

SECRET LAW: SEPARATION OF POWERS AND THE PUBLIC RIGHT OF ACCESS TO FOREIGN INTELLIGENCE SURVEILLANCE COURT JURISPRUDENCE

Abstract: In 2021, the Supreme Court declined to take up a petition from the American Civil Liberties Union (ACLU) asserting a First Amendment right of access to significant opinions issued by the Foreign Intelligence Surveillance Court (FISC). Writing in dissent, Justice Neil Gorsuch, joined by Justice Sonia Sotomayor, raised concerns about the implications of the Court’s denial for two major reasons—the First Amendment rights of Americans, and, more fundamentally, the separation of powers issues implicated by the government’s assertion that the Court lacked jurisdiction to review the work of a subordinate Article III court. This Note examines the arguments advanced by the ACLU in support of its petition, and those of the government in opposition. It proceeds by analyzing the broader implications of each set of assertions for the First Amendment rights of individuals, as well as the structural implications for the separation of powers, arguing that the Supreme Court should take up the issue raised by the ACLU’s petition. Additionally, this Note argues that in light of the recent reauthorization of Section 702, which tasks the FISC with programmatic oversight of sweeping government surveillance programs, it is particularly important that courts find a qualified public right of access to FISC opinions and orders.

INTRODUCTION

From Jeremy Bentham to H.L.A. Hart, legal theorists throughout history have propounded the centrality of public access to the law for just and efficient governance.¹ In common law countries, courts create law in the decisions they issue and in the record of the reasoning that undergirds those decisions.² Public access to judicial records is therefore fundamental to democratic governance.³

¹ See 1 JEREMY BENTHAM, *RAISONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE* 524 (1827) (“Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”); H.L.A. HART, *THE CONCEPT OF LAW* 100–01 (3d ed. 2012) (describing the “rule of recognition” as encompassing a requirement that the law be public and decipherable, such that the governed and those tasked with the law’s administration understand its content and implementation).

² See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989) (“In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, . . . courts have the capacity to ‘make’ law.”).

³ See *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (finding that the “common law right [of public access] is not some arcane relic of ancient English law. To the contrary, the right

The Foreign Intelligence Surveillance Court (FISC) is unique among American courts, in that its proceedings are conducted in secret.⁴ The history of the FISC, from its inception to its current status, is marked by tension between change spurred by public exposure and the necessary secrecy of the court's activities.⁵ On June 5, 2013, the FISC was thrust into the global media spotlight, when *The Guardian* newspaper published a FISC order leaked by Edward Snowden, a contractor working for the National Security Agency (NSA).⁶ The revelation that the NSA had, with the approval of the FISC, undertaken ongoing bulk collection of Americans' data on a grand scale provoked a swift and sweeping public backlash.⁷

Beneath the surface of the outrage over the FISC's role in the Snowden scandal was a deeper issue: the scope and contours of the court's power—a power that had evolved largely shielded from public view.⁸ Although framed in procedural terms, a court's determination on whether it can, or will, exercise jurisdiction is a fraught and weighty one, implicating both the scope of its own power within the judicial branch, and the scope and limitations on the judicial power in relation to the other branches of government.⁹ After all, the very case that estab-

is fundamental to a democratic state”), *rev'd sub nom.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

⁴ See 50 U.S.C. § 1803 (establishing the Foreign Intelligence Surveillance Court (FISC) as sitting in a “classified” setting and delivering its opinions and orders “under seal”); *In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d 484, 488 (FISA Ct. 2007) (“Court sessions are held behind closed doors in a secure facility Other courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception.”).

⁵ See, e.g., Thomas Rockhill, *Accessing the Secrets of the Secret Court: The Foreign Intelligence Surveillance Court and the First Amendment Right of Public Access*, 54 U. TOL. L. REV. 469, 471 (2023) (noting the role of the Watergate scandal and subsequent revelations of abuses by the nation's intelligence community as a catalyst for the establishment of the investigative committee that ultimately led to the FISC's creation).

⁶ See *Verizon Forced to Hand Over Telephone Data—Full Court Ruling*, THE GUARDIAN (June 5, 2013), <https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order> [<https://perma.cc/H3DJ-46H9>] (publishing a FISC order directing Verizon to continue turning over detailed records of telephony metadata on millions of Americans to the National Security Agency (NSA) “on an ongoing daily basis”); see also Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/KPT6-GZQW>] (reporting on revelations contained in the Snowden documents, and their import for the privacy of millions of Americans).

⁷ See John Langford, *The Article III Publication Power and the Foreign Intelligence Surveillance Court*, 43 CARDOZO L. REV. 201, 216 (2021) (describing the public response to the Snowden disclosures, including widespread expressions of outrage and calls for reform from privacy and civil liberties advocates and from government figures).

⁸ See Jeffrey T. Richelson, *The Snowden Affair: Web Resource Documents the Latest Firestorm Over the National Security Agency*, NAT'L SEC. ARCHIVE (Sep. 4, 2013), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB436/> [<https://perma.cc/EXY5-8D56>] (compiling documentation and detailing developments, public reaction, and commentary related to the Snowden disclosures).

⁹ See, e.g., Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1729 n.42 (2022) (noting the relevance of jurisdiction in assessing “the distinctively legal legitimacy of a court's deci-

lished the importance of judicial review culminated in the Court determining that, vast as its power may be to expound the meaning of the law, it could not in that case exercise jurisdiction.¹⁰ In 2021, in *American Civil Liberties Union v. United States*, the Supreme Court declined to take up a petition for certiorari asserting a First Amendment right of access to significant opinions issued by the FISC, over a dissent authored by Justice Neil Gorsuch and joined by Justice Sonia Sotomayor.¹¹ The dissent raised grave concerns not only about Americans' lack of access to a significant body of law that governs their lives, but more fundamentally, about an erosion of the separation of powers that defines the structure of American government and protects individual liberty.¹²

Part I of this Note provides an overview of the history and development of the FISC and of the rights of public access to judicial proceedings and materials.¹³ Part II analyzes the arguments advanced in support of and opposing a petition for Supreme Court review of a request for access to FISC opinions.¹⁴ Part III traces the broader implications of the Supreme Court's denial of certiorari, arguing that the Court should take up the issues raised in the ACLU's petition and determine that a qualified First Amendment right of access attaches to significant opinions issued by the FISC.¹⁵

sion—i.e., whether the decision was lawful or legally authorized”); David. L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 585 (1985) (“[T]he separation of powers principle lends support to the existence of discretion . . . with respect to questions of justiciability and their penumbras.”).

¹⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 177 (1803) (declaring that “[i]t is emphatically the province and duty of the judicial department to say what the law is” but holding that it could not constitutionally exercise jurisdiction to grant the requested relief).

¹¹ See 142 S. Ct. 22, 22 (2021) (denying certiorari).

¹² See *id.* at 22–23 (noting with concern the lack of public access to a significant body of law and the government's assertion that the Supreme Court lacked jurisdiction to review the work of a lower Article III court). Public access to judicial records, and moreover, the judicial power to order the release of a court's rulings and the reasoning undergirding those rulings, is crucial to the institutional legitimacy of the courts. See Langford, *supra* note 7, at 246 (noting that because the judicial branch does not wield enforcement powers, its legitimacy and efficacy is dependent “entirely on the public's perception and acceptance of its exercise”). As Justice O'Connor wrote, “[t]he Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Viewed in this light, the inherent power of Article III courts to publish their opinions is cast into stark relief, as a fundamental prerequisite to the judiciary's exercise of its role in maintaining the separation and balance of power among the three branches of government. See Langford, *supra* note 7, at 246 (“If Courts are to meaningfully check Congress or the President, they must be able to cultivate and wield institutional legitimacy by issuing public judgments and, if they so choose, reasons justifying those judgments.”).

¹³ See *infra* notes 16–140 and accompanying text.

¹⁴ See *infra* notes 141–173 and accompanying text.

¹⁵ See *infra* notes 174–212 and accompanying text.

I. THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, ARTICLE III STATUS, AND PUBLIC ACCESS TO JUDICIAL PROCEEDINGS

The Foreign Intelligence Surveillance Court's creation, and significant subsequent developments throughout its history, have been precipitated by public outcry over revelations about the activities of the nation's intelligence-gathering activities.¹⁶ Although the court's activities are conducted outside of public view, the public has increasingly sought access to this body of law, invoking common law or First Amendment rights.¹⁷ Section A of this Part traces the history, statutory inception, nature, and development of the Foreign Intelligence Surveillance Court.¹⁸ Section B of this Part examines the common law and constitutional dimensions to the public right of access to judicial proceedings and materials.¹⁹

A. The Birth and Development of the Foreign Intelligence Surveillance Court

Subsection 1 of this Section traces the relationship between the Fourth Amendment's protections and surveillance for national security purposes.²⁰ Subsection 2 of this Section provides a history of the FISC's inception.²¹ Subsection 3 of this Section examines the changes that post-September 11 legislation wrought on the FISC's purview.²² Subsection 4 of this Section details the impact of the Snowden disclosures on the FISC.²³ Subsection 5 of this Section explains that the FISC and its appellate body were established and function as Article III entities.²⁴

1. The Fourth Amendment and National Security Surveillance

The Fourth Amendment provides that, absent an applicable exception to the requirement, searches of United States persons—those individuals voluntarily within the United States—require the government to obtain a warrant.²⁵

¹⁶ See, e.g., Laura K. Donohue, *The Evolution and Jurisprudence of the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, 12 HARV. NAT'L SEC. J. 198, 208 (2021) ("It would be hard to overstate the importance of the documents leaked by Edward Snowden in June 2013 in driving [changes to the FISC].").

¹⁷ See *id.* at 208 n.39 (describing a sustained press of legal proceedings seeking access to FISC opinions and orders as well as calls from lawmakers for greater transparency).

¹⁸ See *infra* notes 20–106 and accompanying text.

¹⁹ See *infra* notes 107–140 and accompanying text.

²⁰ See *infra* notes 25–39 and accompanying text.

²¹ See *infra* notes 40–56 and accompanying text.

²² See *infra* notes 57–87 and accompanying text.

²³ See *infra* notes 88–95 and accompanying text.

²⁴ See *infra* notes 96–106 and accompanying text.

²⁵ See U.S. CONST. amend IV (guaranteeing the "right of the people" to be protected "against unreasonable searches and seizures"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)

Notably, to be considered proper under the Fourth Amendment, a warrant must be authorized by an unbiased and detached judicial officer, as well as supported by probable cause and an oath or affirmation.²⁶ A properly issued warrant must also describe with particularity the place that the government is seeking to search.²⁷ The limitations on government conduct enshrined in the Fourth Amendment are animated by early colonial experience, particularly an abhorrence of general warrants.²⁸ Along with writs of assistance, the general warrants of the colonial era gave government agents broad authority to search property for unspecified evidence of criminal acts.²⁹

(suggesting that the Fourth Amendment's protection could extend even to undocumented aliens within the U.S. who are present voluntarily and who have "accepted some societal obligations"); *see also* GEOFFREY CORN ET AL., *NATIONAL SECURITY LAW: PRINCIPLES AND POLICY* 179 (2d ed. 2019) ("*Verdugo-Urquidez* has not been applied broadly by lower courts, and aliens in the United States voluntarily—ostensibly even undocumented aliens—are generally considered to fall within the protections of the Fourth Amendment."). Aside from a limited number of specified exceptions, searches without a warrant violate the Fourth Amendment's prohibition against unreasonableness. *See* *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions"). The Supreme Court has noted that the Fourth Amendment's "touchstone . . . is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). Some scholars have suggested that the Fourth Amendment's two clauses should be read separately, and that the idea that a warrant was required to make a search or seizure permissible was merely "one of several possible ways of understanding the relationship between" the two clauses. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994) (arguing that an originalist view of the Fourth Amendment does not support the absolute connection of the two clauses). Other scholars, however, challenge this view, maintaining that the framers of the Fourth Amendment understood it to prohibit general warrants and require specific ones. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1193 (2016) (refuting the claim that the Fourth Amendment does not *per se* require a warrant to render a search or seizure reasonable, and instead arguing that "[t]he proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities *and* a requirement for specific warrants").

²⁶ *See* U.S. CONST. amend IV (requiring warrants to be issued only "upon probable cause, supported by Oath or affirmation"); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) (emphasizing that "a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime" (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977))) (internal quotation marks omitted).

²⁷ *See* U.S. CONST. amend. IV (specifying that a warrant must "particularly describ[e] the place to be searched" to be valid). The Court has connected the particularity requirement with a prohibition on "general searches" and indiscriminate seizure. *See* *Marron v. United States*, 275 U.S. 192, 196 (1927) (finding that "[t]he requirement that warrants shall particularly describe [their object] makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another").

²⁸ *See* *Riley v. California*, 573 U.S. 373, 403 (2014) (describing the Fourth Amendment as "the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era"); *see also* Donohue, *supra* note 25, at 1194 (noting that "[t]he War of Independence was fought in part because of the Crown's effort to exercise writs of assistance, a form of general warrant").

²⁹ *See* *Riley*, 573 U.S. at 403 (describing general warrants and writs of assistance as "allow[ing] British officers to rummage through homes in an unrestrained search for evidence of criminal activity"); Donohue, *supra* note 25, at 1194 (noting that writs of assistance were "a form of general warrant

Government surveillance, including electronic surveillance, generally falls within the Fourth Amendment's definition of a search.³⁰ Prior to 1972, the executive branch asserted and exercised authority to authorize warrantless electronic surveillance in matters of domestic national security.³¹ In 1972, in *United States v. District Court* (the *Keith* case), the Supreme Court took up the question of whether the President could authorize warrantless surveillance as an exception to the warrant requirement, justified by national security concerns.³² The *Keith* case involved the government's warrantless use of a wiretap to intercept conversations among three defendants charged with a conspiracy against government property.³³ The *Keith* Court's recognition of the wiretap as a Fourth Amendment search reflected the Court's understanding that Americans' expectations concerning their privacy were evolving in response to technologies not envisioned at the time of the Amendment's passage.³⁴ Notably, the

wherein government officials failed to specify the precise place or person to be searched, or to provide evidence under oath to a third-party magistrate of a particular crime suspected").

³⁰ See *Carpenter v. United States*, 585 U.S. 296, 310 (2018) (holding that the government's accessing cell phone data from the suspect's wireless provider, which provided information on a week's worth of the suspect's movements and location, fell within the Fourth Amendment's definition of a search); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the government's use of a thermal imaging device to monitor inside a suspect's home violated the Fourth Amendment because agents did not first obtain a warrant); *Katz*, 389 U.S. at 352–53 (holding that government agents' attachment of a recording device to the outside of a public telephone booth, enabling them to hear a suspect's calls within the booth, was unconstitutional because the government had not obtained a warrant). Scholars have suggested that the determination of what government surveillance qualifies as a Fourth Amendment search requires two inquiries: (1) whether the government engaged in physical trespass in order to collect information; and (2) whether the government conduct intruded upon a "reasonable expectation of privacy." See CORN ET AL., *supra* note 25, at 181–82 (suggesting that recent Supreme Court precedent requires a two-part analysis to determine "when surveillance qualifies as a [Fourth Amendment] search"). Scholars have suggested abandoning the reasonable expectation of privacy test in favor of a more pragmatic approach that "directly address[es] how to regulate government information gathering." See Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1515 (2010) (arguing that the reasonable expectation of privacy test leads to a "fruitless game" of assessing privacy invasions).

³¹ See *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 299 (1972) (explaining that "[s]uccessive Presidents for more than one-quarter of a century have authorized [electronic surveillance in internal security matters without prior judicial approval] in varying degrees, without guidance from the Congress or a definitive decision of this Court").

³² See *id.* (taking up the question for the first time of whether the executive branch could authorize warrantless electronic surveillance for national security purposes).

³³ See *id.* (stating the charge of conspiracy to destroy government property in violation of 18 U.S.C. § 371); *id.* at 300–01 (analyzing the Attorney General's deposition and affidavit conceding that law enforcement had overheard conversations of a defendant by means of wiretaps sanctioned by the Attorney General).

³⁴ See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 65–66 (2000) (citing *Keith*, 407 U.S. at 313, 317) (noting that the *Keith* Court's recognition of the wiretap as a search reflected the influence of "the evolving societal expectations of privacy" and that "[f]itting 18th century concepts of search and seizure into the realities of modern society required the Court's examination of the 'broader spirit' of the Fourth Amendment").

