 1029, 1065–66 (C.P. 1765) (holding that a warrant for personal papers was not sufficient to overcome a trespassing cause of action).

46 *See* Joseph J. Thorndike, *Taxes, Trade, and the British Taste for Beer*, TAX ANALYSTS, http://www.taxhistory.org/thp/readings.nsf/ArtWeb/07D85FCB7991B95A8525743A0075B39B?OpenDocument (Apr. 22, 2008) (reviewing JOHN V.C. NYE, WAR, WINE, AND TAXES: THE POLITICAL ECONOMY OF ANGLO-FRENCH TRADE, 1689–1900 (2007)).

quickly and furtively as their scofflaw adversaries. Official remedies included searches of homes or businesses where tax evaders might be hiding goods.[47] Such remedies enabled officials to secure the taxable goods and guarantee that the government received its legal due. Officials also needed a legal imprimatur for their efforts, to avoid suits for trespass filed by merchants, homeowners, and others contesting searches. The mechanism favored through the first half of eighteenth century and beyond was the general warrant.[48]

Officials requested and received general warrants from English courts in ex parte proceedings. The ease of obtaining the warrant and the ex parte nature of the proceeding allowed officials to act swiftly and secretly to detect crimes such as tax evasion and secure goods subject to tax before those goods were sold, used, or consumed.

While we can understand officials' legitimate law enforcement interest in ensuring payment of taxes and tariffs, another target of official searches in eighteenth-century England was more troubling: free expression. Home searches there implicated liberties that the English had come to understand as their birthright.[49] Economic and technological changes, such as the resources made available by commercial activity and the ease of disseminating information permitted by the printing press, together with the growth of government and empire, fueled increased public criticism which officials framed as "seditious libel."[50] To prove seditious libel, officials needed a swift and secretive way to locate pamphlets and other printed materials that were critical of the government before those materials were disseminated to the general population and those who shared the pamphleteers' critical perspective. Here, too, the issuance of warrants assisted law enforcement goals.

The initial failure of judges issuing the warrants to constrain law enforcement led to serious problems. Instead of insisting on a methodical factual showing and inserting language in the warrant that

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47 *See* ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 78 (2006); *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 153 (1999).

48 *See* LEVY, *supra* note 47, at 153 (1999) (noting that all but 2 of the 108 authorized warrants issued from 1700–1763 were general warrants).

49 Historians view the legal basis for this understanding as more questionable. *See* LEVY, *supra* note 47, at 151 (observing that Fourth Amendment Warrant Clause and prohibition on unreasonable searches and seizures arose from political discourse in Britain prior to American revolution that was "the extraordinary coupling of Magna Carta to the appealing fiction that 'a man's house is his castle' . . . [with] embellishments on the insistence, which was rhetorically compelling, though historically without foundation, that government cannot encroach on the private premises of the individual subject" of the Crown).

50 *Id.* at 159–60.

limited searches to particular items and locations, English courts regularly approved general warrants that delegated all discretion to government officials.[51] In cases of tax and customs violations, the use of general warrants led to lawless official pilferage from houses and places of business, adding to the corruption that government critics lamented. In the seditious libel context, the unfettered official action underwritten by general warrants served as a means for intimidating political opponents.[52] For these reasons, English judges, echoed by the Framers and their compatriots who agitated for an American Bill of Rights, came to view general warrants as "contrary to the fundamental principles of the constitution."[53] To counter the dangers of general warrants, the drafters of the Fourth Amendment included the Warrant Clause, which required that a warrant be specific regarding the items sought and the locations searched.

This Fourth Amendment story has important consequences for Article III. Under the Warrant Clause, a neutral judicial officer had to require a more particularized showing from law enforcement.[54] Therefore, the Fourth Amendment actually *increased* the judge's ex parte factfinding role. Particularity does not happen by magic; it requires more detailed submissions from law enforcement, and of necessity contemplates a more elaborate dialogue between the judicial officer and the party seeking a warrant.[55] While the supporters of the Fourth Amendment voted to mandate this heightened ex parte judicial role, they at no point suggested that this expanded role violated the restrictions on federal judicial power in Article III.[56] Rather, the wide support for the inclusion of the Fourth Amendment suggested that

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51 *Id.* at 154, 156.

52 *See* Entick v. Carrington, 19 How. St. Tri. 1029, 1071–72 (C.P. 1765); Wilkes v. Wood, 19 How. St. Tri. 1153, 1154, 1170 (C.P. 1763); LEVY, *supra* note 47, at 162 (discussing *Entick*); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1195–1207 (2016) (discussing British cases); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 880–83 (1985) (unpacking strands of discussion in *Entick* regarding seizure of papers); *cf.* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 610–11 (1999) (tracing language of Fourth Amendment to Framers' concern about risk of reprise of general warrants). The history of the Fourth Amendment is complex and subject to continuing debate; resolution of those controversies is beyond the scope of this Article.

53 *See Wilkes*, 19 How. St. Tr. at 1167.

54 *See* U.S. CONST. amend. IV.

55 Of course this dialogue may be relatively brief in many cases. However, the judge has both the power and responsibility to make such findings, and request any and all information from law enforcement that will assist in that task.

56 *Cf.* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 317 (1972) (noting Warrant Clause's requirement of "prior judicial judgment" on legality of search, without suggestion that such judgment might violate Article III).

necessary structural remedies for executive overreaching required a measure of flexibility in interpreting Article III's constraints.

A warrant, in addition to providing the government with *permission* to seize property or monitor communications, also *enabled* the government to secure possible evidence of a crime in order to ensure the efficacy of a prosecution.[57] Moreover, warrants in England in the eighteenth century authorized the arrest of a suspect, who might otherwise defeat prosecution by fleeing the jurisdiction. A court would generally adjudicate an arrest warrant ex parte; notice to the party whose arrest the government sought would only encourage that individual's flight. Blackstone, whose commentaries were well known to the Framers, cited an even earlier English treatise writer, Matthew Hale, in declaring that "long custom established" that courts had to be able to issue arrest warrants upon suspicion that the suspect had committed a crime, prior to an indictment.[58] Otherwise, according to Blackstone, "in most cases . . . felons [would] escape without punish-

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57 *See Entick*, 19 How. St. Tr. at 1066 (acknowledging that police or rightful owner could lawfully engage in "search and seizure for stolen goods"). One can read *Entick* as categorically forbidding the seizure of papers from an individual's home, even if officials could show probable cause that those papers were evidence of a crime. *See id.* (appearing to suggest that magistrate could not order seizure of personal papers and that government official who removed papers from an individual's home would be liable for trespass). However, the better view is that Lord Camden objected to officials' unfettered discretion to seize personal papers and refuse to return them. *See id.* (decrying that owner lacked "power to reclaim his [papers], even after his innocence is cleared by acquittal"). Lord Camden was also clearly disturbed by the chilling effect this seizure power had on political speech—a freedom that was vulnerable in Britain, given that country's lack of a written constitution. *See generally* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 402–03 (1995) (discussing context of *Entick*). Professor Stuntz also doubted the relevance of disputes about *Entick*'s meaning beyond its rejection of overly broad warrants. *See id.* at 403. Stuntz observed that the broad language in *Entick* condemning seizure of papers was irrelevant to prosecutions for ordinary crimes lacking the political component of the general warrant cases, since Britain during that era had no regular police force or capacity for investigating criminal conspiracies prior to commission of a criminal act. *Id.* at 401. In addition, Professor Stuntz observed, British law clearly permitted searches incident to arrest, including searches of an individual's home when an arrest took place there. *See id.* at 403–04. The U.S. Supreme Court at one point adopted an absolutist approach to papers, barring their seizure. *See* Boyd v. United States, 116 U.S. 616, 634–35 (1886) (relying on Fifth Amendment privilege against self-incrimination); *see also* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 83–106 (2013) (discussing *Boyd*'s rationale and context, while conceding that its absolutist approach unduly hampers law enforcement). However, the Court routinely upheld administrative subpoenas for the production of papers, *see* Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 476–77 (1894), and overruled *Boyd* decades ago, *see* United States v. Doe, 465 U.S. 605, 610 n.8, 611–12 (1984) (holding that required production of documents did not violate Fifth Amendment).

58 4 WILLIAM BLACKSTONE, COMMENTARIES *287.

ment."[59] Similarly, in *Entick v. Carrington*,[60] the groundbreaking English case outlawing the use of expansive warrants to harass political opponents, Lord Camden implied that a warrant to seize an individual's personal papers as evidence of a crime had to be particular about the nature of the evidence sought and its link with the crime alleged.[61] The flipside of the court's observation was that the government might be able to make out an ex parte showing sufficient to obtain a warrant for a suspect's personal effects or other goods in his possession if the alleged crime at issue was covert in nature, such as a robbery or burglary, and the suspect would be able to dispose of all traces of his or her crime absent government action.[62]

For similar reasons, American courts often allowed warrantless arrests. As an early nineteenth century American case put it, a warrantless arrest would be valid when a law enforcement officer saw the suspect commit a crime, such as murder or robbery, since the suspect, if not "arrested on the spot," would escape and continue to "endanger[ ] the safety of society."[63] A warrant thus did not merely indemnify law enforcement officers who otherwise might have to face a civil suit by the subject of the search. Each warrant also embodied a judicial acknowledgment of the importance of preserving evidence and ensuring that a suspect would be available for prosecution.

B. Ex Parte Proceedings and Civil Remedies

The need for an expeditious remedy that preserved the option of adjudication also played a role in another ex parte procedure—this one civil in nature: attachment to secure disputed goods pending resolution of litigation regarding ownership.[64] The mundane civil litigation landscape in which attachment played out may seem far removed from the charged atmosphere of warrant applications in felony prosecutions. However, the two procedures boast subtle similarities: each is done ex parte for reasons of secrecy and speed. Moreover, each involves facilitating subsequent court proceedings by ensuring that unilateral actions do not frustrate the judicial process. In addition,

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59 *Id.*

60 19 How. St. Tr. 1029 (C.P. 1765).

61 *See id.* at 1072.

62 *See id.* at 1073–74.

63 Wakely v. Hart, 6 Binn. 316, 318 (Pa. 1814). *See generally* United States v. Watson, 423 U.S. 411, 418–22 (1976) (discussing common law basis for warrantless arrests).

64 *See* Ownbey v. Morgan, 256 U.S. 94, 104 (1921); Nathan Levy, Jr., *Attachment, Garnishment, and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 405, 430 (1973).

specific warrants and modern attachment also deter unilateral attempts at self-help by the party seeking relief.

Attachment was related to economic growth in England, since the practice evolved as an ancillary remedy in commercial disputes,[65] just as the issuance of warrants developed as an ancillary to criminal investigations. Attachment was done secretly and with dispatch.[66] Attaching assets at the start of a civil case ensured that a disputed *res* would remain intact during the pendency of litigation.[67] Because the initial attachment was ex parte, the party seeking possession of assets pursuant to a claim of rightful ownership did not provide notice of the proceeding to the party in possession.[68] Proceeding without notice ensured that the party in possession could not "transfer or encumber" the disputed assets while the litigation was pending.[69] Without this remedy in place, a party who had possession of contested property or other assets could sell or transfer the assets while the litigation was pending. This transfer or sale would undermine adjudication, impairing the ability of the party contesting ownership to obtain appropriate relief.[70]

Eventually, U.S. courts began to address a countervailing concern: that the remedy of attachment gave an unfair advantage to the moving party, much as the general warrant in England had given the Crown an edge over its political foes.[71] This inequality was most evident in consumer transactions, where a merchant could use attach-

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65 *See* Levy, *supra* note 64, at 405.

66 *See id.* at 419–21.

67 *See id.* at 420, 428.

68 *See id.* at 420–21.

69 *See* Connecticut v. Doehr, 501 U.S. 1, 16 (1991).

70 Justice Frankfurter analyzed attachment in this fashion, also warning that if a court vacated an attachment, prompt judicial review was necessary to ensure that transfer of the asset formerly subject to attachment did not make the entire substantive proceeding an "empty rite." *See* Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A., 339 U.S. 684, 689 (1950). The same principle underlies the stay of certain trial rulings, such as removal of a noncitizen, pending appeal. The noncitizen's removal by immigration authorities will make it materially more difficult for that individual to contest the substantive bases for her removal, given the obstacles to litigation when the individual has been deported to a foreign country. In writing for the Court on the importance of stays pending appeal of removal orders, Chief Justice Roberts recently cited another opinion by Justice Frankfurter. *See* Nken v. Holder, 556 U.S. 418, 427 (2009) (noting that inherent power of appellate court to grant a stay affirms the integrity of the appellate process, ensuring that the reviewing court need not choose "between justice on the fly or participation in what may be an 'idle ceremony'" (citing Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1942))).

71 *Cf.* Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. REV. 1, 8 ("The process of attachment . . . was one used by the judges . . . by which those who interfered with the king's peace were brought before the court and punished.").

ment or self-help to regain control of merchandise that a consumer had purchased under an opaque agreement that favored the merchant's interests.[72] As part of the Warren Court's due process revolution, the U.S. Supreme Court limited a party's ability to summarily attach assets or use self-help without judicial imprimatur to regain possession.[73] However, the Court continued to permit the remedy in cases involving heightened ex parte factfinding. Attachment was available when a merchant who had sold goods conditioned on regular payments by the purchaser submitted concrete proof of the purchase agreement and the purchaser's default.[74] Similarly, attachment was appropriate when the party seeking this remedy could provide a concrete showing of exigent circumstances, such as proof that the party being sued was seeking to sell, transfer, or borrow against assets that would be required to satisfy a judgment on the merits.[75]

While an attachment at common law was often obtained ex parte, other types of relief also do not entail an adverse party. Consider equitable receiverships sought jointly by both fiduciaries and creditors of insolvent corporations.[76] Before federal bankruptcy law provided automatic stays of litigation, borrowers and creditors would join in applications to Article III courts to order establishment of an equitable receivership.[77] In cases of railroad insolvency, creditors such as banks would join with railroads to seek this relief.[78] Speed was imperative in granting such relief; without prompt action, other litigation or unilateral action by some creditors would dissipate the railroad's assets, frustrating the judicial process. The creditors benefited from the power of a receivership to protect the railroad's assets, which could then be used to satisfy the creditors' claims. The railroad would benefit because establishment of a receivership would stay other litigation by creditors, permitting orderly restructuring.[79]

In other relief not necessarily involving adverse parties, courts can also appoint receivers or special masters to administer "structural" injunctions or consent decrees that reform public institutions

72 *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–08 (1975); Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

73 *See* cases cited *supra* note 72.

74 *E.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600, 601, 603 (1974).

75 *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 16 (1991).

76 Pfander & Birk, *supra* note 2, at 1386–87; *see, e.g.*, *In re* Metro. Ry. Receivership, 208 U.S. 90, 107 (1908); *cf.* Pope v. United States, 323 U.S. 1, 11 (1944) (holding that federal judicial power exists to render judgment even when claim is "uncontested or incontestable").

77 Pfander & Birk, *supra* note 2, at 1386.

78 *Id.*

79 *Id.*

such as prisons or jails.[80] While these remedial measures emerge from adversarial litigation brought by plaintiffs who claim that institutional practices have violated their rights, the court on its own motion can order relief such as appointment of a special master.[81] The court's order empowers the special master to find facts through nonadversarial means, and to report directly to the court on the master's investigation.[82] The appointment of a special master enhances the factfinding capacity of courts in the remedial stage of litigation. This move thus compensates for information asymmetries that could impair the court's ability to render judgment. It gives the court access to information that might otherwise remain in the possession of one or more of the parties, who each have agendas that might limit their inclination to share such information with the tribunal.[83] Giving the court access to such information through appointment of a special master also permits the implementation of more flexible relief. Instead of relying on the parties' remedial prescriptions, the court can fashion a decree that combines the best elements from a range of perspectives.[84] These remedies, which may involve the use of nonadversarial processes, were part of the suite of remedies available to courts at common law. Such relief therefore became part of federal courts' remedial arsenal pursuant to the Judiciary Act of 1789,[85] which authorized federal courts'

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80 *Id.* at 1387. The central studies for institutional reform litigation date back to the activist 1970s. *See* OWEN M. FISS, INJUNCTIONS (1972); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1300–01 (1976). For a broad view of the stakeholders in such cases, see Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1994–95, 2017, 2019, 2022 (1999) (book review).

81 *See* Brown v. Plata, 563 U.S. 493, 502, 504 (2011) (upholding decree, based in part on reports by special master, that remedied inadequate medical and psychiatric care in California prisons by requiring release of inmates from overcrowded facilities); *cf.* Horne v. Flores, 557 U.S. 433, 447–50 (2009) (asserting that courts entering and enforcing an equitable decree that reforms public institutions such as school systems must be attentive to changed circumstances that undermine decree's original purpose); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018–20 (2004) (discussing collaborative, experimental approach to implementation of structural remedies); Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1527–38 (2014) (discussing evolving approaches to implementing workplace reforms).

82 *See, e.g.*, *Plata*, 563 U.S. at 516 (upholding decree based in part on special master's reports directly to the court).

83 *E.g.*, *id.* at 516, 523.

84 *Id.* at 513, 529 (affirming lower court's reliance on testimony from prison officials, expert witnesses, as well as reports from special master and receiver to craft a remedy).

85 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

resort to any and all remedies that stemmed from the "inherent" powers of courts.[86]

In sum, nonadversarial processes are no stranger to federal courts or to the common law. When speed, secrecy, or flexibility are required, courts in both civil and criminal proceedings have a range of nonadversarial processes available. These processes may not be sufficiently pervasive to constitute an entirely discrete branch of federal jurisdiction.[87] However, there is nonetheless ample precedent for their use in situations such as warrants, attachments, and receiverships that might otherwise result in threats to the courts' own remedial power and factfinding abilities, or might pose an unacceptable risk of overreaching by one or more parties to a dispute.

C. *Ex Parte Proceedings and the Administrative State*

The status of ex parte proceedings under Article III became even more complicated with the growth of the regulatory state, starting in the late nineteenth century. An important circuit decision by the influential Supreme Court Justice Stephen J. Field appeared to classify adverse parties as indispensable for Article III.[88] Justice Field's principal concerns in this decision were threefold: (1) absolutely protecting papers relevant to litigation, a stance quickly rejected by Justice Field's colleagues on the Supreme Court that relied on a broad view of English cases like *Entick v. Carrington*,[89] (2) reducing the power of regulatory agencies in the nascent administrative state,[90] and (3) ensuring that federal courts retained the power to render final judgments.[91] Viewed from the perspective of later developments in the case law, only the third concern has continued relevance. The marginalization of concerns (1) and (2) permits a more flexible reading of Justice Field's account of Article III essentials.

In addressing the interaction of Article III and the administrative state, it is useful to highlight the dangers of conflating two distinct points: (1) the lack of adverse parties in a particular proceeding, and (2) federal courts' determination of broad legal questions about the scope of agency power. The presence of *one* of these factors, standing

86 Nken v. Holder, 556 U.S. 418, 426 (2009).

87 This Article therefore takes a more cabined view of ex parte proceedings than commentators Pfander and Birk. *See* Pfander & Birk, *supra* note 2, at 1440–41 (arguing for a broader view that classifies ex parte proceedings as a distinct tributary in federal jurisdiction).

88 *See In re* Pac. Ry. Comm'n, 32 F. 241, 255, 257–58 (C.C.N.D. Cal. 1887).

89 *See id.* at 250–51.

90 *See id.* at 253–54.

91 *See id.* at 253–55.

alone, has not been problematic. Warrants and various forms of civil relief, such as attachment or receiverships, involve the first factor.[92] Much of administrative law involves the second, as courts assess whether particular agency rules or policies are consistent with the agency's statutory mandate.[93] Combination of contexts (1) and (2) is rare, but not unprecedented.[94] Critics of the FISC's section 702 role frequently fail to distinguish between these two concerns.[95]

Blame Justice Field.[96] In *In re Pacific Railway Commission*,[97] Justice Field, sitting as a Circuit Justice, expressed hostility to the developing regulatory state and the need for regulators to have access to documents generated by regulated businesses.[98] The Justice held that Article III prohibited Congress from authorizing a federal court to enforce ex parte an administrative subpoena issued by a federal agency investigating a railroad's allegedly improper business practices.[99] The Supreme Court soon marginalized Justice Field's holding, ruling squarely that Congress *could* authorize federal courts to enforce agency subpoenas ex parte.[100] However, Justice Field's language has continued to sow uncertainty on the relationship between federal judicial power and ex parte proceedings.

In ruling that Article III barred federal courts from enforcing agency subpoenas, Justice Field also seemed motivated by a concern voiced in the English case of *Entick v. Carrington* and by the Supreme Court in *Boyd v. United States*[101] on the sacrosanct nature of papers.[102] However, Justice Field's concern seemed misplaced in the context of

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92 *See, e.g.*, Finberg v. Sullivan, 634 F.2d 50, 65 (3d Cir. 1980) (Aldisert, J., dissenting) (noting the difficulties presented by "the lack of sufficiently adverse parties" in the context of attachment execution procedures).

93 *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014) (noting that statutory interpretation should address both the particular context in which Congress uses language and the broader context of the statute); *see also* King v. Burwell, 135 S. Ct. 2480, 2489–90 (2015) (upholding administrative interpretation of health insurance "exchange" on ground that this reading was consistent with underlying statutory plan).

94 *See* United States v. Windsor, 133 S. Ct. 2675, 2686–87 (2013) (adjudicating challenge to DOMA despite government's agreement with merits of challenge).

95 *See, e.g.*, Mondale et al., *supra* note 2, at 2276 (arguing that FISC's review of intelligence collection procedures under section 702 is "[b]ulk adjudication . . . foreign to Article III courts").

96 Pfander and Birk do. *See* Pfander & Birk, *supra* note 2, at 1421 (criticizing Justice Field's opinion as providing an incomplete view of federal courts' historical practice).

97 32 F. 241 (C.C.N.D. Cal. 1887).

98 *Id.* at 253–54.

99 *Id.* at 258–59.

100 *See* Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 476–77 (1894).

101 116 U.S. 616 (1886).

102 *See In re Pac. Ry. Comm'n*, 32 F. at 250–51 (noting that "[o]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of

agency efforts to obtain documents relevant to conduct of a regulated corporation. *Entick* and the other English cases stemmed from substantive revulsion at general warrants' chilling of speech that still resonates today.[103] In contrast, Justice Field's opinion in *Pacific Railway Commission* flowed from an outmoded resistance to the power of Congress to establish agencies to regulate interstate commerce and the discretion of those agencies to adopt procedures and rules of evidence that were less formal than those used by courts.[104] Nevertheless, Justice Field's language regarding Article III has continued to spur debate.

The principal questions have focused on the breadth of Justice Field's language identifying the presence of adverse parties as a condition for the exercise of federal judicial power. In defining the claims cognizable in federal courts, Justice Field referred to the "claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[105] While Justice Field's use of the term "litigants" could refer either to adverse parties in a single case or to a series of ex parte litigants in unrelated matters, the Justice's effort to clarify his meaning spurred further questions.

Justice Field explained that the term "case" in Article III "implies the existence of present *or possible* adverse parties whose contentions are submitted to the court for adjudication."[106] This language has momentous implications for proceedings conducted ex parte. A broad insistence on actual adverse parties, coupled with a narrow definition of the class of "possible" adverse parties, would rule out most ex parte proceedings. On the other hand, a more generous construction of "possible" adverse parties would leave many ex parte proceedings undisturbed, since many, such as warrant applications, entail possible adverse parties—e.g., warrant requests align the government against the interests of an absent, but "possible" adverse party: the proposed target of surveillance.

Justice Field also worried about another issue that was not germane to the case before him, but that triggered concern by the Justices

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personal security, [including] . . . exemption of his private affairs, books, and papers from the inspection and scrutiny of others").

103 *See* Stuntz, *supra* note 57, at 393–95.

104 *See In re Pac. Ry. Comm'n*, 32 F. at 257 (criticizing agency's view that it was not bound by rules of evidence and could receive "information of every character," including hearsay).

105 *Id.* at 255.

106 *Id.* (emphasis added).

of the Supreme Court in the Founding Era: the finality of federal court judgments.[107] The case law defines finality broadly: a "final" decision is one not subject to revision by an executive source.[108] Justice Field, in holding that a federal court could not enforce the subpoena issued by the agency, cited the facts of a Founding Era decision, *Hayburn's Case*.[109] The statutory scheme that triggered questions by a majority of Justices in *Hayburn's Case* involved a mere judicial *recommendation* of pension eligibility, which the executive branch was free to reject.[110] Although the pension scheme also involved an ex parte determination, the finality concern seems far more integral to the Justices' rationale for doubting the scheme's validity under Article III.[111]

Perhaps Justice Field believed that a finality problem existed because the railroad regulatory agency, having had the federal court find its subpoena lawful, could at any time *withdraw* its subpoena request. However, this possibility does not affect the finality of the court's judgment. In many situations, a litigant who seeks a remedy and obtains it from a court can subsequently withdraw or modify that application. That is certainly true in the case of warrants. While a court can approve a warrant, it is up to the government to follow through with the surveillance that the court approved. The need to follow through does not affect the finality of a court's review of the initial warrant request, in which the court decides only that the law *permits* the surveillance. Judicial review of either a subpoena or a warrant request would raise finality concerns under *Hayburn's Case* only if law enforcement authorities could override a judicial *denial*. In situations short of this scenario, a judicial finding is still final for purposes of Article III.[112]

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107 *See id.* at 258 (citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).

108 *See, e.g., id.* at 258.

109 2 U.S. (2 Dall.) 409 (1792); *see In re Pac. Ry. Comm'n*, 32 F. at 258 (citing *Hayburn's Case*, 2 U.S. 409).

110 *See* Pfander & Birk, *supra* note 2, at 1426; *see also* United States v. Ferreira, 54 U.S. (13 How.) 40, 51–52 (1851) (ruling that Court lacked power under Article III to make recommendation to executive branch regarding claims brought by Spanish nationals allegedly injured by U.S. Army operations in Florida).

111 *See* Pfander & Birk, *supra* note 2, at 1431–32.

112 *Id.* at 1461 (noting that judicial approval of extradition is a final judgment, even though executive branch retains the leeway to decide not to extradite (citing DeSilva v. DiLeonardi, 181 F.3d 865, 870 (7th Cir. 1999))); *cf.* Tutun v. United States, 270 U.S. 568, 576, 578 (1926) (holding that ex parte grant of naturalization petition was final for Article III purposes, even though government could seek to vacate citizenship certificate if certificate was obtained through fraud or other illegal conduct).

Today, ex parte proceedings occur in relatively self-contained realms, such as warrant requests or applications for civil remedies such as attachment. Typically, those realms involve fact-specific situations, such as the activities of a particular proposed subject of surveillance. Most cases involving broader legal questions feature adverse parties.[113] However, there are exceptions. For example, in *United States v. Windsor*,[114] the Supreme Court, in an opinion by Justice Kennedy, struck down the federal Defense of Marriage Act ("DOMA"), even though the Obama Administration's decision not to defend DOMA arguably eliminated the adverse party that Justice Field would have viewed as central.[115] Justice Kennedy countered that while adverse parties were customary, their presence was a "prudential" feature that promoted "judicial self-governance," not a rigid Article III requirement.[116] On this view, adverse parties help ensure that cases turned on legal and factual issues, not policy disputes best left to the political branches. However, the hardship and inefficiency of leaving DOMA's constitutionality for another day seemed to outweigh these concerns in *Windsor*. In reaching this decision, the Court was bolstered by the presence of a vigorous amicus curiae that argued for upholding DOMA, providing the "sharp . . . presentation of the issues" that adverse parties typically offer.[117]

If another source, such as an amicus, provides the court with an opposing view, an actual adverse party adds little to the litigation equation. A party's specific factual circumstances often play no role in the resolution of broad legal questions. In administrative law, for ex-

113 Advisory opinions trigger Article III issues because they ensnare the courts in addressing hypothetical questions rather than concrete disputes. *See* Muskrat v. United States, 219 U.S. 346, 353–55 (1911). However, the Court has ruled that declaratory judgment actions, which merely flip the ordinary order of parties commencing a lawsuit, possess the adversity that Article III requires. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (noting that Article III "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts" (quoting Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249, 264 (1933))).

114 133 S. Ct. 2675 (2013).

115 *Id.* at 2680, 2695–96.

116 *Id.* at 2685 (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)); *cf.* Bradford C. Mank, *Does* United States v. Windsor *(the DOMA Case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1, 8 (2014) (suggesting that *Windsor* will "pave the way for increased congressional participation" in cases where the executive branch agrees with a party challenging the statute that a statute is unconstitutional); Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 74 (2014) (describing *Windsor*'s treatment of absence of adverse parties as a "sharp break with prior precedent").