Court recognized that electronic government surveillance of speech activity stood at the confluence of First and Fourth Amendment principles.³⁵

In finding a national security exception to the warrant requirement unjustified, the *Keith* Court emphasized that the danger of government abuse is particularly acute in matters of asserted national security interests.³⁶ Despite its assertion of the warrant requirement's primacy, the *Keith* Court qualified its opinion with the observation that normal criminal warrant procedures may be ill-suited to surveillance related to national security concerns.³⁷ To address this discrepancy, the *Keith* Court suggested that Congress could devise a different warrant process, in accordance with the Fourth Amendment, but tailored to national security surveillance.³⁸ In a development that would prove significant for the creation of the FISC, the Court specifically excluded from its decision in *Keith* surveillance of foreign powers or agents of foreign powers for national security purposes.³⁹

2. The Birth of the FISC

In 1975, with public confidence in the activities of the intelligence community shaken by revelations of abuses during the Watergate scandal, Congress convened the Senate Select Committee to Study Government Operations

³⁵ See *Keith*, 407 U.S. at 313 (noting that cases involving national security “often reflect a convergence of First and Fourth Amendment values” and that in such cases, there is greater danger to “constitutionally protected speech”). The government argued in the *Keith* case that requiring prior judicial review would impede the executive branch in its duty to ensure national security, and a broad national security exception to the warrant requirement was therefore necessary. See *id.* at 318 (“The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security.”). The government based its assertions of this presidential power on Title III of the Omnibus Crime Control and Safe Streets Act, which points to the inherent constitutional authority of the President in matters of national security. See *id.* at 303 (describing the government’s reliance on section 2511(3) of the Act). The Court rejected the government’s assertion of a national security exception, holding the Fourth Amendment requires prior judicial approval of a search or surveillance, notwithstanding the government’s national security concerns. *Id.* at 317–21.

³⁶ See *id.* at 314 (highlighting the “danger to political dissent” when the government acts “under so vague a concept as the power to protect ‘domestic security,’” and finding that “[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent”).

³⁷ See *id.* at 322 (noting that because national security surveillance may be different in policy motivation and practical needs from ordinary criminal surveillance, “we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case”).

³⁸ See *id.* (suggesting that Congress consider an alternative warrant process for surveillance involving national security); CORNET AL., *supra* note 25, at 186 (“[T]he Court essentially invited Congress to consider adopting a modified warrant process when the surveillance is not conducted in support of criminal prosecution, but instead domestic national security.”).

³⁹ See *Keith*, 407 U.S. at 321–22 (“We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”). Rather, the Court explicitly limited the scope of its holding to “domestic aspects of national security.” *Id.* at 321.

with Respect to Intelligence Activities, chaired by Senator Frank Church and known as the Church Committee.⁴⁰ Congress established the Church Committee in response to the negative public reaction to alleged wrongs committed by national intelligence agencies, thrust into the public eye by reporting in *The New York Times*.⁴¹ The Church Committee's report concluded that the federal government had for decades disregarded legal limitations on domestic surveillance activities, violating Americans' constitutional rights.⁴²

Following these revelations, Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978, directing that the statute be the sole means for the government to conduct domestic surveillance for the purpose of foreign intelligence.⁴³ The statute created the FISC.⁴⁴ The FISC was empowered, as a

⁴⁰ S. Res. 21, 94th Cong. (1975); see April Falcon Doss, *Time for a New Tech-Centric Church-Pike: Historical Lessons from Intelligence Oversight Could Help Congress Tackle Today's Data-Driven Technologies*, 15 J. BUS. & TECH. L. 1, 1 n.1 (2019) (providing an overview of the congressional action leading to the formation of the Church Committee); Rockhill, *supra* note 5, at 471 (noting the role of the Watergate scandal and subsequent revelations of abuses by the nation's intelligence community in the establishment of the Church Committee).

⁴¹ S. REP. NO. 94-755, at v (1976). In particular, the Church Committee was concerned with warrantless surveillance activities. *Id.* at 1. The *New York Times* reported that the Central Intelligence Agency had violated its 1947 charter by operating a large-scale domestic intelligence collection program. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974), <https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html> [<https://perma.cc/9D2F-ZS7B>].

⁴² S. REP. NO. 94-755, at 137. The Church Committee's hearings revealed that intelligence agencies had been broadly surveilling Americans, and furthermore, that determinations about surveillance activities had been made based on Americans' views and associative conduct. See Donohue, *supra* note 16, at 243 ("The Church Committee hearings, which gave birth to [the Foreign Intelligence Surveillance Act], showed that the intelligence community had placed Americans under surveillance based on what they said and did—and with whom. Decisions were made on the basis of political views, and in some cases, religious beliefs."); see also *FBI Oversight: Hearing Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 94th Cong., pt. 3, at 426–27 (1976) (acknowledging that surveillance targets included the Women's Liberation Movement and "every Black Student Union and similar group regardless of their past or present involvement in disorders," members of Congress, political candidates, and federal judges).

⁴³ Rockhill, *supra* note 5, at 471; see Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (amending 18 U.S.C. § 2511 to instruct that FISA "shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted"). FISA's enactment was both the culmination of the Church Committee's investigation and report, and a reflection of the *Keith* Court's holding that the government conducting surveillance for the purpose of domestic security without judicial oversight was a violation of the Fourth Amendment. See Donohue, *supra* note 16, at 201 (describing the impetus for FISA); *Keith*, 407 U.S. at 320–21 (holding that the Fourth Amendment requires prior judicial approval of a search or surveillance, notwithstanding the government's security concerns). In addition to the *Keith* decision and the Church Committee's findings, FISA was also enacted in response to the need to equip the executive branch with the means to investigate and address the dangers of foreign intelligence. See *United States v. Rosen*, 447 F. Supp. 2d 538, 542–43 (E.D. Va. 2006) (explaining that FISA was enacted in response to three concerns, including "judicial confusion" following the *Keith* decision, executive branch abuses revealed in the Church Committee Hearings, and "the felt need to provide the Executive Branch with an appropriate means to investigate and counter foreign intelligence threats").

neutral arbiter, to oversee the collection of electronic surveillance carried out for the purpose of foreign intelligence, acting as a warrant-granting body akin to that suggested by the *Keith* Court.⁴⁵ The statute also created a forum for appeals from FISC determinations, the Foreign Intelligence Surveillance Court of Review (FISCR).⁴⁶ In its current form, the FISC consists of eleven federal district court judges, with three additional federal judges making up the FISCR.⁴⁷ Judges on the FISC and FISCR (collectively the FISC/R) serve for seven-year terms, though this tenure restriction on the FISC/R does not affect the Article III status of the federal district court judges who make up the courts established by FISA.⁴⁸

The FISC's purpose is to review government applications to undertake electronic surveillance for national security purposes, bringing such activity within the bounds of the Fourth Amendment by creating a process for the government to obtain a judicially approved warrant.⁴⁹ FISA requires the government to show probable cause that the target of surveillance is a foreign power or the agent of a foreign power, and that the targeted individual is likely to use

⁴⁴ See 50 U.S.C. § 1803(a) (directing the Chief Justice to designate FISC judges to serve on a court with “jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States,” following the protocol established in the subsequent sections).

⁴⁵ See *Keith*, 407 U.S. at 322 (suggesting that “Congress may wish to consider” different protective standards that accord with the Fourth Amendment’s warrant requirement, but also comport with the government’s needs in countering national security threats); Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 554 (2022) (describing the FISC’s mandate to act as a neutral and disinterested arbiter in evaluating the government’s domestic electronic surveillance activities used for foreign intelligence).

⁴⁶ See 50 U.S.C. § 1803(b) (directing the Chief Justice to designate judges to serve on a court of review with “jurisdiction to review the denial of any application made under this chapter”). The statute further directs that the Supreme Court may exercise certiorari jurisdiction to review decisions of the FISA appellate court. See *id.* (“If such court determines that the application was properly denied . . . on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.”).

⁴⁷ See *id.* § 1803(a)–(b) (specifying that the FISC be made up of eleven federal district court judges and the FISCR be made up of three additional federal district court judges).

⁴⁸ See *id.* § 1803(d) (establishing the maximum term for judges on the FISC and FISCR as seven years); *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) (holding that FISA does not violate Article III provisions, because judges who sit on the court retain their life appointment as federal district court judges, with no additional compensation for their FISC service, so their compensation remains unchanged when their FISC term ends), *aff’d*, 729 F.2d 1444 (2d Cir. 1983); see also U.S. CONST. art. III, § 1 (establishing that judges of the Supreme Court and inferior courts created under Article III hold their office “during good behavior” and are to receive no diminution in compensation during their service).

⁴⁹ See 50 U.S.C. § 1803(a) (directing the FISC to “hear applications for and grant orders approving electronic surveillance anywhere within the United States”); Donohue, *supra* note 16, at 201 (explaining that the establishment of the FISC reflected the *Keith* Court’s holding that the Executive may not, consistent with the Fourth Amendment, conduct surveillance without “independent judicial oversight,” even where national security concerns are implicated).

the particular facility or location to be placed under surveillance.⁵⁰ To obtain a surveillance warrant from the FISC, the government must have a significant purpose to collect information related to foreign intelligence.⁵¹ Unlike the warrants required in a criminal investigation, FISA does not require that the object of the surveillance be the detection of evidence of a crime.⁵² Furthermore, targets of surveillance under FISA may be U.S. persons, provided the government shows probable cause that they are acting as a foreign power's agent.⁵³ The statute stipulates, however, that a U.S. person may not be deemed an agent of a foreign power purely based on activities protected by the First Amendment.⁵⁴ In contrast with other American courts, the FISC conducts its hearings *ex parte*—without adversary parties.⁵⁵ Furthermore, because of the highly sensitive nature of the materials at issue, FISC proceedings are conducted in secret,

⁵⁰ See 50 U.S.C. § 1805(a)(2) (specifying the probable cause requirements to be included in an application to conduct electronic surveillance under FISA). The statute provides that in making the probable cause determination, FISC judges “may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.” *Id.* § 1805(b).

⁵¹ See *id.* § 1804(a)(6)(B) (requiring the government to certify that “a significant purpose of the surveillance is to obtain foreign intelligence information”). Prior to 2001, the government was required to certify to a *primary* rather than a *significant* purpose of gathering foreign intelligence. See *United States v. Abu-Jihaad*, 630 F.3d 102, 119 (2d Cir. 2010) (citing *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)) (noting that in its original form, and in accordance with a subsequent decision interpreting it, FISA required “that foreign intelligence information be the *primary* objective of the surveillance”). Following the September 11, 2001 terrorist attacks, Congress amended FISA’s primary purpose language to instead require a “significant purpose.” See CORN ET AL., *supra* note 25, at 209–10 (describing the “significant purpose” amendment to FISA in response to the September 11 terrorist attacks); see also *Abu-Jihaad*, 630 F.3d at 120 (upholding the constitutionality of the “significant purpose” amendment over a challenge asserting that the amendment could allow the government to “misuse the statute to procure warrants for criminal investigations without demonstrating” probable cause required for a normal criminal investigation).

⁵² See CORN ET AL., *supra* note 25, at 206 (“There is no requirement that the information sought is evidence of a crime or connected to criminal activity.”); see also *Abu-Jihaad*, 630 F.3d at 120 (distinguishing FISA warrants from normal criminal warrants).

⁵³ See CORN ET AL., *supra* note 25, at 206 (“[T]he term ‘agent of a foreign power’ is not limited to foreign nationals, but includes U.S. persons suspected of being involved in espionage, sabotage, or international terrorism.”).

⁵⁴ See 50 U.S.C. § 1805(a)(2)(A) (“[N]o United States person may be considered . . . an agent of a foreign power solely upon the basis of activities protected by the first amendment . . .”); see also *United States v. Rosen*, 447 F. Supp. 2d 538, 550 (E.D. Va. 2006) (holding that the FISC had adequate probable cause to determine that surveillance targets “were agents of a foreign power quite apart from their First Amendment lobbying activities”).

⁵⁵ See Donohue, *supra* note 16, at 204 (noting that FISC proceedings are conducted *ex parte*); CORN ET AL., *supra* note 25, at 207 (“[T]he FISC only hears from one side—the government.”); see also *United States v. Megahey*, 553 F. Supp. 1180, 1196–97 (E.D.N.Y. 1982) (finding that the FISC is not improperly constituted under Article III’s case or controversy requirement on the basis of its “exercising exclusively *ex parte* powers” because the electronic surveillance applications require the FISC to apply the law to a set of facts contained in the application, and therefore meet the case or controversy requirement), *aff’d*, 729 F.2d 1444 (2d Cir. 1983).

in a secure facility, and FISC opinions are by default withheld from public view.⁵⁶

3. The USA PATRIOT Act, the FISA Amendments Act, and Section 702

The first significant changes to the FISC's role after its 1978 establishment came in 2001, in response to the September 11 terrorist attacks.⁵⁷ Reacting to the attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), which amended FISA with the goal of destroying the so-called wall within the Department of Justice that separated criminal investigations from foreign intelligence collection.⁵⁸ Section 215 of the USA PATRIOT Act amended FISA to expand the provision of the statute that enabled the government to request business records.⁵⁹ Section 215 empowered the government to collect records from telecom providers, such as Verizon, containing details on domestic and international calls placed by individuals.⁶⁰ This practice is known as bulk data collection.⁶¹

Additionally, in the wake of September 11, the executive branch, outside FISA's auspices, established the Stellar Wind program, which surveilled cer-

⁵⁶ See Donohue, *supra* note 16, at 204 (noting that FISC proceedings are conducted *in camera*); Rockhill, *supra* note 5, at 471 (noting that FISC opinions and orders are not released to the public); CORNET AL., *supra* note 25, at 207 (explaining that the FISC operates with "classified, *ex parte* proceedings in a secure facility located in the federal courthouse in Washington, D.C."); *In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d 484, 487–88 (FISA Ct., 2007) (describing the unique nature of the FISC, with the entirety of its docket relating to the federal government's collection of foreign intelligence, and accordingly that its proceedings are conducted outside of public view). The default in American courts is public operation, with secrecy only in exceptional circumstances. *In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d at 488. The FISC and FISCRC reverse this paradigm, with secrecy as the default and public access only in exceptional circumstances. *Id.*

⁵⁷ See Donohue, *supra* note 16, at 204 (noting that between 1978 and 2001 "the FISC essentially functioned as a warrant-granting body," reviewing applications, issuing thousands of orders, and releasing "just one public opinion," but that "following the attacks of 9/11, that all changed").

⁵⁸ See *In re Sealed Case*, 310 F.3d 717, 727–28 (FISA Ct. Rev. 2002) (explaining that FISA's primary purpose requirement had come to be "narrowly interpreted" by the Department of Justice "as requiring . . . a 'wall' to prevent the FBI intelligence officials from communicating with the Criminal Division regarding ongoing [foreign intelligence] or [foreign counterintelligence] investigations"); Donohue, *supra* note 16, at 204 (explaining that the 2001 USA PATRIOT Act amendments to FISA "brought down the wall that had previously existed within the Department of Justice between foreign intelligence collection and criminal investigations").

⁵⁹ See Donohue, *supra* note 16, at 204 (describing the "expansion of the business records provision in Section 215" as one of "the most significant alterations" to FISA that the USA PATRIOT Act brought about).

⁶⁰ See Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA's 215 Program*, 12 COLO. TECH. L.J. 309, 313 (2014) (noting that Section 215 permits the government to "collect[] call detail records from the large telecom providers pertaining to calls into, out of, and within the United States").

⁶¹ See Freiwald, *supra* note 60, at 310 (describing the collection of data under Section 215 as "bulk data collection").

tain domestic and international telephone calls, internet communications, and metadata.⁶² Beginning in 2004, the Bush Administration sought to bring the Stellar Wind program within FISA's legal framework, pursuing FISC approval.⁶³ These attempts, and media reporting on the Administration's surveillance program, led to the 2008 passage of the FISA Amendments Act (FAA).⁶⁴

Among the most significant changes that the FAA made to FISA was the addition of Section 702, which allows for the warrantless electronic surveillance of non-U.S. persons located outside the United States.⁶⁵ Section 702 lets

⁶² See Donohue, *supra* note 16, at 205 (describing the Bush Administration's Stellar Wind program, and its inception outside the auspices of FISA "[d]espite Congress's explicit direction in 1978 that FISA be the sole means for conducting domestic surveillance for foreign intelligence purposes"). The FISC has defined metadata as "comprehensive routing information, including but not limited to session identifying information . . . trunk identifier, telephone calling card numbers, and time and duration of calls." Freiwald, *supra* note 60, at 313 (quoting Secondary Order, In re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. 13-80, slip. op. at 2 (FISA Ct. Apr. 25, 2013)). In short, the term "metadata" does not include the content of calls or texts but does include nearly everything else. See *id.* (describing the FISC's definition of metadata, as of 2014). Metadata surveillance can reveal a wealth of personal information, including the subjects' relationships, location, and other "sensitive inferences." See Jonathan Mayer, Patrick Mutchler & John C. Mitchell, *Evaluating the Privacy Properties of Telephone Metadata*, 113 PROC. NAT'L ACAD. SCI. U.S. 5536, 5540 (2016) (conducting a quantitative analysis of telephone metadata collection, concluding that "there are significant privacy impacts associated with telephone metadata surveillance," and noting that arriving at an acceptable "balance between national security and civil liberties [requires that] future policymaking . . . be informed by input from the relevant sciences").