117 *Windsor*, 133 S. Ct. at 2688.

ample, courts regularly hear challenges to agency rules and policies. Those challenges address whether the agency's rules and policies conform to the agency's governing statute and to the federal Administrative Procedure Act.[118] Frequently, the party challenging administrative rules or policies is an umbrella group, such as an industry trade association, whose interests coincide with a broad cross section of businesses in the industry that the agency regulates.[119] Beyond this coincidence of interests, the individual factual circumstances of the trade association do not figure in the litigation, which proceeds on a far higher level of abstraction.[120] The breadth of the issues presented in the case does not undercut a reviewing court's exercise of federal judicial power under Article III. To that extent, criticism of the FISC's role under the FAA as too general[121] is misplaced. Admittedly, it is rare to decide such broad questions ex parte. However, it is commonplace to decide such matters through court review of agency rules, where the individual factual circumstances of the litigants are largely irrelevant to adjudication.

II. ENACTING AND AMENDING FISA: THE ARTICLE III DEBATE

With this history of ex parte remedies in mind, we can now turn to the history of FISA. Congress enacted FISA in 1978 as a framework with hybrid purposes that echoed the rationale for ex parte factfinding on warrant requests.[122] FISA's framework permitted the government to uncover data linked to the fluid realm of foreign intelligence. By establishing the FISC, Congress also endeavored to deter the government from unilaterally expanding the keyhole of foreign intelligence into an open window on all domestic communications.

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118 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015). *See generally* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015) (analyzing Chief Justice Roberts's approach to discerning Congress's plan regarding health insurance exchanges in *King v. Burwell*, and contrasting that approach with textualism associated with the late Justice Antonin Scalia and standard administrative law's deference to agency rules).

119 *See, e.g.*, Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 39 (1983) (action brought by automobile insurance companies for review of an order the National Highway Traffic Safety Administration rescinding crash protection requirements of a federal motor vehicle safety standard).

120 *See* Vladeck, *supra* note 2, at 1178–79.

121 *See, e.g.*, Mondale et al., *supra* note 2, at 2254.

122 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered titles of U.S.C.).

From the start, FISA was an effort to fashion structural remedies for executive branch abuses documented in the U.S. Senate Church Committee Report,[123] such as the warrantless surveillance of domestic opponents.[124] FISA followed the Supreme Court's decision in *Keith* holding that warrantless government surveillance of supposed domestic security threats violated the Fourth Amendment.[125] In enacting FISA, Congress took up Justice Powell's invitation in *Keith* to have Congress act.[126] Central to the architecture that Congress established was the judicial role suggested by Justice Powell, refined by Congress into establishment of the FISC.[127] Congress made clear that the independent check provided by the FISC was integral to the boundaries that FISA placed on executive discretion. This check would curb the warrantless surveillance that the Court had struck down in *Keith*, as well as the other abuses detailed in the Church Committee report.

The original FISA debate featured arguments about the necessity of structural reform that continue to resonate today. One camp asserted that the executive branch abuses documented in the Church Committee Report were reflective of a particular time and place, and not representative of future executive branch performance. In the future, according to this camp, the executive branch would self-correct due to increased legislative, media, and public scrutiny. An able witness advocating for this position before Congress, former Acting Attorney General Laurence Silberman (later Chief Judge of the FISA Court of Review ("FISCR")) asserted that structural change was not

123 *See* FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (1976).

124 *See* DONOHUE, *supra* note 4, at 9–12; FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 53–54 (2007); Zachary K. Goldman, *The Emergence of Intelligence Governance*, *in* GLOBAL INTELLIGENCE OVERSIGHT: GOVERNING SECURITY IN THE TWENTY-FIRST CENTURY 207, 209–13 (Zachary K. Goldman & Samuel James Rascoff eds., 2016); Mondale et al., *supra* note 2, at 2259–62. Executive unilateralism on surveillance dates back to the administration of Franklin D. Roosevelt. *See generally* Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023 (2008).

125 United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 321 (1972).

126 *See id.* at 322–24 (suggesting in dicta that questions about national security surveillance could go to a "specially designated court" and that the court's review could be governed "in accordance with such reasonable standards as the Congress may prescribe"); *see also Subcommittee Hearings*, *supra* note 41, at 30 (testimony of John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel) (noting that "the Supreme Court has indicated that Congress might fashion a warrant procedure for domestic intelligence," and also citing D.C. Circuit's decision suggesting warrant requirement even for surveillance of foreign embassies in United States, *Zweibon v. Mitchell*, 516 F.2d 594, 656–57, 656 n.205 (D.C. Cir. 1975)).

127 *See* S. REP. NO. 95-604, at 5 (1977) (explaining the FISC's function in adjudicating warrant requests targeting a "foreign power or an agent of a foreign power").

necessary.[128] While Silberman acknowledged that the executive branch had overreached in the policies that led to the *Keith* decision, he claimed that the publicity attending disclosure of these abuses would obviate the risk of their recurrence.[129]

Silberman also warned of potential Article III problems with a court that would review applications for surveillance focused on the acquisition of foreign intelligence, rather than the investigation of crime. According to Silberman, issuance of warrants in ordinary criminal cases was compatible with Article III because warrants were "ancillary" to a criminal prosecution with two adverse parties: the government and the criminal defendant.[130] For Silberman, a judicial role would wade into the watery realm of the "traditionally prohibited advisory opinion,"[131] immerse the courts in matters beyond their power, and threaten the president's prerogatives in foreign affairs.[132]

On the other side, civil liberties advocates did not expressly discuss Article III concerns, but believed that the proposed legislation gave government too much power. Civil liberties advocates counseled against congressional authorization of investigations not squarely based on detecting actual crimes.[133] Urging that the proposed court retain a criminal law standard for the issuance of warrants, civil liberties advocates criticized any attempt to move beyond that standard.[134] Indeed, in remarkably frank testimony, then–Attorney General Griffin Bell, who had inveighed against warrantless wiretapping as a federal district judge, informed the House committee that then–Vice President Walter Mondale also wished to retain a criminal law stan-

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128 *See Subcommittee Hearings*, *supra* note 41, at 232 (suggesting that statutory reform designed to enhance disclosure to Congress would suffice to address abuses, and contending that legislative branch, with its popular mandate to "stand for the people," would protect public interest more effectively than "lifetime tenured judges").

129 *Id.* at 218. This argument presages arguments made today. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4–5 (2010). For a more subtle and multidimensional account of executive power that includes the courts, see JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012).

130 *See Subcommittee Hearings*, *supra* note 41, at 223–24; Vladeck, *supra* note 2, at 1167–68 (discussing testimony).

131 *See Subcommittee Hearings*, *supra* note 41, at 224.

132 As Chief Judge of the FISCR, Silberman conceded that subsequent Supreme Court decisions had limited the force of his Article III concerns with the original FISA. *See In re* Sealed Case, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (discounting Article III objections).

133 *See Subcommittee Hearings*, *supra* note 41, at 297–300 (letter from George M. Hasen, Chairman, Committee on Civil Rights, Association of the Bar of the City of New York).

134 *See id.*

dard, although the Attorney General favored a more flexible approach.[135]

Another influential voice, former Watergate Deputy Independent Prosecutor Philip Lacovara, testified for the compromise embodied in the bill. Lacovara had authored a widely read law review article that both criticized executive overreaching and claimed that courts could issue warrants to investigate foreign intelligence matters such as the activities of foreign diplomats in the United States, even absent a showing of probable cause that a crime had been committed.[136] For Lacovara, the federal judicial power, configured as the FISC in FISA's scheme, was a check respected by the legislature, the executive branch, and the public.[137] The role of the FISC was both a meaningful constraint on executive power and "symbolic" of the surveillance framework's legitimacy.[138]

The Department of Justice's Office of Legal Counsel ("OLC") asserted that the crux of the Article III issue was the presence of "adversity in fact."[139] Adversity in fact entailed intrusions on a target's privacy, whether or not the target knew of the government's efforts.[140] This position leaned heavily on the issuance of warrants and the Supreme Court's earlier decision in *United States v. Pope*,[141] noting that the lack of an adverse party at a particular stage in proceedings was not fatal under Article III if there were possible adverse parties at other phases of the proceedings.[142] The OLC's reasoning amply cov-

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135 *See id.* at 33, 35 (testimony of Attorney General Griffin Bell, noting that he and Vice President Mondale held "different views," with Vice President Mondale preferring a "straight criminal standard" that would condition issuance of a warrant on the government showing probable cause that a crime was being committed or about to be committed, while Attorney General Bell believed it was more appropriate to link surveillance to a showing that a proposed target was an agent of a foreign power).

136 *See* Philip A. Lacovara, *Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV*, 40 LAW & CONTEMP. PROBS. 106, 107–09, 123–24 (1976).

137 *See Subcommittee Hearings*, *supra* note 41, at 228 (arguing that judicial role would persuade public that "foreign intelligence collection was being more responsibly administered" than it had been in the past).

138 *See id.* at 228, 230–31.

139 *Id.* at 28 (quoting 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3530, at 165 (1975)).

140 *See id.*

141 323 U.S. 1, 11 (1944); *cf.* Stump v. Sparkman, 435 U.S. 349, 357–58 (1978) (upholding judicial immunity regarding ex parte sterilization on grounds that state law did not bar exercise of jurisdiction over ex parte order); *In re* Penn Cent. Transp. Co., 384 F. Supp. 895, 911 (Reg'l Rail Reorg. Ct. 1974) (upholding statutory procedure for railroad reorganization despite lack of requirement of adversarial pleadings).

142 *See Subcommittee Hearings*, *supra* note 41, at 28–29.

ered traditional FISA.[143] However, the OLC's focus on individual targets may not justify the more general judicial review of targeting procedures contemplated by the FAA.

Traditional FISA was joined in 2008 by the FAA, which responded to another epochal executive overreach: the Terrorist Surveillance Program ("TSP"). After 9/11, the Bush administration unilaterally directed the NSA and other agencies, collaborating with the private sector, to collect both certain content information from communications made or received by U.S. persons and metadata, such as the numbers called.[144] The Bush administration ran the TSP outside FISA's constraints, such as FISC approval.[145] After *New York Times* reporters disclosed the existence of the TSP, the Justice Department persuaded the FISC to permit a modified form of the TSP.[146] When at least one FISC judge declined to reauthorize the program, Congress, in a bipartisan effort including then-Senator Barack Obama, first passed the Protect America Act[147] in 2007, and followed that with the FAA in 2008.[148]

The role of the FISC under the FAA triggers Article III questions more acute than those presented by the original FISA legislation. Under section 702 of the FAA, the government may target the contents of communications in which one participant is a non-U.S. person reasonably believed to be located abroad when the surveillance will result in the collection of foreign intelligence information.[149] To comply with section 702, the government submits a certification to the

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143 Courts found on these grounds that traditional FISA complied with Article III. *See* United States v. Megahey, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982).

144 *See* Banks, *supra* note 9, at 1641–42.

145 *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 181 (2007) (discussing stance of Bush administration officials such as Vice President Dick Cheney and his counsel, David Addington, in the period following 9/11, noting that these officials "dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations"); Banks, *supra* note 9, at 1641–42.

146 *See* Banks, *supra* note 9, at 1641–43.

147 Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (repealed 2008).

148 *See* DONOHUE, *supra* note 4, at 31–38; Banks, *supra* note 9, at 1643–45. *See generally* Joel Brenner, *FISA and Foreign Intelligence: Getting the History Straight*, 51 New Eng. L. Rev. (forthcoming 2017) (reviewing DONOHUE, *supra* note 4), http://joelbrenner.com/fisa-and-foreign-intelligence-getting-the-history-straight/ (text at nn.50–66).

149 50 U.S.C. § 1881a(a) (2012). Portions of the discussion in this subsection originated in earlier articles. *See* Margulies, *supra* note 35, at 17–20; Peter Margulies, *Reauthorizing the FISA Amendments Act: A Blueprint for Enhancing Privacy Protections and Preserving Foreign Intelligence Capabilities*, 12 J. BUS. & TECH. L. 23, 28 (2016); Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137, 2140–41 (2014).

FISC describing its targeting procedures, as well as minimization measures that reduce the likelihood that analysts will use or retain purely domestic communications.[150] The FISC has jurisdiction to review these procedures.[151] However, unlike either ordinary warrants, where courts find probable cause regarding a crime, or traditional FISA, in which the FISC finds probable cause of a link to a foreign power, under section 702, the FISC does not review individual targets of surveillance.[152] The absence from the certification process of both individual target reviews *and* actual adverse parties distinguishes the FISC's role under the FAA.[153]

Under section 702, foreign intelligence information that the government may acquire includes data related to national security, such as information concerning an "actual or potential attack or other grave hostile acts [by] a foreign power or an agent of a foreign power."[154] Foreign intelligence information also comprises information relating to possible sabotage[155] and clandestine foreign "intelligence activities."[156] Another prong of the definition is broader, encompassing information relating to the "the conduct of the foreign affairs of the United States."[157]

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150 *See* 50 U.S.C. §§ 1801(h), 1881a(g). This Article, following common usage in U.S. national security law, defines U.S. persons as U.S. citizens and lawful permanent residents. *See id.* § 1801(i). Similar protections cover persons physically located within the United States. *See id.* § 1881a(b). The Supreme Court has held that the Fourth Amendment's Warrant Clause does not protect non-U.S. persons (i.e., individuals who are not citizens or lawful permanent residents) located outside the territorial United States. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266, 274–75 (1990).

151 50 U.S.C. § 1881a(i)(1)(A).

152 PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 135–36 (2013) [hereinafter PRESIDENT'S REVIEW GROUP].

153 *Cf.* Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?*, LAWFARE (July 30, 2014, 4:26 PM), https://www.lawfareblog.com/article-iii-problems-appellate-review-leahy-bill (suggesting that statutory changes setting up certification procedure for review of FISC decisions by FISCR and Supreme Court could run afoul of Article III).

154 50 U.S.C. § 1801(e)(1)(A).

155 *Id.* § 1801(e)(1)(B).

156 *Id.* § 1801(e)(1)(C).

157 *Id.* § 1801(e)(2)(B). The United States also conducts surveillance of exclusively foreign communications under Executive Order 12,333 ("EO 12,333"). *See* Exec. Order No. 12,333, 3 C.F.R. 200 §§ 2.1–2.3 (1981). After Edward Snowden's disclosures, President Obama issued Presidential Policy Directive 28 ("PPD-28"), which provided greater transparency and ultimately yielded detailed procedures governing foreign surveillance. *See* Press Release, Office of the Press Sec'y, *Presidential Policy Directive—Signals Intelligence Activities* (Jan. 17, 2014), https://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities; NSA, PPD-28 SECTION 4 PROCEDURES: USSID SP0018: SUPPLEMENTAL PROCEDURES FOR THE COLLECTION, PROCESSING, RETENTION, AND DISSEMINATION OF SIGNALS INTELLIGENCE INFORMATION AND DATA CONTAINING PERSONAL INFORMATION OF NON-UNITED

Commentators have highlighted the effectiveness of the section 702 program. For example, the Privacy and Civil Liberties Oversight Board ("PCLOB") recognized that section 702 had generated information about the structure, operation, and plans of terrorist groups.[158] The President's Review Group adopted the same position.[159] However, as section 702 heads toward its sunset in 2017,[160] civil liberties advocates and scholars continue to question the statute's costs to privacy[161] and its compliance with Article III.[162]

STATES PERSONS 7 nn.1–2 (2015), https://fas.org/irp/nsa/nsa-ppd-28.pdf; *see also* Peter Margulies, *Surveillance by Algorithm: The NSA, Computerized Intelligence Collection, and Human Rights*, 68 FLA. L. REV. 1045, 1059–60 (2016) (discussing EO 12,333). In 2015, the Court of Justice of the European Union ("CJEU") struck down Safe Harbor, a U.S.-European Union ("EU") privacy agreement governing trans-Atlantic corporate data transfers, on grounds that U.S. surveillance under both section 702 and EO 12,333 violated EU privacy rules. *See* Case C-362/14, Schrems v. Data Prot. Comm'r (Oct. 6, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0362 (document at 25–26). Subsequently, the United States and EU approved a new agreement, Privacy Shield, which sought to respond to the CJEU's decision. *See* European Comm'n, *Commission Implementing Decision of 12.7.2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield* 4 (Dec. 7, 2016). Commentators have critiqued the CJEU's *Schrems* decision on the grounds that it imposed unworkable rules and vastly understated current constraints on U.S. intelligence collection, including those provided under section 702. *See* Margulies, *supra*; Christopher Kuner, *Reality and Illusion in EU Data Transfer Regulation Post* Schrems 11 (Univ. of Cambridge, Paper No. 14/2016, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732346; Peter Swire, *US Surveillance Law, Safe Harbor, and Reforms Since 2013* 10–11 (Ga. Tech. Scheller Coll. of Bus., Research Paper No. 36, 2015), https://fpf.org/wp-content/uploads/2015/12/White-Paper-Swire-US-EU-Surveillance.pdf.

158 PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 107 (2014) [hereinafter PCLOB § 702 REPORT], https://www.pclob.gov/library/702-Report.pdf.

159 *See* PRESIDENT'S REVIEW GROUP, *supra* note 152, at 145 (noting that in great majority of counterterrorism investigations since 2007 "that resulted in the prevention of terrorist attacks[,] . . . information obtained under section 702 contributed . . . to the success of the investigation"); *cf.* Shedd et al., *supra* note 9, at 1–2 (praising effectiveness of program); Swire, *supra* note 157, at 2 (same). *But see* DONOHUE, *supra* note 4, at 38 (taking more skeptical view of intelligence programs' effectiveness).

160 *Cf.* Mieke Eoyang, *Beyond Privacy and Security: The Role of the Telecommunications Industry in Electronic Surveillance* 15–16 (Hoover Inst., Aegis Series Paper No. 1603, 2016), http://www.hoover.org/sites/default/files/research/docs/eoyang_privacysecurity_final_v3_digital.pdf (arguing that government should delegate more screening of section 702 data to private sector to minimize government intrusions on U.S. persons' private information). *See generally* David S. Kris, *Trends and Predictions in Foreign Intelligence Surveillance: The FAA and Beyond* (Hoover Inst., Aegis Series Paper No. 1601, 2016), http://www.hoover.org/sites/default/files/research/docs/kris_trendspredictions_final_v4_digital.pdf (discussing cutting-edge questions Congress should address in FAA reauthorization).

161 *See* DONOHUE, *supra* note 4, at 68–72 (noting privacy issues with section 702); *cf.* Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SEC. J. 112, 113 (2015) (suggesting that U.S. intelligence community lawyers and policy-

III. THE FAA AND ARTICLE III: CONGRUENCE OR CONFLICT?

The most convincing answer to the Article III questions raised by section 702's critics flows from application of criteria governing the congruency of the FISC's role with Article III.[163] The congruency inquiry, first announced in the context of reconciling Article III and the Appointments Clause, also offers guidance on other tasks that Congress has assigned to federal courts.[164] In each context, congruency turns on: (1) the operational values that Congress sought to optimize in volatile areas such as national security, foreign affairs, and emerging technology; (2) the structural values served by the statute; (3) the task's consistency with federal courts' history and practice; (4) the availability of alternatives; and (5) limits on the role that Congress asked courts to play. The first two Sections below broadly address the themes of structure and operational values such as speed, secrecy, and accuracy. The following Sections apply the factors described above to the FISC's role under the FAA.

A. Congruence and Constitutional Structure

The congruency test is best described in *Morrison v. Olson*, in which the Supreme Court, in an opinion by Chief Justice Rehnquist, held that Article III did not bar Congress from lodging the power to appoint independent prosecutors in the D.C. Circuit.[165] *Morrison* noted that the Appointments Clause gives Congress the power to authorize federal courts to appoint inferior officers.[166] The question for the Court was whether having the D.C. Circuit appoint an independent counsel to investigate alleged misconduct by a senior executive branch official would be "incongruous," in light of the Article III role of the D.C. Circuit's judges.[167] The term "incongruous" generally means a relationship lacking harmony or fit,[168] given the attributes of one or both sides of the relationship. A relationship in which attributes operate at cross-purposes, or where an individual, thing, or entity

makers do not adequately incorporate costs to civil liberties into overall assessments of programs' value).

162 *See generally* Mondale et al., *supra* note 2; Strossen, *supra* note 2.

163 *See* Morrison v. Olson, 487 U.S. 654, 676 (1988) (citing *Ex parte* Siebold, 100 U.S. 371, 398 (1879)). Neither *Siebold* nor *Morrison* expressly articulates the indicia of congruence. This Part seeks to refine and distill the approach taken in these cases and more recent case law.

164 *See Morrison*, 487 U.S. at 676.

165 *Id.* at 677.

166 *Id.* at 673–74 (quoting U.S. CONST. art. II, § 2, cl. 2).

167 *Id.* at 676.

168 *See Incongruous*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/incongruous [https://perma.cc/Q3GM-3BLS] (last visited Apr. 30, 2017).

would be expected to do something not in keeping with its typical or traditional purpose, would be incongruous.[169] By the same token, a relationship in which attributes harmonized would meet the test of congruency that the *Morrison* Court identified.[170]

For Chief Justice Rehnquist, several factors were important. First was structure: Congress, the Chief Justice observed, acted to alleviate "conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers."[171] Chief Justice Rehnquist's understanding of this factor was doubtless informed by the backdrop of the independent counsel statute,[172] which Congress had enacted to prevent a repeat of the infamous Saturday Night Massacre in which then-President Nixon had fired the Watergate Special Prosecutor, former Solicitor General Archibald Cox.[173]

Chief Justice Rehnquist's analysis of the need to ensure independent investigations of alleged executive branch misconduct acknowledged that alternatives to judicial appointment risked the appearance of executive influence.[174] The clearest alternative was appointment of the independent counsel by senior executive branch officials, such as the Attorney General. However, the Saturday Night Massacre illustrated the perils of this option, at least when the president was as desperate to avoid investigation as Richard Nixon turned out to be. Chief Justice Rehnquist may have shared the view expressed by Justice Scalia in a memorable dissent that Congress's framework was unwise.[175] However, for Chief Justice Rehnquist, the structural rationale that Congress had embraced was worthy of deference.

In addition, Chief Justice Rehnquist considered the degree to which the D.C. Circuit's statutory appointment power interfered with Article III duties. Chief Justice Rehnquist noted that courts on occa-

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169 *See id.*

170 *See Morrison*, 487 U.S. at 676.

171 *Id.* at 677. The Watergate scandal was one of several catalysts for reform efforts of the 1970s. The warrantless political surveillance of that era led to the Court's holding in *Keith* that such government intrusions were unconstitutional. *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 321–23 (1972). Justice Powell, writing for the Court in *Keith*, saw federal courts' review of national security surveillance requests as a useful reform measure, and invited Congress to legislate on the subject. *Id.* at 323. Congress did so, just as it legislated on the judicial appointment of independent counsel to investigate the executive branch.

172 28 U.S.C. § 595 (2012). The U.S. Office of the Independent Counsel was eliminated in 1999 upon sunset of the underlying statute. *See id.* § 599.

173 *See generally* ELAINE W. STONE, THE GENESIS OF THE INDEPENDENT COUNSEL STATUTE (1999), https://www.cov.com/~/media/files/corporate/publications/1999/06/oid6591.pdf.

174 *See Morrison*, 487 U.S. at 677.

175 *See id.* at 700–03 (Scalia, J., dissenting) (asserting that the *Morrison* litigation stemmed from the criminalization of a political dispute between Congress and the executive branch).

sion made appointments on an ex parte or sua sponte (on the court's own motion) basis. For example, a court had the inherent power to appoint a special prosecutor to investigate and try lawyers for alleged contempt of court.[176] Courts can also appoint others close to the judicial process, including federal marshals, certain U.S. commissioners, and interim U.S. Attorneys.[177] In this sense, appointment of a special prosecutor was not a foreign or idiosyncratic task for an Article III court. Moreover, the statute ensured that federal judges remained impartial by barring any judge who had participated in the appointment from participating in any judicial proceeding involving the independent counsel.[178]

At the same time, the Court relied on the limited reach of the statute at issue. The unspoken assumption of the Court was that serious executive misconduct was not a daily occurrence, and therefore appointment of independent counsels pursuant to this statutory procedure would be relatively rare. Chief Justice Rehnquist expressly noted that the independent counsel would perform only "limited duties" tied to the investigation and prosecution of a limited range of federal crimes.[179] In appointing an officer with such a limited portfolio, the D.C. Circuit would not get involved, even indirectly, in matters of policy properly left to the discretion of senior executive branch officials.[180] These practical limits also influenced the Court's view that Congress's addition to the D.C. Circuit's role was constitutionally sound.

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176 *Id.* at 676 (majority opinion) (citing Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987)).

177 *Id.* at 676.

178 *Id.* at 683–84. In this portion of his opinion, Chief Justice Rehnquist cited an opinion by Justice O'Connor that had upheld a congressional scheme for efficient resolution of disputes between commodities brokers and their customers that allowed the Commodity Futures Trading Commission to hear common law counterclaims that would ordinarily be heard in state court or by an Article III tribunal. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841–43 (1986). Rejecting reliance on "formalistic and unbending rules," *id.* at 851, Justice O'Connor noted the limited nature of the agency's role, suggesting that those limits demonstrated that the statute did not "impermissibly intrude on the province of the judiciary," *id.* at 851–52. The Supreme Court has also held that the federal courts have rulemaking authority over functions of the judicial branch. *See* Mistretta v. United States, 488 U.S. 361, 386–91 (1989) (upholding participation of federal judges on sentencing commission).

179 *Morrison*, 487 U.S. at 671.

180 *Id.* at 671–72.

B. *Deference to Operational Values: National Security, Foreign Affairs, and Emerging Technologies*

Case law, including two cases from the October 2015 term, illustrates that the Court generally accords Congress a measure of deference in the interaction between Article III and federal courts' activities. That deference seems broadest when the subject concerns national security and foreign affairs or changes in technology. Each of these areas is dynamic, entailing frequent shifts in alignment and governing paradigms. They "arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."[181] In each of these areas, Congress has better access than the courts to information necessary to make informed decisions.[182] An unduly literalist or mechanical approach by courts to Congress's powers under Article I or limits imposed by Article III may result in a vision of governance that is "strained and impracticable,"[183] and thus antithetical to the Framer's scheme.

To be sure, that deference is not absolute, since Congress's immersion in politics may lead it to discount courts' distinctive role and commandeer the courts for tasks that overtly or more subtly erode judicial independence.[184] However, some measure of deference regarding the contours of Article III is appropriate in the areas of national security, foreign affairs, and changing technology.[185] When, as in the case of the FISC's role under section 702, Congress has relied on the courts to supply a structural check on executive power that harmonizes well with courts' traditional functions, the case for deference is that much stronger.

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181 Holder v. Humanitarian Law Project, 561 U.S. 1, 34, 39 (2010) (holding that statute that barred material support of foreign terrorist groups was consistent with the First Amendment).

182 *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

183 *Ex parte* Siebold, 100 U.S. 371, 396 (1879); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government").

184 *See* Stern v. Marshall, 564 U.S. 462, 502–03 (2011) (citing Reid v. Covert, 354 U.S. 1, 39 (1957)) (cautioning that even "[s]light encroachments" can herald significant threats to judicial independence). Courts must also be vigilant regarding the Constitution's protections for access to the courts. *See* Boumediene v. Bush, 553 U.S. 723, 795 (2008) (striking down statute that precluded access to habeas corpus for Guantanamo detainees).

185 *See* Chesney, *supra* note 182, at 1383 n.84 ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981))).

In one recent case, *Bank Markazi v. Peterson*, the Court rejected an Article III challenge to a statute that designated particular property as subject to attachment or execution by victims of state-sponsored terrorism.[186] The property was owned by Iran, and the legislation aimed to send a strong message to Iran and other state sponsors of terror that such a stance was at odds with fundamental norms.[187] The statute also sought to provide justice to the victims and their families, who had often been frustrated by the difficulty of finding assets with which to satisfy the judgments against Iran that they had already obtained.[188] The defendants claimed that Congress, by designating particular assets as subject to judicial remedies sought by the plaintiffs, had intruded on the prerogatives of the judicial branch under Article III.[189]

The Article III objection here did not turn on the absence of adverse parties: the case featured plaintiffs—the surviving relatives of victims of terrorism—who had sued entities that the courts had found to be responsible for those attacks.[190] However, the very *specificity* of Congress's directive to the courts to consider particular assets as subject to execution of the judgments that the plaintiffs had obtained[191] nicely bookends the *generality* of the FISC's mandate under the FAA. The former is not typical of Congress's guidance to courts on remedies, while the latter is not typical of courts' role in matters such as warrant requests that do not feature actual adverse parties asserting opposing positions. In this sense, *Bank Markazi* is a useful template for the questions at issue under section 702.