⁶³ See Donohue, *supra* note 16, at 205 (describing the Bush Administration's attempts to bring Stellar Wind within the FISA framework, and observing that "it took creative legal interpretations to find a way to bring parts of the program within FISA"). See generally Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/us/politics/documents-shed-new-light-on-legal-wrangling-over-spying-in-us.html?ref=politics> [<https://perma.cc/SNS3-VUPL>] (reporting that only years later, in response to Freedom of Information Act Litigation, was the FISC/R's role in approving, and subsequently disapproving, aspects of the Stellar Wind program revealed to the public).

⁶⁴ See Donohue, *supra* note 16, at 205 (observing that "[t]he ill-fitting nature of bulk collection programs in the existing statutory framing prompted further statutory revision and ushered in what is colloquially referred to as 'modernized FISA'"); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [<https://perma.cc/6TDS-Y7MS>] (revealing the existence of the Stellar Wind program and reporting on the FISC's role in approving government surveillance programs).

⁶⁵ See Foreign Intelligence Surveillance Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2438 (2008) (codified at 50 U.S.C. § 1881(a)) (empowering the Attorney General and Director of National Intelligence to authorize surveillance for "up to 1 year . . . of persons reasonably believed to be located outside the United States to acquire foreign intelligence information"). Section 702 sunsets every two years and was most recently reauthorized in April 2024. See Noah C. Chauvin, *The Warrant Exception That Isn't: FISA Section 702, 'Defensive' Searches, and the Fourth Amendment*, 74 AM. U. L. REV. 563, 564 (2025) (noting Congress's recent reauthorization of Section 702 and stating that the provision "periodically sunsets"); Press Release, Off. Pub. Aff., Attorney General Merrick B. Garland Statement on the Senate's Vote on the Reauthorization and Reform of Foreign Intelligence Surveillance Act Section 702 (Apr. 20, 2024), <https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-statement-senates-vote-reauthorization-and-reform-foreign> [<https://perma.cc/6VPQ->

the government circumvent the need for individual court orders approving particular surveillance requests, instead allowing it to apply annually to the FISC to certify the surveillance on a programmatic basis.⁶⁶ Furthermore, subject to certain restrictions, the FAA allows the Attorney General and Director of National Intelligence to authorize up to one year of surveillance without FISC approval.⁶⁷ Despite Section 702's application to surveillance of non-U.S. persons located outside the United States, the communications of U.S. persons are unavoidably swept up within the collection.⁶⁸ This phenomenon, known as incidental collection, means that when a U.S. person contacts a target of a Section 702 collection via text message, phone call, or email, those communications are captured in addition to those of the target.⁶⁹ Legislative history reflects that members of Congress explicitly contemplated this incidental collection of U.S. persons' communications when they drafted Section 702, and the statute as enacted permits such collection.⁷⁰ Although the statute requires the government to adopt procedures to minimize the acquisition, retention, and use of U.S. persons' information, the government can conduct warrantless searches of this information if there is reasonable likelihood that it will discover foreign intelligence.⁷¹ In effect, Section 702 gives government officials the ability to

8RUY] (approving the reauthorization of Section 702 as "indispensable to the Justice Department's work to protect the American people from terrorist, nation-state, cyber, and other threats").

⁶⁶ See 50 U.S.C. § 1881a(h) (laying out the programmatic certification procedure under which the Attorney General and Director of National Intelligence seek annual authorization from the FISC); Chauvin, *supra* note 65, at 565 ("Under Section 702, government officials need not obtain individualized court orders justifying surveillance against particular targets; instead, the Attorney General and the Director of National Intelligence apply annually to the [FISC] . . . for 'certification[s]' approving the spying on a programmatic basis.").

⁶⁷ FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 702–704, 122 Stat. 2438–57 (2008); see Donohue, *supra* note 16, at 205 (describing the mandate that the FAA gave executive branch officials to authorize certain spying programs without court approval for a time-limited period).

⁶⁸ PRIV. & C.L. OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 82 (2014), <https://irp.fas.org/offdocs/pclob-702.pdf> [<https://perma.cc/4XJ4-R9UP>] (observing that "[t]he collection of communications to and from a target inevitably returns communications in which non-targets are on the other end, some of whom will be U.S. persons").

⁶⁹ See Chauvin, *supra* note 65, at 565 (explaining incidental collection as occurring "[w]henver a U.S. person, for example, calls, texts, or emails a target of Section 702 collection, [and] his or her messages are captured along with the target's").

⁷⁰ See PRIV. & C.L. OVERSIGHT BD., *supra* note 68, at 82–83 ("The incidental collection . . . was clearly contemplated by Congress at the time of drafting."); Priv. & C.L. Oversight Bd., *Transcript of Public Hearing Regarding the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, at 96–97 (Mar. 19, 2014) (statement of Robert Litt, General Counsel, ODNI), <https://documents.pclob.gov/prod/Documents/EventsAndPress/bf331b9c-218c-4caf-b352-0e05af2a6a66/20140319-Transcript%20-%20Completed%20508%20-%20Nov%2015,%202023%20-%201335.pdf> [<https://perma.cc/D5DS-2UEM>] (describing the collection as neither "accidental" nor "inadvertent").

⁷¹ See 50 U.S.C. § 1881a(e) (directing the Attorney General and Director of National Intelligence to adopt minimization procedures for the collection and retention of information on U.S. persons); Chauvin, *supra* note 65, at 572 (explaining that "[o]nce collected, the government can perform back-

search U.S. persons' private communications, without the judicial approval or probable cause that the Fourth Amendment requires.⁷² The backdoor search capabilities that Section 702 gives government officials have stoked bipartisan ire.⁷³ Nonetheless, Congress voted to reauthorize the provision in April 2024 without significant changes.⁷⁴

door searches of these communications, again without a warrant, whenever the searches are reasonably likely to return foreign intelligence—despite a congressional command to minimize the retention and use of U.S. persons' information"). Privacy and civil liberties advocates strenuously oppose Section 702 and its April 2024 reauthorization, maintaining that these backdoor searches give the executive branch a means to circumvent the Fourth Amendment. *See, e.g.*, Press Release, Brennan Ctr. for Just., at NYU Law, House Passes Section 702 Reauthorization Bill Without Protections Against Warrantless Spying on Americans (Apr. 12, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/house-passes-section-702-reauthorization-bill-without-protections-against> [<https://perma.cc/HU26-57NC>] (stating that "[f]ederal agencies routinely get around the Fourth Amendment's prohibition on warrantless domestic surveillance by searching Americans' data acquired under Section 702").

⁷² *See* Chauvin, *supra* note 65, at 565–66 (describing the capabilities that Section 702 gives intelligence and law enforcement officials, without officially implicating Fourth Amendment protections). The government makes extensive use of these capabilities. *See id.* (noting that in 2021 alone, "the FBI conducted 3.4 million backdoor searches" and that "it has performed them at a rate of tens or hundreds of thousands per year in the time since"). Furthermore, aside from the backdoor searches that law enforcement performs within the auspices of Section 702, there are "compliance problems with the FBI's [searching] of Section 702 [that] have proven to be persistent and widespread." Memorandum Opinion and Order, Section 702 2021 Certification, at 49 (FISA Ct. Apr. 21, 2022), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_FISC_Certification_Opinion.pdf [<https://perma.cc/ZF4V-MUTR>] (noting FBI abuses of Section 702 data). Privacy advocates have noted that these abuses have been perpetrated against groups including "racial justice protesters, members of Congress, journalists, crime victims, and political donors." *See* Noah Chauvin, *Too Much Power for Spy Agencies*, BRENNAN CTR. FOR JUST. (Apr. 23, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/too-much-power-spy-agencies> [<https://perma.cc/J3ZN-JT29>] (noting documented abuses of Section 702).

⁷³ *See* Chauvin, *supra* note 65, at 567 (noting that Section 702 has led to bipartisan outrage and declarations by members of Congress that they would vote against its reauthorization, absent "significant reforms"); John Sakellariadis, *In the Senate, Biden's Spy Pitch Falls on Deaf Ears*, POLITICO (June 13, 2023), <https://www.politico.com/news/2023/06/13/senate-biden-foreign-surveillance-00101749> [<https://perma.cc/C8CF-5T25>] (quoting Senators Dick Durbin and Mike Lee, who expressed disapproval of Section 702's implementation).

⁷⁴ *See, e.g.*, Press Release, Brennan Ctr. for Just. at NYU Law, House Passes Section 702 Reauthorization Bill Without Protections Against Warrantless Spying on Americans (Apr. 12, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/house-passes-section-702-reauthorization-bill-without-protections-against> [<https://perma.cc/HU26-57NC>] ("Members of the House voted to reward the government's widespread abuses of Section 702 by massively expanding its surveillance powers. This is a craven betrayal of Americans who have placed their faith in these members to protect their rights."); Chauvin, *supra* note 72 (describing an amended provision of the reauthorized version of Section 702 as "[an] empty gesture at reform" that would have little practical effect in constraining law enforcement or protecting civil liberties). Executive branch officials reacted positively to Section 702's reauthorization. *See, e.g.*, Press Release, Off. Pub. Aff., Attorney General Merrick B. Garland Statement on the Senate's Vote on the Reauthorization and Reform of Foreign Intelligence Surveillance Act Section 702 (Apr. 20, 2024), <https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-statement-senates-vote-reauthorization-and-reform-foreign> [<https://perma.cc/6VPQ-8RUY>] (describing Section 702 as indispensable).

Under the FAA, the role of the FISC/R significantly broadened from its originally intended role of reviewing applications and issuing orders for the surveillance of particular targeted individuals.⁷⁵ The courts now additionally monitor and evaluate government surveillance programs carried out by the executive branch that collect international communications.⁷⁶ As a result of this expanded mandate, the FISC/R now frequently addresses issues ranging from the separation of powers to First, Fourth, and Fifth Amendment questions with direct implications on the lives and civil liberties of every individual in the United States.⁷⁷

In 2013, in *In re Application of the FBI for an Order Requiring Production of Tangible Things from [REDACTED]*, the FISC considered whether it could issue an order for business records, despite all of the target's conduct and speech that the FBI cited to show that it was seeking to investigate international terrorism falling within the First Amendment's scope.⁷⁸ The court acknowledged the First Amendment's protection of the target's activities and resultant challenges under the FISA, as the statute bars the government from relying solely on First Amendment activity in determining whether to conduct surveillance.⁷⁹ Nonetheless, the FISC determined that the relevant portion of the stat-

⁷⁵ See 50 U.S.C. §§ 1881a(h)–1881c (broadening the ambit of FISC activities beyond its original form); Donohue, *supra* note 16, at 205–06 (describing changes to the FISC and FISC/R brought about by the 2008 FISA Amendments Act); PRIV. & C.L. OVERSIGHT BD., *supra* note 68, at 106, <https://irp.fas.org/offdocs/pclob-702.pdf> [<https://perma.cc/4XJ4-R9UP>] (noting the expanded role of the FISC, in particular under Section 702). Furthermore, the FISC's role grew to include considering bulk communications collections, although later statutory changes increased the protections for U.S. citizens' telephony metadata. See Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 767–83 (2014) (discussing the events that led to increased safeguards surrounding domestic collection of U.S. citizens' telephony metadata).

⁷⁶ See Donohue, *supra* note 16, at 205 (explaining that rather than “just issuing orders targeted at particular individuals inside the U.S., the FISC and FISC/R now monitor programmatic collection of international electronic communications”).

⁷⁷ See *id.* at 205–06 (describing the expanded range of issues that the FISC now regularly addresses, and their widespread impact on American life); see, e.g., *In re Proc. Required by Section 702(i) of the FISA Amends. Act of 2008*, No. Misc 08-01, 2008 WL 9487946, at *3, *5 (FISA Ct. Aug. 27, 2008) (addressing First and Fourth Amendment questions); Opinion on Motion for Disclosure of Prior Decisions, at 3 (FISA Ct. 2014), available at Georgetown Foreign Intelligence Law Collection, GID.C.00112 (addressing Fifth Amendment questions).

⁷⁸ See Opinion, *In re Application of the FBI for an Ord. Requiring Prod. of Tangible Things from [REDACTED]*, No. BR 13-25, at 4 (FISA Ct. Feb. 19, 2013), available at Georgetown Foreign Intelligence Law Collection GID.C.00080 (considering whether the FISC could approve the FBI's application even though “[n]one of the conduct or speech” of the investigation's target was “outside the ambit of the first amendment”). FISA explicitly requires that an investigation of tangible things under the statute shall “not be conducted of a United States person solely upon the basis of activities protected by the first amendment . . .” 50 U.S.C. § 1861(a)(2)(B) (emphasis added).

⁷⁹ See *In re Application of the FBI*, No. BR 13-25, at 5 (stating that “the government's own assessment of [REDACTED] points to the conclusion that it is protected speech” and that therefore, “the Court is doubtful that the facts regarding [REDACTED] own words and conduct alone establish reasonable grounds to believe that the investigation is not being conducted solely on the basis of [sic] first amendment”).

ute allowed it to consider the related conduct of a non-U.S. person to determine whether the investigation was permissible, and therefore granted the FBI's application.⁸⁰

The FISC also regularly decides questions under the Fourth Amendment, notably in relation to the warrant requirement, the nature of a search, and probable cause determinations under the FISA.⁸¹ Although with less frequency, the FISC has considered questions relating to the Due Process Clause of the Fifth Amendment.⁸² In addition to deciding questions bearing directly on civil liberties, the FISC's role includes monitoring the executive branch in its surveillance activities and making determinations about its compliance with statutory and constitutional requirements.⁸³

As the role of the FISC has expanded to encompass constitutional questions, including interpreting the First, Fourth, and Fifth Amendments, the court now produces a significant body of law in the form of opinions with wide-ranging implications, including on individual civil liberties.⁸⁴ Not only does the FISC/R issue opinions containing legal reasoning and interpretation, but those opinions are also treated as precedent by the FISC/R itself and by other government actors.⁸⁵ Nonetheless, FISC proceedings are conducted behind

⁸⁰ See *id.* (finding that the statute allows the FISC not only to consider the "personal words" of the target of the investigation, which "suggest sympathy toward, if not support of, international terrorism," but also to consider the conduct of a non-U.S. person in determining whether the FBI's application was proper); Donohue, *supra* note 16, at 246 ("The activities of a non-U.S. person could be used in conjunction with protected First Amendment protected [sic] activities to target a U.S. person.").

⁸¹ See Donohue, *supra* note 16, at 258 (noting the FISC's Fourth Amendment jurisprudence, and its "profound impact on U.S. persons' constitutional rights"); *In re Sealed Case*, 310 F.3d 717, 736–37, 746 (FISA Ct. Rev. 2002) (holding that under FISA and the Fourth Amendment, the government did not have to demonstrate a "primary purpose" of foreign surveillance in order to conduct electronic surveillance, but that a "significant purpose" was sufficient).

⁸² See Donohue, *supra* note 16, at 265 (citing Opinion on Motion for Disclosure of Prior Decisions, [REDACTED], No. [REDACTED], available at Georgetown Foreign Intelligence Law Collection, GID.C.00112, at 3 (FISA Ct. 2014)) (noting that the FISC denied a motion seeking disclosure of FISC decisions partially on the basis that the due process clause "does not compel the requested disclosure").

⁸³ See *id.* at 205–06 (explaining that the FISC "police[s] an Executive that makes technical errors, fails to comply with court orders, omits critical information, and makes misrepresentations to the court"). As the FISC has observed, the executive branch does not always comply with legal requirements. See, e.g., [REDACTED], No. [REDACTED], 2011 WL 10945618, at *5–6, *28 (FISA Ct. Oct. 3, 2011) (finding, in a proceeding under Section 702 in which the government sought approval to collect telephone and internet communications, that the NSA had not made accurate representations to the FISC, and that its proposed collection procedure violated the relevant FISA section and the Fourth Amendment). Moreover, observers have documented constitutional and statutory violations by the executive branch that have come to light outside FISC review. See Chauvin, *supra* note 65, at 622 (providing an overview of intelligence abuses).