Justice Ginsburg, writing for the Court, noted that the political branches had long had a "controlling role" in foreign affairs and that deference was therefore appropriate to Congress's exercise of power.[192] Justice Ginsburg noted that Congress and the President had repeatedly "exercised control" over the resolution of claims against other nations and the judicial treatment of foreign assets.[193] For exam-

186 *See* 22 U.S.C. § 8772 (2012); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016).

187 *See* 22 U.S.C. § 8772(a)(2).

188 *See Bank Markazi*, 136 S. Ct. at 1316–17.

189 *See id.* at 1321.

190 *See id.* at 1319.

191 The statute did not *require* courts to issue any particular remedy. It permitted other parties to demonstrate that they, not Iran, were the owners of the assets. *See id.* at 1325. It also permitted other parties, including creditors of Iran, to prove that they had a legally superior claim to the assets. *See id.* at 1325 & n.20 (citing district court's view that statute "left it 'plenty . . . to adjudicate'").

192 *Id.* at 1328.

193 *Id.*

ple, in *Dames & Moore v. Regan*,[194] the Court had upheld presidential action, taken against a backdrop of legislative acquiescence, to settle particular claims by U.S. individuals or entities against Iran.[195] Congress has also over time granted the President authority to block specific assets linked to rogue states or subject those assets to judicial remedies.[196]

Moreover, as Justice Ginsburg noted and our earlier discussion of attachments made clear, remedies such as attachment are inherently *not* final judgments for Article III purposes. Instead, as Justice Frankfurter observed, attachment is *collateral* to a judgment, providing the means for ensuring that the judgment can be satisfied.[197] A collateral remedy, like a consent decree,[198] is always modifiable. In the case of a collateral remedy, additional investigation by the parties or changes in the law can always reveal more assets to satisfy an outstanding judgment.

By identifying such assets, Congress acted in a fashion entirely consistent with the purpose of attachment and similar remedies: preserving the integrity and efficacy of the judicial process by ensuring that assets are available to pay a party that prevails on the merits. Congress made the judgment that identifying specific assets was necessary to achieve this goal in the daunting arena of litigation against state sponsors of terrorism, who are not known for their transparency or compliance with fair accounting principles.[199] The Court's deference merely recognized Congress's superior competence to make this policy judgment.[200]

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194 453 U.S. 654 (1981).

195 *Id.* at 688.

196 *See id.* at 673, 681.

197 *See* Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A., 339 U.S. 684, 688–89 (1950).

198 *See* Horne v. Flores, 557 U.S. 433, 447 (2009).

199 *See* Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (observing that "terrorist organizations can hardly be counted on to keep careful bookkeeping records"); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (remarking that "terrorist organizations do not maintain open books").

200 Chief Justice Roberts, who dissented, was troubled by Congress's focus on a particular case, viewing this as a threat to judicial independence. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (Roberts, C.J., dissenting) (noting that Article III "commits the power to decide cases to the Judiciary alone"). Chief Justice Roberts's overall concern was appropriate; congressional action with respect to every federal case (or even a small percentage of the total) would render the justice system both unfair and unworkable. Moreover, Chief Justice Roberts may have been particularly troubled by assertions at the oral argument by plaintiff's counsel Ted Olson (ironically, Olson decades earlier had challenged the independent counsel law upheld in *Morrison*) that "no limiting principle" could temper Congress's plenary authority. *See* Transcript

The importance of deference to Congress in matters of evolving technology or technological change was addressed, albeit less conclusively, in *Spokeo, Inc. v. Robins*.[201] *Spokeo* recognized that Congress has a role to play in fixing the precise boundaries of a crucial component under Article III: injury in fact.[202] According to Justice Alito, who wrote for the Court, the injury in fact test serves much the same purpose as the presumption favoring adverse parties: it ensures that courts will be considering a concrete legal or factual dispute amenable to judicial resolution, not a policy disagreement or camouflaged request for an advisory opinion.[203] To this end, the Court has repeatedly noted that to constitute injury in fact, an alleged harm had to be both "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'"[204]

Although *Spokeo* addressed provisions of the Fair Credit Reporting Act of 1970 ("FCRA"),[205] the tone and tenor of Justice Alito's opinion, as well as Justice Alito's prior discussions of search and seizure issues, suggested that technological change buttressed the case for deference to Congress. The second paragraph of Justice Alito's opinion situated the case in the realm of evolving technology, noting that Spokeo, the defendant firm accused of unfair credit reporting, runs a "'people search engine' . . . [that] conducts a computerized

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of Oral Argument at 42, Bank Merkazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 14-770); *cf. id.* (reporting Chief Justice Roberts's incredulity that once Congress acts, the Court's only role is to "sign on the dotted line"). However, before determining that Congress had intruded unduly on the courts' remedial discretion, Chief Justice Roberts could have given more weight to the inherently modifiable nature of attachment and other remedies, which Justice Frankfurter had discussed in *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950).

201 136 S. Ct. 1540 (2016).

202 *See id.* at 1549.

203 *See id.* at 1547.

204 *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). In *Spokeo*, Justice Alito asserted that the Court's precedents made a claim's concreteness and particularity, respectively, into *separate* elements. *See Spokeo*, 136 S. Ct. at 1548. Justice Alito justified the Court's remand to the Ninth Circuit on grounds that the circuit court had failed to parse concreteness and particularity separately in its analysis of injury in fact. *See id.* at 1550. In her dissent, Justice Ginsburg asserted that the case law relied on by Justice Alito had instead viewed concreteness and particularity as intermingled attributes, not separate inquiries. *See id.* at 1555 (Ginsburg, J., dissenting). Accordingly, Justice Ginsburg saw no need for a remand to the Ninth Circuit, and would have found that the plaintiff had established standing based on the particularity of his claim. *Id.* at 1556. The precise content of the Court's standing test is beyond the scope of this Article. Nevertheless, this Article's praise of deference derives support from Justice Alito's acknowledgment of Congress's role in identifying types of injuries that meet Article III minima. *See id.* at 1549–50 (majority opinion).

205 15 U.S.C. § 1681 (2012); *see Spokeo*, 136 S. Ct. at 1545.

search in a wide variety of databases and provides information about the subject of the search."[206] While Congress presumably did not foresee the development of the Internet when it enacted the FCRA in 1970, Justice Alito's analysis seemed to suggest that the ease of aggregating databases online highlighted the urgency of Congress's concerns.[207]

Against this backdrop of rapid technological change,[208] Justice Alito suggested that Article III contemplated a measure of deference to Congress in its assessment of whether individuals protected by a

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206 *Spokeo*, 136 S. Ct. at 1544; *see also id.* at 1546 (describing Spokeo as a corporation that "operates a Web site that allows users to search for information about other individuals").

207 Justice Alito has also suggested that legislatures merit a measure of deference when they address the impact of new technologies on Fourth Amendment searches and seizures. *See* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring in part and judgment) (urging that Congress act to regulate law enforcement's digital searches of suspects' smart phones, citing legislation enacted in 1968 to guide electronic surveillance such as wiretaps, and asserting that the Legislature was in the best position to balance technology's facilitation of "serious crimes" with its effect on "very sensitive privacy interests"); United States v. Jones, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring in judgment) (expressing wish that Congress would legislate procedures for law enforcement use of GPS to track criminal suspects, with an inferred argument for deference to the Legislature's ability to "gauge changing public attitudes, . . . draw detailed lines, and . . . balance privacy and public safety in a comprehensive way"). Circuit courts have also favored deference to Congress. *See* United States v. Carpenter, 819 F.3d 880, 889–90 (6th Cir. 2016) (finding that statutory standard for government access to suspect's cell-site locational information was consistent with Fourth Amendment, noting that "Congress has specifically legislated on the question before us today, and in doing so has struck the balance reflected in the Stored Communications Act"); ACLU v. Clapper, 785 F.3d 787, 824–25 (2d Cir. 2015) (declining to hold that Fourth Amendment would bar NSA program that collected call records from most U.S. landline telephones, suggesting that, "the legislative process has considerable advantages in developing knowledge about the far-reaching technological advances that render today's surveillance methods drastically different from what has existed in the past"). The Fourth Amendment context presents somewhat different questions than the Article III domain, since the Fourth Amendment's inclusion of the term "unreasonable" seems to leave room for the kind of societal consensus that legislation connotes. However, one can find language in the Article III case law that gestures toward a similarly pragmatic outlook. *See Ex parte* Siebold, 100 U.S. 371, 396 (1879) (warning courts not to adopt "strained and impracticable view of the nature and powers of the national government"). Scholars have presented mixed views on the interaction of the Fourth Amendment and statutes. For an argument that judicial deference to legislatures on searches is inappropriate, see Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1121 (2017); *cf.* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1874–75 (2016) (arguing, based on analogy to positive law governing interactions of private parties, that courts should not defer to statutes such as Stored Communications Act that impose standards lower than probable cause for government access to electronic communications). *See generally* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011) (advancing model of judicial response to technological change).

208 *Cf.* City of Ontario v. Quon, 560 U.S. 746, 759 (2010) (noting that courts "risk error by elaborating too fully on" Fourth Amendment rules amidst "[r]apid changes in the dynamics of communication and information transmission").

federal statute had alleged an injury that was "legally cognizable" under Article III.[209] Deference to Congress was appropriate, Justice Alito stated, regarding whether an intangible injury that did not involve direct or visible harm to the plaintiff's person or property possessed the concreteness necessary for an injury in fact.[210] Justice Alito noted that "both history and the judgment of Congress play important roles."[211] In addition, he asserted that Congress is "well positioned to identify intangible harms that meet minimum Article III requirements."[212] Congress's judgment on this score is therefore "instructive and important."[213] There are limits to Congress's role; Congress could not require courts to hear a case under the FCRA that entailed an allegation of a "bare procedural violation" unrelated to a harm actually suffered by the plaintiff, such as a credit reporting agency's failure to disclose its ultimate customer's identity to a seller of credit information.[214] However, within those limits, Congress was entitled to a measure of deference.

A deferential strand regarding Congress's exercise of Article I authority also runs through the cases on legislative establishment of tribunals that lack Article III's protections of judicial independence. In parsing Chief Justice Marshall's early approval of territorial courts whose judges lacked lifetime tenure where establishment of Article III tribunals would be inefficient, Justice Harlan urged avoidance of "dogmatic" and "doctrinaire" approaches, counseled "flexibility," and asserted that Chief Justice Marshall was "conscious as ever of his responsibility to see the Constitution work."[215] In *Commodity Futures*

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209 *See Spokeo*, 136 S. Ct. at 1549 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)).

210 *See id.*

211 *Id.*

212 *Id.*

213 *Id.*; *cf. Lujan*, 504 U.S. at 578; *id.* at 580 (Kennedy, J., concurring) (acknowledging that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy").

214 *See Spokeo*, 136 S. Ct. at 1549.

215 Glidden Co. v. Zdanok, 370 U.S. 530, 546–47 (1962). For scholarly arguments justifying flexibility for Congress in establishing non-Article III tribunals as long as Article III courts retain some authority over decisions rendered by such tribunals, see Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 266 (1990) (arguing for deference to Congress's Article I powers); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 992 (1988) (asserting that appellate review by Article III courts is sufficient); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 775–76 (2004) (arguing that bankruptcy courts and other tribunals that are adjuncts of Article III courts do not pose insurmountable Article III problems).

Trading Commission v. Schor,[216] the Court upheld a statute which permitted a federal administrative agency, the Commodity Futures Trading Commission ("CFTC"), to adjudicate state law counterclaims brought by broker/dealers against customers who had lodged complaints against those broker/dealers with the CFTC.[217] Justice O'Connor, writing for the Court, noted that the efficient resolution of disputes by the CFTC was essential to an "effective . . . regulatory scheme."[218] Here, too, deference had its limits: Justice O'Connor noted that the spectrum of claims that could be heard by the agency was narrow in scope.[219] The agency thus did not threaten a wholesale displacement of state or federal courts in the adjudication of traditional state law contract or property claims.[220]

C. *Operational Concerns and the FAA*

Addressing the FISC's role under the FAA entails consideration of both the national security and foreign affairs factors that influenced the Court in *Bank Markazi* and the impact of new technology that shaped Justice Alito's opinion in *Spokeo*. The speed and dynamic nature of risk in the Internet age drove Congress's decision to focus the FISC on review of government procedures, not individual instances of surveillance. That decision should receive a measure of deference.

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216 478 U.S. 833 (1986).

217 *Id.* at 857.

218 *Id.* at 855.

219 *See id.* at 856; *cf.* Stern v. Marshall, 564 U.S. 462, 500, 503 (2011) (citing absence of clear limits in striking down bankruptcy provision that permitted adjudication of tort claim).

220 The D.C. Circuit recently held that the conviction of a former aide to Osama bin Laden on conspiracy charges related to his role in preparations for the 9/11 attacks did not violate Article III. *See* Bahlul v. United States, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (per curiam). For scholarly commentary on the interaction of Article III and military tribunals, compare David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 74-75 (2005) (expressing skepticism about military commissions), Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 693–713 (same), and Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 965–66 (2015) (arguing that military commissions violate Article III if they venture beyond trial of specific recognized international law violations), with Geoffrey S. Corn & Chris Jenks, *A Military Justice Solution in Search of a Problem: A Response to Vladeck*, 104 GEO. L.J. ONLINE 29 (2015), https://georgetownlawjournal.org/articles/162/military-justice-solution-search/pdf (arguing that deference to Congress's judgments regarding military tribunal jurisdiction is consistent with Framers' vision, including values of fairness, discipline, and civilian control), and Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305 (2015) (recommending deference to Congress as long as underlying charge, overt acts listed in charging instrument, and proof at trial have reasonable relationship to international law).

The challenges faced by U.S. law enforcement and national security personnel overseas have led the Supreme Court to hold that the Fourth Amendment did not require a warrant for investigations overseas of persons without ties to the United States.[221] In *United States v. Verdugo-Urquidez*,[222] Chief Justice Rehnquist noted that "[s]ituations threatening to important American interests may arise halfway around the globe," requiring a swift and decisive U.S. response.[223] Requiring ex ante judicial approval of searches in every case would "plunge [U.S. officials] into a sea of uncertainty."[224] Chief Justice Rehnquist warned that requiring ex ante judicial approval would result in "significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[225] Justice Kennedy agreed that these considerations rendered a warrant requirement "impracticable and anomalous."[226]

The need for expeditious and effective action is most salient in responding to transnational threats to cybersecurity. In the cyber domain, an intrusion may occur in a microsecond, resulting in the pilfering of massive amounts of intellectual property or personal information.[227] Because of the architecture of the Internet, national

221 United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

222 494 U.S. 259 (1990).