⁸⁴ See Donohue & McCabe, *supra* note 45, at 557 (describing the expanded role of the FISC, including its "monitor[ing] how the government wields its power").

⁸⁵ See Donohue, *supra* note 16, at 206 ("Instead of just issuing orders approving applications, the FISC routinely issues opinions, which the Executive Branch, *amici*, non-specialized Article III judges (and their clerks and parties before them), cite to as precedent.").

closed doors, and the court does not routinely publish its decisions.⁸⁶ From its inception in 1978 until 2013, the FISC publicly released two opinions.⁸⁷

4. The Snowden Disclosures and the USA FREEDOM Act

On June 5, 2013, the FISC was thrust into the global media spotlight when *The Guardian* published a FISC order leaked by Edward Snowden, a contractor working for the National Security Agency (NSA).⁸⁸ The revelation that the NSA had, with the approval of the FISC, undertaken ongoing bulk collection of Americans' data on a grand scale provoked a swift and sweeping public backlash.⁸⁹ Responding to this public pressure, the government voluntarily released additional FISC opinions.⁹⁰ The culmination of the legislative response to the Snowden-precipitated public demand for transparency came in 2015, when Congress passed the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act).⁹¹ The USA FREEDOM Act requires the government to con-

⁸⁶ See *supra* note 4 and accompanying text; CORN ET AL., *supra* note 25, at 207 (describing the secret nature of FISC proceedings).

⁸⁷ See *In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d 484, 488 (FISA Ct., 2007) ("In the entire history of the FISC, just two opinions have been publicly released."). Scholars have predicted that public demand for FISC material will not abate. See Donohue, *supra* note 16, at 287 ("What is being adjudicated is law, and the public does and will demand the right for access to it.").

⁸⁸ See *Verizon Forced to Hand Over Telephone Data—Full Court Ruling*, *supra* note 6 (publishing a FISC order directing Verizon to continue turning over detailed records of telephony metadata on millions of Americans to the NSA "on an ongoing daily basis"); see also Greenwald, *supra* note 6; Donohue, *supra* note 16, at 207–08 (noting the "suddenness with which the courts have found themselves in the public eye" as a result of the Snowden disclosures and public reaction).

⁸⁹ See Langford, *supra* note 7, at 216 (describing the public response to the Snowden disclosures, including widespread expressions of outrage and calls for reform from privacy and civil liberties advocates and from government figures). In addition to revealing government surveillance activities that shocked the public, the exposure of the FISC's role in sanctioning activities brought to light the degree to which the nature of the court had changed in the decades since its 1978 establishment. See ELIZABETH GOITEIN, *THE NEW ERA OF SECRET LAW* 58 (2016) (explaining that "Edward Snowden's disclosures showed that the role of the FISA Court had fundamentally changed" and that it was "no longer limited to resolving whether the facts of individual cases met the legal standard for issuance of a search order" but was "resolving novel, cutting-edge Fourth Amendment issues in the context of surveillance programs affecting tens of millions of Americans").

⁹⁰ See Langford, *supra* note 7, at 218 (detailing government entities' voluntarily release of various FISC opinions and information, including a whitepaper published by the Obama Administration, and declassification and publication of FISC opinions by the NSA Director, including FISC Judge Walton "sua sponte order[ing] publication of four FISC orders concerning the constitutionality of the bulk collection of telephony metadata"); GOITEIN, *supra* note 89, at 59 (noting that the Office of the Director of National Intelligence collaborated with the Department of Justice to release over fifty FISC opinions, "some in response to FOIA requests or litigation, but many on the government's own initiative"); see also Donohue, *supra* note 16, at 208 ("It would be hard to overstate the importance of the documents leaked by Edward Snowden in June 2013 in driving [the declassification and release of FISC opinions and orders].").

⁹¹ See Pub. L. No. 114-23, 129 Stat. 268 (June 2, 2015) (amending the FISA of 1978); Donohue, *supra* note 16, at 225, 227 (describing the passage of the USA FREEDOM Act as the legislative cul-

duct a declassification review of FISC opinions, declassifying and publishing any that include novel or significant construction of law, to the greatest extent practicable, with redactions where necessary.⁹² Notably, the declassification review is carried out not by the court, but by the Director of National Intelligence in consultation with the Attorney General—both executive branch officials.⁹³ Furthermore, the review is subject to a national security waiver.⁹⁴ By the government’s assertion, the declassification review provision of the USA FREEDOM Act does not apply retroactively to FISC or FISC/R decisions pre-dating its passage.⁹⁵

mination of the “political fallout” of the “Snowden documents burst[ing] on the scene”); Chauvin, *supra* note 65, at 573–74 (explaining that the Snowden disclosures led to the passage of the USA FREEDOM Act).

⁹² See 50 U.S.C. § 1872(a)–(b) (requiring that the government declassify FISC/R opinions containing “a significant construction or interpretation of any provision of law” and make any such opinions publicly available). Where declassification and publication even in redacted form would, in the judgement of executive branch officials, compromise national security, executive branch officials are directed to prepare and publish a document “summarizing the significant construction or interpretation of any provision of law” *Id.* § 1872(c)(2)(A).

⁹³ See *id.* § 1872(a)–(b) (providing that the evaluation, declassification, and publication of FISC/R opinions be conducted by the Director of National Intelligence and the Attorney General). Although the USA FREEDOM Act declassification and publication requirements have led to publication of FISC/R opinions, scholars have nonetheless described them as relatively inconsequential. See, e.g., Rockhill, *supra* note 5, at 486 (noting that because the review is conducted by the executive branch, rather than the court itself, the “amendments on their face attempt to create more transparency with FISC proceedings yet do little in practice to change the secretive *status quo*”); Chauvin, *supra* note 65, at 574 (describing the changes as “modest surveillance reforms”); GOITEIN, *supra* note 89, at 59 (asserting that although increased transparency is a “success story,” “the law still leaves ample room for secrecy”). In particular, scholars point to the separation of powers issues posed by the executive branch, rather than the FISC/R itself, being the body entrusted with reviewing the court’s opinions and making determinations about declassification and publication. See Donohue, *supra* note 16, at 221 (noting that because control over its own records is an inherent power of any Article III court, “separation of powers means that the executive cannot bind the court and classify judicial opinions”); GOITEIN, *supra* note 89, at 59 (stating that because executive branch officials rather than the FISC/R are vested with the declassification discretion, “[t]here is no external check to prevent the executive branch from interpreting the term ‘significant’ as creatively as it interpreted the term ‘relevant,’ or a host of other common-sense terms that the intelligence establishment has notoriously redefined”).

⁹⁴ See 50 U.S.C. § 1872(c) (outlining the procedure under which the Director of National Intelligence and the Attorney General may decline to declassify FISC opinions containing novel or significant legal interpretations, where national security would, in their judgment, be compromised); GOITEIN, *supra* note 89, at 59 (noting that the national security waiver portion of the statute allows the executive branch to issue “a summary that must include certain basic information only ‘to the extent consistent with national security’”).

⁹⁵ See Langford, *supra* note 7, at 220–21 (explaining that the government asserted, and successfully litigated, the position that the FREEDOM Act declassification review requirement “does not apply retroactively to decisions that predate” the Act’s enactment); Meenakshi Krishnan, *The Foreign Intelligence Surveillance Court and the Petition Clause: Rethinking the First Amendment Right of Access*, 130 YALE L.J.F. 723, 733 (2021) (citing Gov’t Mem., Elec. Frontier Found. v. DOJ, No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF No. 28) (noting that the transparency brought about by the USA FREEDOM Act “remains constrained,” in part “because the government maintains that the declassification provision does not apply retroactively”).