223 *See id.* at 275.

224 *Id.* at 274.

225 *Id.* at 273; *cf.* United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980) (holding that Fourth Amendment was subject to exception for collection of foreign intelligence and observing that "attempts to counter foreign threats to . . . national security require the utmost stealth, speed, and secrecy").

226 *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in result)).

227 Moreover, those threats are growing exponentially. *See* P.W. SINGER & ALLAN FRIEDMAN, CYBERSECURITY AND CYBERWAR: WHAT EVERYONE NEEDS TO KNOW 60 (2014) (observing that in 2010, a major vendor of Internet security software "was discovering a new specimen of malware [virus-laden software spread over the Internet] every fifteen minutes," and "[i]n 2013 it was discovering one every single second"); *see also* Daniel Garrie & Shane R. Reeves, *An Unsatisfactory State of the Law: The Limited Options for a Corporation Dealing with Cyber Hostilities by State Actors*, 37 CARDOZO L. REV. 1827, 1835 (2016) (noting "growing willingness of state actors [such as China, Iran, and North Korea] to use their cyber capabilities against private companies"); Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICH. J. INT'L L. 253, 271 (2014) (citing "numerous examples of private hackers, organized groups, and business organizations using the Internet to do great harm to both private and public entities"); David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 235–36 (2016) (discussing government surveillance as remedy for transnational privacy threats such as organized hacking efforts by state and nonstate actors). Hacking from abroad has already had an impact on the 2016 presidential election. *See* Paul Rosenzweig, *More DNC Leaks*, LAWFARE (Aug. 13, 2016, 10:47 AM), https://www.lawfareblog.com/more-dnc-leaks (discussing Russia's apparent hacking into Internet communications of U.S. Democratic National Commit-

boundaries are largely irrelevant to the mounting and detection of cyber threats.[228] Detecting such plots on a global scale requires exceptionally quick analysis, facilitated by computer networks designed to look for threat patterns and signatures autonomously—i.e., without specific ex ante human direction.[229] The hours or days preparing a request for an ordinary warrant or traditional FISA court order are an eternity in this volatile environment.[230]

D. The FISC and Structural Concerns

While a measure of deference to Congress is appropriate given the importance of expeditious responses to transnational cyber threats, the emerging technology of the Internet also exacerbates structural threats to constitutional governance. In *Morrison v. Olson*, the Court relied heavily on Congress's view that judicial appointment of independent counsel would alleviate structural threats posed by the prospect of the executive branch investigating itself.[231] Analogous threats posed by emerging technology to the ordinary warrant system supply a further rationale for deference regarding the FISC's role under the FAA. These threats also demonstrate that the FISC's role

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tee). Indeed, experts now believe that the NSA itself has been hacked, most likely by Russia. *See* Nicholas Weaver, *NSA and the No Good, Very Bad Monday*, LAWFARE (Aug. 16, 2016, 10:34 AM), https://lawfareblog.com/very-bad-monday-nsa-0.

228 Both Congress and the courts are in the early stages of sorting through the legal implications of the transnational pivot to cyberspace. *See* Microsoft Corp. v. United States (*In re* Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 829 F.3d 197, 233 (2d Cir. 2016) (Lynch, J., concurring in judgment) (arguing for amending statute to better address appropriate balance between law enforcement's need for access to data stored abroad by U.S. corporation and corporation's need to maintain stable relationships with governments around the world). For further insight on these issues, compare Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 329, 332 (2015) (arguing that the Internet has profoundly disrupted traditional conceptions of jurisdiction and sovereignty), with Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 734–35 (2016) (arguing that challenges posed by Internet are amenable to resolution using traditional legal concepts).

229 *See* Margulies, *supra* note 157, at 1061–75; *cf.* Margaret Hu, *Small Data Surveillance v. Big Data Cybersurveillance*, 42 PEPP. L. REV. 773, 813–14 (2015) (urging courts to apply *Daubert* test for scientific evidence to validation of computer search techniques).

230 These operational concerns shaped the deferential tone of the Fourth Circuit in *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980). In addition to finding a foreign intelligence exception to the Fourth Amendment in a case that arose prior to FISA's enactment, the Fourth Circuit asserted in dicta that Congress's subsequent judgments in foreign intelligence surveillance merited deference. *See id.* at 914 & n.4 (suggesting that Congress's care in drafting FISA counseled deference to the "intricate balancing performed in the course of the legislative process by Congress and the President" and demonstrated that "the political branches need great flexibility to reach the compromises and formulate the standards which will govern foreign intelligence").

231 *See* Morrison v. Olson, 487 U.S. 654, 677 (1988).

fits the checking function that independent courts have historically performed.

The emerging landscape of the Internet provides opportunities for government intrusions, just as it provides an opening for attacks by foreign states and nonstate actors. Under section 702, the NSA's upstream program collects a significant number of communications at the Internet's backbone.[232] The data collected by the NSA takes the form of communications "transactions,"[233] which the transmittal pathways of the Internet have aggregated or divided to aid efficient transmission.[234] One common type of transaction, called a multi-communication transaction ("MCT"), includes many individual communications, analogous to a page of emails.[235] Some of these communications may be one-end foreign in nature, involving communication between a U.S. citizen or resident and an individual abroad. However, many communications within any given MCT are purely domestic, involving communication between two U.S. citizens or lawful residents, or two persons physically located in the United States.[236]

The disparate nationalities of the senders and recipients of communications within any given MCT create a legal quandary. MCTs mix and match domestic and foreign communications, regardless of the nationality of the communication's sender or receiver.[237] Under both the Fourth Amendment and U.S. statutes, the NSA would have to obtain a court order if it had targeted purely domestic communications for surveillance.[238] However, given the NSA's current technological limits, the agency will incidentally collect MCTs containing domestic communications when it targets one-end foreign messages that happen to be included in those MCTs.[239] If the agency could rummage through all the contents of such purely domestic communications, it would put a dent, if not a gaping hole, in the legal structure regulating government access to domestic emails. Through the FAA's

232 *See* DONOHUE, *supra* note 4, at 55, 60.

233 *See* PCLOB § 702 REPORT, *supra* note 158, at 39.

234 *See* SINGER & FRIEDMAN, *supra* note 227, at 23–24 (discussing how servers use packets of data to send information to an individual user's computer based on user requests).

235 *See* DONOHUE, *supra* note 4, at 60; PRESIDENT'S REVIEW GROUP, *supra* note 152, at 141 & n.138.

236 *See* Redacted, 2011 WL 10945618, at *11–12 (FISA Ct., Oct. 3, 2011); PCLOB § 702 REPORT, *supra* note 158, at 41.

237 *See* DONOHUE, *supra* note 4, at 60.

238 *See Redacted*, 2011 WL 10945618, at *23.

239 *See* DONOHUE, *supra* note 4, at 56–57, 60.

certification process, the FISC can ensure that the NSA has procedures in place to guard against this risk.[240]

Similarly, U.S. Internet users engaged in ordinary web browsing of putatively domestic sites may inadvertently access links connected to foreign servers, routers, and other elements of Web architecture. As Jonathan Mayer observed, the Internet is called the World Wide Web for a reason—among other attributes, many websites mix domestic and international content and applications, sometimes in ways that are not obvious to a visitor to the site.[241] For example, the U.S. House of Representatives website happens to include an Internet application (an "app," in common parlance) for visitors who have difficulty reading text—that application enables a speech version of the website's content.[242] That application entails contact with a dedicated server each time the House of Representatives website loads.[243] In the case of the House website, the read-aloud app is authored by a firm incorporated in the United Kingdom, and the firm uses a server that similarly appears to be located in that country.[244] The Internet is replete with such mixed and matched applications—the ease of combining such applications regardless of geography is one of the Internet's great strengths, but it also muddies the water of what constitutes a purely domestic communication. Moreover, domestic emails with links to such mixed sites may also appear to search algorithms as one-end foreign Internet traffic.

The FISC can identify these issues, impose rules for compliance, and monitor the agency's performance.[245] The government must notify the FISC of noncompliance incidents.[246] These incidents typically trigger an extensive iterative process, through which the FISC seeks clarification regarding corrective measures that the government has undertaken.[247] For example, in 2011, a government report of past

240 *See supra* notes 149–51 and accompanying text.

241 *See* Letter from Jonathan Mayer, Stanford Sec. Lab., to Review Grp. on Intelligence and Commc'ns Techs., Office of the Dir. of Nat'l Intelligence, JONATHANMAYER.ORG, Oct. 3, 2013, https://jonathanmayer.org/papers_data/dni_comment13.pdf.

242 *Id.*

243 *Id.*

244 *Id.*

245 *See* Berman, *supra* note 31, at 1207 (asserting, based on study of FISC decisions, that the court "has taken seriously its role as gatekeeper"); *cf.* BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE 135, 200–01 (2015) (conceding that in theory U.S. surveillance *could* target disfavored groups but arguing that legal safeguards have greatly diminished this concern).

246 PCLOB § 702 REPORT, *supra* note 158, at 29.

247 *See id.* at 30–31.

overcollection in the upstream program led FISC Judge John Bates to request a statistical sample of the Internet communications acquired through the upstream program and hold a hearing on the issues raised by that analysis.[248] Ultimately, Judge Bates required changes in NSA minimization procedures to more effectively limit retention of U.S. person information unrelated to foreign intelligence.[249] While internal agency protocols can contribute to such salutary outcomes, *exclusive* reliance on internal protocols would not provide the same robust check.[250]

To the extent that the FISC's role under section 702 contributes to the continued integrity of the warrant process, the rationale for that role is related to ordinary criminal prosecutions. Admittedly, the FISC's role is one step removed from the criminal justice system, not "ancillary" in the fashion of the warrant requests that Laurence Sil-

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248 *See id.*; *see also* Redacted, 2011 WL 10945618, at *2–4 (FISA Ct., Oct. 3, 2011).

249 *Redacted*, 2011 WL 10945618, at *21–22, 30. A similar process at the FISC led to the NSA's decision in April 2017 to halt so-called "about" collection. Collection of this kind entailed scanning global Internet traffic for communications *about* a particular selector. "About" collection was more likely to result in the incidental collection of communications between U.S. persons. *See* Name Redacted, at 19–30 (FISA Ct., Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf; Quinta Jurecic, *NSA Stops "About" Collection*, LAWFARE (Apr. 28, 2017, 2:14 PM), https://www.lawfareblog.com/nsa-stops-about-collection.

250 *Cf.* Riley v. California, 134 S. Ct. 2473, 2491 (2014) (asserting that "the Founders did not fight a revolution to gain the right to government agency protocols"). Chief Justice Roberts readily conceded that such protocols were a "good idea," merely suggesting that protocols were not sufficient in and of themselves. *Id.* This cautionary perspective does not impute bad faith to the NSA or anyone else in the executive branch. It merely reinforces Madison's insight that both external and internal controls on government are necessary. *See* THE FEDERALIST NO. 51, *supra* note 8, at 323 (James Madison); *see also* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 914 (2016) (noting Madison's view that focus on virtue (or lack thereof) of individual officials was distraction from design of institutions that would supply checks and balances); *cf.* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 529–47 (2015) (discussing fabric of constraint within executive branch).

Nor is congressional scrutiny the sole answer. Congress has its own agenda, which may leave little time or inclination for robust oversight. *See* DONOHUE, *supra* note 4, at 66–68. Furthermore, Congress lacks the most effective tools for addressing attempts by the executive branch to downplay noncompliance. *Cf.* ACLU v. Clapper, 785 F.3d 787, 819–20 (2d Cir. 2015) (observing that in 2010 and 2011, members of Congress, apart from those on House and Senate intelligence committees, often lacked awareness of domestic metadata program approved by FISC under provision of USA PATRIOT Act); Margulies, *supra* note 35, at 46–47 (suggesting that executive branch's written disclosures to Congress about 2009 compliance issues with domestic metadata program did not fully acknowledge official responsibility for those problems). *See generally* Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 935–40 (arguing that members of Congress, particularly those not serving on the House and Senate intelligence committees, face hindrances to obtaining access to classified materials on intelligence collection).

berman cited in the debates around FISA's 1978 enactment.[251] But an indirect nexus may be sufficient. In addition, the relationship between the FISC and the judiciary's customary role in adjudicating warrant requests suggests an analogy to the judicial participation on the U.S. Sentencing Commission that the Court upheld in *Mistretta v. United States*.[252] Writing for the Court, Justice Blackmun noted the aptness of a statutory provision for federal judges' service on the Sentencing Commission.[253] Citing Justice Jackson's observation in *Youngstown Sheet & Tube Co. v. Sawyer*[254] that the Framers' view of separation of powers contemplated "'reciprocity' among the Branches" to form a "workable government,"[255] Justice Blackmun conceded that Congress could "enlist[ ] federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing."[256] In section 702, Congress asked the FISC to perform a role related to the distinctively judicial province of adjudicating warrant requests. Warrant requests, while perhaps not as close to the heart of the criminal justice system as sentencing, are nonetheless integral to that system and to the Fourth Amendment's regulation of criminal procedure. The FISC's role under section 702 therefore merits the same pragmatic, deferential approach that the Court exhibited in *Mistretta*.[257]

E. Preserving the Essential Elements of Article III Proceedings

Another element of congruency under *Morrison* is the extent to which the judicial action mandated by the statute preserves elements

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251 *See supra* notes 128–31 and accompanying text.

252 488 U.S. 361 (1989). In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that under the Constitution the sentencing guidelines were advisory, not binding. *Id.* at 245–46 (Breyer, J.). However, the *Booker* Court made clear that this holding "does not call into question any aspect of our decision in *Mistretta*." *Id.* at 242 (Stevens, J.).

253 *See Mistretta*, 488 U.S. at 407–08.

254 343 U.S. 579 (1952).

255 *Mistretta*, 488 U.S. at 408 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

256 *Id.*

257 It is true, as Justice Blackmun noted in *Mistretta*, that the Sentencing Commission is not a court. *Id.* at 408. In contrast, the FISC *is* a judicial body. Moreover, as the next subsection describes, the FISC *acts* like a court. *See infra* Section III.E. It applies a statute in proceedings with possible adverse parties (one of whom on at least one occasion became an *actual* adverse party). *Id.* Those proceedings can entail the orderly submission of opposing views through amici curiae and the final resolution of disputes related to injury in fact. *Id.* Such indicia of judicial power reinforce the case for the FISC's compliance with Article III. Moreover, in *Booker*, the Court observed that the Sentencing Commission's main constitutional problem if Congress had established it as a court would have been the membership of individuals who were *not* Article III judges. *See Booker*, 543 U.S. at 243. In contrast, the FISC consists entirely of jurists with Article III protections.

of Article III adjudication. In *Morrison*, Chief Justice Rehnquist commented that the independent counsel statute did not supply the only occasion for judges to make appointments.[258] As he described, courts have long had the authority to appoint a lawyer to assist in prosecution of a possible contempt.[259] This link to judicial tradition buttressed the Court's holding that the appointment power provided to the D.C. Circuit under the independent counsel statute did not suffer from incongruity under Article III. Along the same lines, the FAA prominently displays indicia of congruency with the broad run of judicial proceedings, including possible adverse parties, amici curiae presenting opposing views, and injury in fact.

The proceedings of the FISC appear to meet the formulation articulated by Justice Field in *Pacific Railway Commission*, since FISC matters include "possible adverse parties."[260] The FAA expressly permits ISPs that receive directives from the government to hand over data to seek judicial review.[261] While communications and Internet firms have rarely availed themselves of this right, in 2008, Yahoo did litigate the lawfulness of directives it had received from the government pursuant to the Protect America Act, the predecessor of the FAA.[262] That litigation eventually resulted in an opinion by the FISCR upholding the directives and the Protect America Act's constitutionality.[263] In addition, adverse parties can emerge in two other

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258 *See* Morrison v. Olson, 487 U.S. 654, 676 (1988).

259 *See id.*

260 *See In re* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887); *cf.* Tutun v. United States, 270 U.S. 568, 576–78 (1926) (in course of upholding ex parte adjudication of naturalization by federal court, remarking that the government was a possible adverse party since the citizenship certificate could be cancelled pursuant to an action brought by the Justice Department if the naturalization applicant had procured the certificate by fraud or otherwise failed to fulfill legal conditions). An important recent analysis asserts that *Tutun* did not rely heavily on the presence of possible adverse parties in naturalization proceedings. *See* Pfander & Birk, *supra* note 2, at 1393–1402. In that analysis, Pfander and Birk read *Tutun* more broadly as support for the position that non-contentious jurisdiction is a discrete strand of federal judicial power that raises no problems under Article III. *Id.* This Article agrees with Pfander and Birk that the presence of possible adverse parties does not in and of itself resolve Article III concerns. However, instead of seconding Pfander and Birk's thesis that the absence of adverse parties connotes a separate strand of federal jurisdiction, this Article looks case-by-case to indicia of congruency, including the structural concerns that drove the Court's decision in *Morrison v. Olson*.

261 50 U.S.C. § 1881a(h)(4)(A) (2012) (stating that service provider receiving a directive may petition the FISC to "modify or set aside such directive").

262 *See* Craig Timberg & Christopher Ingraham, *You Think You've Got Bills? Government Could Have Fined Yahoo Trillions of Dollars*, WASH. POST: SWITCH (Sept. 15, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/09/15/you-think-youve-got-bills-government-could-have-fined-yahoo-trillions-of-dollars/?utm_term=.9efbd0ef2395.

263 *In re* Directives [redacted text] Pursuant to Section 105b of the Foreign Intelligence

contexts. First, aggrieved parties can sue the government for damages based on wrongful surveillance,[264] although such suits may be rare, in large part because of the secrecy that surrounds section 702 targeting. Second, the government must notify criminal defendants when it uses evidence derived from surveillance under section 702.[265] The government for some time did not properly fulfill this duty.[266] Eventually, the government began issuing such notifications, leading to the litigation in *United States v. Muhtorov*.[267]

Even in the absence of adverse parties, a court can use other methods to simulate the "concrete adverseness which sharpens the presentation of issues."[268] The Court in *Windsor* cited opposing arguments advanced by a vigorous amicus curiae.[269] Similarly, even when a FISC proceeding under section 702 has no adverse parties, the statute provides the FISC with an opportunity to seek views opposing the government. The FISC always had the power, like any Article III court, to appoint an amicus curiae to present opposing views. In the USA FREEDOM Act,[270] Congress expressly established a panel of amici to assist the FISC in resolution of novel legal questions.[271] In the most recent FISC decision on the constitutionality of section 702 and other compliance issues, the FISC appointed distinguished Washington lawyer Amy Jeffress as amicus.[272] Jeffress argued vigorously that section 702 violated the Fourth Amendment, clarifying the issues on each side and thereby prodding the FISC to consider the legal questions in the case with greater depth, concreteness, and specificity.[273]

Surveillance Act, 551 F.3d 1004, 1016 (FISA Ct. Rev. 2008); *see* Timberg & Ingraham, *supra* note 262.

264 50 U.S.C. § 1810.

265 *Id.* § 1806(d).

266 *See* Vladeck, *supra* note 2, at 1170.

267 187 F. Supp. 3d 1240, 1250–53 (D. Colo. 2015) (stating arguments on why FISC violates Article III, but declining to decide issue).

268 Baker v. Carr, 369 U.S. 186, 204 (1962).

269 *See* United States v. Windsor, 133 S. Ct. 2675, 2687–88 (2013).

270 USA FREEDOM Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (codified at various sections of title 50 of the U.S. Code).

271 50 U.S.C. § 1803(i) (2015); *see also* ACLU v. Clapper, 785 F.3d 787, 829–31 (2d Cir. 2015) (Sack, J., concurring) (expressing concern about ex parte nature of most FISC proceedings and suggesting that amici curiae or other source of arguments opposed to those of the government would benefit the court); *cf.* Berman, *supra* note 31, at 1239–40 (discussing importance of amici to the FISC's work).

272 *See* Name Redacted, at 6 (FISA Ct., Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

273 *See* Peter Margulies, *Madison at Fort Meade: Checks, Balances, and the NSA*, LAWFARE (May 10, 2016, 12:45 PM), https://www.lawfareblog.com/madison-fort-meade-checks-balances-and-nsa (discussing importance of Jeffress's work as amicus curiae). Another distinguished attor-

Particularly in cases turning on legal, as opposed to factual issues, the participation of amici can supply many of the virtues that one might ordinarily expect from the presence of adverse parties.[274]

In addition, the core Article III requirement of injury in fact is actually relatively easy to demonstrate in cases under section 702. Under the statute, the government can engage in incidental collection of U.S. person data, as long as it is not targeting those individuals.[275] The harm to privacy caused by incidental collection of data, while intangible in nature, would—after *Spokeo*—clearly provide the particularity and concreteness that the Court has identified as touchstones of standing.[276] The harm would be particular, since it would involve an intrusion on the distinctive personal information of each person whose data the government collected and retained. It would be concrete because incidental collection is an actual intrusion that exacerbates the loss of personal control and spontaneity[277] and exposes private data to a greater risk of public disclosure.[278] No more tangible harm would be necessary to make out a claim of injury in fact.

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ney, Marc Zwillinger, acted as amicus curiae in a recently disclosed opinion by the FISCR, which reviews FISC decisions. *See In re* Certified Question of Law, No. FISCR 16-01, at 1–3 (FISA Ct. Rev. Apr. 14, 2016), https://www.dni.gov/files/icotr/FISCR%20Opinion%2016-01.pdf (holding that when court-authorized pen register device that targets metadata, such as telephone numbers called, results in incidental collection of post-cut-through digits ("PCTD")—numbers, such as passwords, pressed after placing a telephone call—such incidental collection is not inconsistent with statutes or the Fourth Amendment, assuming restrictions are in place to limit government use of PCTD when it constitutes content, not merely call record information). *See generally* Orin Kerr, *Relative vs. Absolute Approaches to the Content/Metadata Line*, LAWFARE (Aug. 25, 2016, 4:18 PM), https://lawfareblog.com/relative-vs-absolute-approaches-contentmetadata-line (discussing FISCR decision).

274 A full-time public advocate tasked with assisting the FISC in a broader range of cases would be a welcome additional step. *See* Mondale et al., *supra* note 2, at 2297–98; Vladeck, *supra* note 2, at 1176–77; *see also* DONOHUE, *supra* note 4, at 147 (viewing provision for amici as helpful but recommending further measures to assure amici's independence and efficacy). *See generally* Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY (Nov. 4, 2013, 1:34 PM), https://www.justsecurity.org/2873/fisa-special-advocate-constitution/ (discussing the constitutionality of an advocate). In addition to Amy Jeffress, the FISC has named Professor Laura Donohue, former Assistant Attorney General David Kris, and three other distinguished attorneys (Jonathan G. Cedarbaum, John D. Cline, and Marc Zwillinger) as members of the amicus panel. *See Individuals Designated as Eligible to Serve as an Amicus Curiae Pursuant to 50 U.S.C. § 1803(i)(1)*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., http://www.fisc.uscourts.gov/amici-curiae [https://perma.cc/GLC4-GHJK] (last visited Apr. 30, 2017).

275 *See* 50 U.S.C. § 1881a(b)(1) (2012).

276 *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–50 (2013) (assuming collection of content of communications without consent would be legally cognizable injury).

277 *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK 94–95 (2007) (describing research suggesting individual's awareness of pervasive surveillance may limit spontaneity).

278 *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945–48

While the FISC addresses such intrusions not through individual review of surveillance but instead through approval of targeting procedures that will minimize invasions of privacy,[279] this broader review is entirely consistent with the role of courts in countless administrative law cases. Courts that adjudicate a challenge to an environmental regulation rarely dwell on the challenger's distinctive factual posture. Instead, courts deciding administrative law issues determine if the regulation, which could potentially affect millions of people, is consistent with the agency's governing statute and with the notice and comment process of the Administrative Procedure Act.[280] Viewed in this light, the broader inquiry mandated by the FAA is entirely congruent with the stance a reviewing court adopts in administrative law matters.[281]

Nor do the FISC's determinations under section 702 pose a finality problem. Unlike the pension disputes in *Hayburn's Case* that the Justices of the early Supreme Court believed posed tensions with Article III,[282] the FISC does not merely make a recommendation that the executive branch can disregard. FISC approval of the government's certification is a necessary condition for collection under the statute.[283] If the FISC rejects a certification, the government must either cease surveillance or revise its certification to address the court's concerns. That makes the FISC's decisions final in a fashion that eluded the tentative recommendations at issue in *Hayburn's Case*.

F. Lack of Alternatives to the FISC

Because the congruency test has always been a practical one,[284] the lack of alternatives to the statutory regime is an important element. In *Morrison*, Chief Justice Rehnquist cited Congress's wish to avoid the conflict of interest caused by the executive branch investigating itself; the only feasible alternative was appointment by the courts.[285] In the FAA context, alternatives to the FISC's role are im-

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(2013) (discussing value of privacy for thinking and speaking freely without government intimidation); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1151 (2002) (arguing that privacy guards against "exercises of power employed to destroy or injure individuals").

279 *See* 50 U.S.C. § 1881a(g)(2).

280 *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014).

281 *See* Renan, *supra* note 16, at 1075 (arguing that "[r]eimagining the FISC as an administrative law court" advances debate about surveillance oversight).

282 *See* Pfander & Birk, *supra* note 2, at 1431–32.

283 *See* 50 U.S.C. § 1881a(c)(1), (g).

284 *See Ex parte* Siebold, 100 U.S. 371, 396 (1879) (cautioning against "strained and impracticable" visions of separation of powers).

285 *See* Morrison v. Olson, 487 U.S. 654, 677 (1988).

practicable because of (1) the sheer number of foreign targets, (2) the danger of encroaching on executive power through unduly burdensome regulation of those targets' selection, (3) the difficulty of establishing standing for individual complainants, and (4) the lack of independence of non–Article III sources of review.

Because of the dynamic nature of foreign challenges, the NSA has compiled a large target list.[286] That list currently includes approximately 90,000 "persons" who are non-U.S. citizens and lawful residents located outside the United States.[287] The number of targets under section 702 makes it difficult to require a warrant or advance court order for each and every target.

Moreover, courts would not have the authority to require the executive branch to make substantial reductions in the number of foreigners targeted. As noted above, the Supreme Court has held that the Fourth Amendment does not require a warrant for searches concerning non-U.S. citizens or residents overseas.[288] Indeed, courts have forged a foreign intelligence exception to the warrant clause, citing separation of powers concerns.[289] As the FISCR noted, "requiring a warrant would hinder the government's ability to collect time-sensitive information and . . . impede the vital national security interests that are at stake."[290] This would make requiring a warrant imprudent. Even more to the point, the time-sensitive aspects of foreign intelligence collection make the preservation of a zone of executive discretion a constitutional mandate. In *Zivotofsky v. Kerry*,[291] the Court cited functional considerations, including the president's ability to act with "dispatch," as a basis for holding that the president's power to recognize foreign states barred Congress from enacting legislation

286 *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING USE OF NATIONAL SECURITY AUTHORITIES 5 (2016), https://www.dni.gov/files/icotr/ODNI%20CY15%20Statistical%20Transparency%20Report.pdf.

287 *See id.* The FAA defines the term "persons" broadly, to include not just individuals, but also "any group, entity, association, corporation, or foreign power." *See* 50 U.S.C. § 1801(m); PCLOB § 702 REPORT, *supra* note 158, at 21. The breadth of this statutory definition reinforces the need to couple intelligence targeting with robust checks, including the FISC, amici curiae, and, ideally, a full-time public advocate. Without such checks in place, intelligence agencies might be tempted to exploit their technological prowess to find overseas repositories of U.S. persons' private data, thus circumventing both the statute and the Constitution.

288 United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990).

289 *See In re* Directives [redacted text] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010–12 (FISA Ct. Rev. 2008); United States v. Truong Dinh Hung, 629 F.2d 908, 913–14 (4th Cir. 1980).

290 *In re Directives [redacted text] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d at 1011.

291 135 S. Ct. 2076 (2015).

that classified disputed territory as belonging to a particular state.[292] Those functional considerations would be even more acute in the case of foreign intelligence collection.

Requiring a warrant for queries of U.S. person information incidentally collected under section 702 is also not an adequate alternative to the FISC's current role under that provision. Admittedly, the Constitution would probably not bar Congress from requiring a court order for querying U.S. person data, given the Fourth Amendment protections already in place for U.S. persons.[293] However, requiring a warrant for querying incidentally collected U.S. person data would not address the systemic issues that the FISC currently examines, such as the executive branch's overall procedures for preventing the *targeting* of purely domestic communications.[294] Without this systemic review in place, analysts skilled in computer searches might be able to craft non-U.S. person queries that would still uncover substantial U.S. person information in the NSA's vast databases.[295] Broader-based review of targeting and minimization procedures is still necessary to preserve U.S. persons' privacy rights. Because of this factor, requiring warrants for querying incidentally collected U.S. person data would not be an effective substitute for the FISC's current role.

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292 *See id.* at 2086 (quoting THE FEDERALIST NO. 70, *supra* note 8, at 423 (Alexander Hamilton)).

293 A debate has already begun on the wisdom of including such a provision in the upcoming 2017 reauthorization of section 702. *Compare* ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT 45–49 (2015), https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf (setting out proposed reforms), *and Oversight and Reauthorization of the FISA Amendments Act: The Balance between National Security, Privacy and Civil Liberties: Hearing before the S. Comm. on the Judiciary*, 114th Cong. (2016) (prepared statement of David Medine, Chair of the Privacy and Civil Liberties Oversight Board, at 8), https://www.judiciary.senate.gov/imo/media/doc/05-10-16%20Medine%20Testimony.pdf (detailing possible reforms), *with* Chris Inglis & Jeff Kosseff, *In Defense of FAA Section 702: An Examination of Its Justification, Operational Employment, and Legal Underpinnings* 24–25 (Hoover Inst., Aegis Series Paper No. 1604, 2016), http://www.hoover.org/sites/default/files/research/docs/ingliskosseff_defenseof702_final_v3_digital.pdf (arguing that this reform would downgrade intelligence capabilities without appreciable increase in privacy), *and Oversight and Reauthorization of the FISA Amendments Act: The Balance between National Security, Privacy and Civil Liberties: Hearing before the S. Comm. on the Judiciary*, 114th Cong. (2016) (testimony of Rachel L. Brand, Member of the Privacy and Civil Liberties Oversight Board, at 10, 12, 14), https://www.judiciary.senate.gov/imo/media/doc/05-10-16%20Brand%20Testimony.pdf (same).

294 *See* 50 U.S.C. § 1881a(d)(1)(B) (2012).

295 *Cf.* Jonathan Mayer et al., *Evaluating the Privacy Properties of Telephone Metadata*, 113 PROC. NAT'L ACAD. SCI. U.S. 5536, 5540 (2016) (illustrating how the unrestricted collection of metadata such as call records, even without the collection of content, can reveal vast amounts of personal information).

Another alternative within Article III tribunals—direct challenges to surveillance by individuals—is impracticable because the secrecy surrounding such programs impairs any given individual's standing to sue.[296] The government does not usually inform subjects of surveillance that they are currently under surveillance, since doing so would hinder the government's ability to collect useful information. Without this knowledge, subjects of surveillance lack the requisite knowledge to even commence an action. Moreover, the Supreme Court has been very guarded in recognizing standing to sue among potential challengers to surveillance policy. The Court has demanded clear and concrete proof that an individual is under surveillance, precisely because of the operational security that cloaks section 702 and other surveillance programs. Indeed, in *Clapper v. Amnesty International USA*,[297] the Court denied standing to lawyers and journalists working on topics related to national security, citing the threat to operational secrecy that could result if standing were more liberally granted.[298] As Justice Alito observed in his opinion for the Court, more liberal standing rules might permit enterprising terrorists, foreign hackers, and other threats to national security to conduct fishing expeditions in the guise of federal court challenges, to probe the weaknesses of government surveillance.[299] In the wake of Edward Snowden's disclosures, more individuals may be able to make out a case for injury in fact based on information regarding section 702 that is now publicly available. However, many others will still lack this opportunity.

Similarly, it would be inadvisable to relegate questions about the legality of section 702 surveillance to adjudication of motions to exclude evidence in criminal trials. Under section 702, far more than under traditional FISA, most targets will not see the inside of a courtroom. Instead, the government will inform counterintelligence and counterterrorism activities with the intelligence it has collected. Waiting for doctrine to evolve through suppression motions will delay adjudication unreasonably, and sometimes fail to resolve issues at all. In this sense, rejecting adjudication by the FISC creates a gap in adjudi-

296 *See generally* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 278, 282, 287 (2010) (discussing framework, risks, benefits, and potential reform of deep secrecy practices in the United States).

297 133 S. Ct. 1138 (2013).

298 *See id.* at 1149 n.4.

299 *See id.* (noting that more liberal standing rules could "allow a terrorist . . . to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program").

cation like the gap that the Court closed in *United States v. Windsor* by considering DOMA's constitutionality even in the absence of an adverse party.[300]

Flaws also undermine proposals for creating an independent executive branch agency to perform the ex post review that the FISC now performs. In theory, this idea has merit. Indeed, the PCLOB currently reviews intelligence programs and writes exceptionally valuable reports.[301] However, no executive branch agency has the independence or the authority necessary to serve as the exclusive source for review of civil liberties issues linked to intelligence collection.[302] That oversight task might be compromised by the ability of the President to fire the agency chief for cause,[303] or by legal or practical problems associated with ensuring that the agency receives unfettered access to the necessary information to perform its function. As an executive agency, such an entity would inevitably turn to negotiation with other executive branch agencies, such as the Director of National Intelligence, to resolve access issues. However, the access required for robust review cannot be a matter for negotiation—rather, it is an *essential prerequisite* for such review. Indeed, given the secrecy that pervades intelligence collection, negotiating for access already concedes the game. Without prior access, agency officials would not have sufficient knowledge to conduct an effective negotiation.[304] Moreover,

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300 *See* United States v. Windsor, 133 S. Ct. 2675, 2688 (2013) (observing that without adjudication of DOMA's legality, the "costs, uncertainties, and alleged harm and injuries [caused by the statute] likely would continue for a time measured in years before the issue is resolved"). Admittedly, the issues in *Windsor* included pressing matters such as eligibility for tax refunds and other benefits raised by the many federal statutes and rules affected by DOMA. *See id.* at 2686. The hardships caused by illegal surveillance may not be quite as tangible in nature. However, if Justice Alito's opinion in *Spokeo* is any guide, Congress should receive deference in determining that an injury is sufficiently tangible to warrant consideration in a judicial forum. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); *supra* notes 201–05 and accompanying text (discussing *Spokeo*).

301 *See, e.g.*, PCLOB § 702 REPORT, *supra* note 158. For a thoughtful discussion by one current PCLOB member on intelligence oversight, see Rachel Brand, *What Does Effective Intelligence Oversight Look Like?*, LAWFARE (May 3, 2016, 3:19 PM), https://www.lawfareblog.com/what-does-effective-intelligence-oversight-look.

302 For a more optimistic view, see Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 637, 646, 648–50 (2016), and compare it with Carrie Cordero, *A Response to Professor Samuel Rascoff's* Presidential Intelligence, 129 HARV. L. REV. F. 104, 107–09 (2016) (suggesting that spectrum of government entities, including Director of National Intelligence, PCLOB, and FISC, should review and oversee aspects of intelligence collection).

303 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010) (striking down measure that imposed undue restrictions on President's power to remove executive officers for good cause).

304 *Cf.* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pric-*

gaps in access can become incubators for bureaucratic abuses, undermining the efficacy of review. Congress could reasonably find that a constitutionally separate entity like the FISC, with both statutory and inherent power to obtain access and impose sanctions for abuse, is the best guardian of the executive branch's compliance with law.

G. Limits on the FISC's Section 702 Role

Setting appropriate limits is also vital for congruency. In *Morrison*, the Supreme Court also cited limits on the D.C. Circuit's role and that of the independent counsel, noting that judges who participated in the appointment of the independent counsel could not then review convictions that their appointee subsequently obtained.[305] Analogous limits cabin the FISC's role under section 702.

The FISC only reviews a narrow band of intelligence collection. Its sole task under the FAA entails review of the collection of one-end foreign communications.[306] It does not review collection of wholly foreign communications. It has no role in the adjudication of ordinary warrant requests by federal law enforcement agencies. The FISC also has no authority over broader national security or foreign policy issues. Those limits prevent the FISC from trespassing on the prerogatives of the political branches. The tailored nature of the FISC's role also preserves the distinctive capacity for judgment that Hamilton identified as the hallmark of an independent judiciary.[307]

CONCLUSION

The FISC's role under the FAA raises questions under Article III. The FISC's core Article III problem is the combination of the absence of actual adverse parties and the broad scope of the FISC's review.[308] Closer examination reveals that although the FISC's role under section 702 is novel, it fits within Article III's space for the exercise of judgment by independent courts.

The first step in analyzing the FISC and Article III is clarifying that neither factor identified above—the FISC's reliance on ex parte

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ing, 94 YALE L.J. 239, 263–67 (1984) (discussing importance of access to information in effective negotiations). Because an executive agency tasked with overseeing intelligence collection would inevitably be bogged down in bureaucratic turf battles, suggestions for delegating this task to the PCLOB may not fully address the issues at stake. *But see* Renan, *supra* note 16, at 1118–23 (arguing for increased role for PCLOB).

305 *See* Morrison v. Olson, 487 U.S. 654, 683 (1988).

306 *See* 50 U.S.C. § 1881a(g) (2012).

307 *See* THE FEDERALIST NO. 78, *supra* note 8, at 464–65 (Alexander Hamilton).

308 *See supra* Section I.C.

proceedings or its broad review of procedures for collecting one-end foreign communications—poses an Article III problem on its own.[309] Ex parte proceedings are common in federal courts; for example, warrant requests are typically made ex parte, and have been since the era preceding American independence. In civil remedies such as attachment, ex parte proceedings have also been common.[310] In both the warrant and attachment contexts, ex parte proceedings promoted both secrecy and speed. By ensuring that adjudication could proceed and facilitating wrongdoers' accountability, each remedy enhanced the rule of law. As the Framers knew, requiring that a court issuing a warrant make an ex parte finding of probable cause also curbed executive abuses reflected in the general warrants that threatened English liberties in the mid-eighteenth century.

While warrants typically involve specific, concrete fact patterns, there is no definitive constitutional objection to ex parte proceedings involving broader review of legal issues.[311] Administrative law is replete with instances of exactly this kind of broad review.[312] Agency rules attract challengers such as trade associations or nonprofit advocacy groups who serve as adverse parties.[313] However, these adverse parties usually confine their arguments to issues of law. The specific factual circumstances of such parties rarely figure in rules challenges, which instead focus on the compliance of a regulation with statutory norms.

Despite the absence of a definitive constitutional bar on proceedings like the FISC's review of one-end foreign communications, a coherent analysis of the FISC's role requires an affirmative case. This Article makes that case through the congruency test that the Supreme Court invoked in *Morrison v. Olson* to determine that a statute providing for judicial appointment of an independent counsel was consistent with Article III.[314] Although that test was designed for the Appointments Clause, it also fits context such as the FISC's section 702 role.

This Article builds on the wisdom in *Morrison* and other Supreme Court decisions that the test for compliance of statutes with Article III must be pragmatic, affording Congress a measure of flexi-

309 *See supra* Section I.B.

310 *See supra* Section I.B.

311 *See supra* Section I.C.

312 *See* Vladeck, *supra* note 2, at 1178–79; *supra* Section I.C.

313 *See supra* Section I.C.

314 *See* Morrison v. Olson, 487 U.S. 654, 675–76 (1988).

bility and deference in its exercise of Article I power. Two cases from October Term 2015—*Bank Markazi v. Peterson* and *Spokeo, Inc. v. Robins*—demonstrate that Congress is entitled to deference when it seeks to promote operational values such as speed and accuracy in dynamic domains such as national security, foreign relations, and emergent technology.[315]

Congruency also looks to a statute's service to constitutional structure. Just as judicial appointment of independent counsel in *Morrison* guarded against conflicts of interest when the executive branch investigated itself,[316] the FISC's role under section 702 tempers the danger of executive abuses posed by intelligence agencies' technological reach. In reviewing government certifications that protect against the targeting of citizens, lawful residents, and individuals within the United States, the FISC ensures that the collection of one-end foreign communications does not entail over-collection of purely domestic communications.[317]

Moreover, although the FISC's role is novel, it is also tethered to Article III practice. There are possible adverse parties in FISC proceedings, including ISPs like Yahoo, which in 2008 vigorously challenged government surveillance directives.[318] Amici curiae at the FISC can articulate opposing arguments that aid the court's deliberations. Although a more institutionalized public advocate at the FISC would provide even more pushback to executive branch views, competent and vigorous amici at the FISC serve the same salutary function that the Court in *Windsor* identified with the role of an amicus in the litigation challenging DOMA.[319] Moreover, the U.S. individuals whose data is incidentally collected under the FAA have experienced intrusions that amount to the Article III touchstone of injury in fact. FISC review merely compensates for the inability of these many individuals to demonstrate standing because of the secrecy that cloaks surveillance. Lastly, the FISC's rulings on certifications are final, addressing the concern with mere recommendations that Supreme Court Justices first advanced in *Hayburn's Case*.[320]

Reinforcing the case for congruency, there are no feasible alternatives to the FISC's FAA role.[321] Individual review of all one-end

315 *See supra* Section III.B.

316 *See Morrison*, 487 U.S. at 677.

317 *See* 50 U.S.C. § 1881a(c)(1), (g) (2012).

318 *See supra* notes 260–63 and accompanying text.

319 *See supra* notes 268–74 and accompanying text.

320 *See supra* notes 282–83 and accompanying text.

321 *See supra* Section III.F.

foreign targeting decisions would tax Article III courts' capabilities, and might intrude on executive branch prerogatives regarding foreign intelligence. Executive agencies and Article I courts whose judges lack lifetime tenure lack the independence and authority to properly hold the line against intelligence abuses.

Finally, the FISC's role under the FAA is narrow. The FISC acts only in the contained domain of one-end foreign communications.[322] It has no role regarding ordinary warrants, and no involvement in the setting of national security or foreign policy beyond the review of certifications pursuant to statute.

In sum, the FISC's FAA role is a congressional response to the risk of executive overreaching in the age of the Internet. The FISC's role serves operational values like speed and secrecy that are vital in an era of cyber threats. It also vindicates structural values, comparable to those served by the independent counsel statute's response to the problem of executive branch conflicts of interest in *Morrison*. The FAA also preserves the core judicial attributes of independence and finality. Fortified by these attributes, the FISC can guard against executive abuses without hobbling intelligence collection that is necessary for national security. That was the driving force behind Justice Powell's invitation to Congress in *Keith* to create a specialized surveillance court.[323] That same impetus renders the FISC's section 702 role congruent with Article III.

322 *See supra* Section III.G.

323 *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 322–24 (1972).