5. The FISC and FISCER as Article III Courts

Importantly, although they are specialized by subject matter, the FISC/R are Article III bodies, a status carrying certain inherent powers.⁹⁶ Article III of the U.S. Constitution vests the judicial power in the Supreme Court, and grants to Congress the power to establish lower federal courts, in which the judicial power is also vested.⁹⁷ Congress has used this power to create Article III courts that are limited by geography and by subject matter.⁹⁸ Courts created pursuant to Article III exercise inherent constitutional powers and operate as a co-equal branch of government, alongside the executive and legislative branches.⁹⁹ Furthermore, the Supreme Court exercises discretionary certiorari jurisdiction to review decisions from all Article III courts, including those limited to specialized subject matter.¹⁰⁰

Congress intended the FISC and FISCER to be subject matter specialized Article III courts.¹⁰¹ Courts confronting the question of the FISC's Article III status have buttressed this intention.¹⁰² Furthermore, the FISC designates itself

⁹⁶ See generally Donohue & McCabe, *supra* note 45, at 553–58 (explicating the Article III status of the FISC/R and the inherent powers that status confers); Peter Margulies, *Searching for Federal Judicial Power: Article III and the Foreign Intelligence Surveillance Court*, 85 GEO. WASH. L. REV. 800, 853 (2017) (arguing that although the FISC's role under Section 702 presents a novel issue under Article III, "it fits within Article III's space for the exercise of judgment by independent courts").

⁹⁷ See U.S. CONST. art. III, § 1 (vesting the judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish"). By contrast, state courts, for example, are not Article III courts. See Donohue & McCabe, *supra* note 45, at 550 (contrasting state courts with courts established under Article III).

⁹⁸ See Donohue & McCabe, *supra* note 45, at 550, 554, 560 (stating that Congress has, under Article III, established both "non-specialized and specialized" courts, and listing both the FISC and the U.S. Court of Appeals for the Federal Circuit as examples of subject matter specialized Article III courts).

⁹⁹ See *id.* at 550 (explaining that Article III "status conveys certain inherent authorities that are constitutionally derived and indelibly linked to the courts' status as a co-equal branch of government"); *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929) (stating that courts created under Article III "share in the exercise of the judicial power" as defined in that Article); see also THE FEDERALIST NO. 51, at 348 (James Madison) (Jacob Ernest Cooke ed., 1961) (describing the separation of powers as a means for preventing any of the three branches of government from gaining supremacy, with the branches being "the means of keeping each other in their proper places").

¹⁰⁰ See Donohue & McCabe, *supra* note 45, at 552 (citing 28 U.S.C. §§ 1254, 1257(a), 1259) (The Court has the authority to review (by certiorari) all cases in the Courts of Appeal . . . It has jurisdiction over decisions from . . . the specialized Article III courts . . .).

¹⁰¹ See *id.* at 554 (explaining that "[d]espite its in camera, *ex parte* emphasis and the absence of adversary parties, from the beginning, Congress has consistently considered FISC/FISCER to be an Article III court"). For an exploration of the relationship between the FISC/R and Article III, focusing on the changes to the FISC/R's role following the September 11, 2001 terrorist attacks, see Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015).

¹⁰² See *In re Certification of Questions of L. to the Foreign Intel. Ct. of Rev.*, No. FISCER 18-01, 2018 WL 2709456, at *8 (FISA Ct. Rev. Mar. 16, 2018) (stating that "[w]e have held that the FISC's authority and inherent secrecy is cabined by—and consistent with—Article III of the Constitution"); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the argument that the FISC is "not a proper Article III court"), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

as an Article III court,¹⁰³ and the Supreme Court is the forum for appeals from FISCER judgments.¹⁰⁴

Among the inherent powers of Article III entities, including the FISC and FISCER, is control over that entity's own records.¹⁰⁵ Because the FISC and FISCER are Article III courts exercising the judicial power of the United States, incursion into the exercise of this power by other branches of government would offend the separation of powers.¹⁰⁶

B. The Right of Public Access to Judicial Materials

The right of access to judicial proceedings and materials has both common law and First Amendment underpinnings.¹⁰⁷ Subsection 1 of this Section traces the historical and current common law dimensions of the right.¹⁰⁸ Sub-

¹⁰³ See *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTEL. SURVEILLANCE CT., <https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court> [<https://perma.cc/35Z9-T2QM>] (“As other federal courts have recognized, the FISC is an Article III federal court.”).

¹⁰⁴ See 50 U.S.C. § 1803(b) (directing that if the FISCER determines that the FISC improperly denied a surveillance application, “on petition of the United States for a writ of certiorari, the record [of the FISCER’s decision] shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision”); *id.* § 1822(d) (directing the same procedure as in § 1803(b) for FISCER determinations on applications for physical searches for foreign intelligence purposes).

¹⁰⁵ See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (holding that “[e]very court has supervisory power over its own records and files”); *In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007) (refuting the argument that the FISC lacked jurisdiction over its own records); Langford, *supra* note 7, at 205 (explaining that the publication power is a core Article III inherent power, and that although in the case of the FISC, it may not extend to all court records, it does mean that the “the FISC must have the power to publish its decisions in full, even if those decisions contain classified information”). Moreover, not only does the FISC, as an Article III entity, have inherent power over its opinions, it also has jurisdiction to review and make determinations on actions seeking access to those opinions. See Langford, *supra* note 7, at 205 (stating that the FISC has jurisdiction over actions “seeking access to its opinions, despite the courts’ narrow grant of statutory jurisdiction”).

¹⁰⁶ See Donohue & McCabe, *supra* note 45, at 553 (“[I]nterference by the other branches in the core functioning of Article III courts, of any type, violates separation of powers.”); Langford, *supra* note 7, at 205 (“[C]ourts’ power to make their decisions public cannot be limited by Congress or the executive branch.”). Notably, Congress *does* have the power “to control the jurisdiction of [Article III] courts.” See Andrea Olson, *Defining the Article III Judicial Power: Comparing Congressional Power to Strip Jurisdiction with Congressional Power to Reassign Adjudications*, 53 CREIGHTON L. REV. 111, 111, 112–14 (2019) (discussing Congress’s power over federal courts’ jurisdiction, as well as the Supreme Court’s acknowledgement that “Congress has plenary authority over the jurisdiction of Article III federal courts”). Yet scholars have recognized that some core powers of Article III courts are immune from congressional interference. See Langford, *supra* note 7, at 228, 237 (noting that a “point of consensus in the literature is that all federal courts possess some ‘core’ or ‘pure’ ‘judicial power’ that is beyond Congress’s reach,” and that among those inviolate powers is “inherent power over public access to their orders, judgments, and opinions”).

¹⁰⁷ See generally Laura K. Donohue, *The Common Law and First Amendment Qualified Right of Public Access to Foreign Intelligence Law*, 112 GEO. L.J. 271 (2023) (providing an analysis of the origins of the right of public access to court proceedings, with particular focus on the FISC/R).

¹⁰⁸ See *infra* notes 111–121 and accompanying text.

section 2 of this Section examines the First Amendment qualified right of public access to judicial materials.¹⁰⁹ Subsection 3 of this Section provides an overview of recent actions invoking a First Amendment right of access to FISC decisions.¹¹⁰

1. The Common Law Right of Public Access

The American common law presumes a right of public access to judicial materials, with its provenance in centuries of English common law tradition.¹¹¹ Not only were English judicial decisions recorded, preserved, and made available to the public, the accompanying court records and evidence were similarly treated, and court proceedings were open to the public.¹¹² This tradition of openness was rooted in the rationale that the law and its workings must be known to its subjects in order to be just and effective.¹¹³ Although certain limitations on the English right were introduced during the reign of Charles II, those limitations were not reflected in the Founding-era American courts.¹¹⁴

The American common law's present recognition of the public right of access to judicial documents has firm historical roots and is an offshoot of the broad right of access to public records.¹¹⁵ An inherent power of every court is

¹⁰⁹ See *infra* notes 122–132 and accompanying text.

¹¹⁰ See *infra* notes 133–140 and accompanying text.

¹¹¹ See Donohue, *supra* note 107, at 279 (tracing the American common law presumed right of public access through its English common law roots); see also *United States v. Erie County*, 763 F.3d 235, 238–39 (2d Cir. 2014) (“The notion that the public should have access to the proceedings and documents of courts is integral to our system of government.”). Records of English judicial proceedings have been public since the 1307–1327 reign of Edward II. See Donohue, *supra* note 107, at 279 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *70–72).

¹¹² See Donohue, *supra* note 107, at 279 (explaining that the recordation and publication of English judicial materials was not limited to final decisions, but encompassed judicial proceedings more broadly); 2 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, at vi (Joseph Butterworth & Son & J. Cooke eds., 1826) (reporting that the common law required that “whensoever a man is enforced to yield a reason of his opinion or judgment, that then he set down all authorities, precedents, reason, arguments and inferences whatsoever that may be probably applied to the case in question” and that those records, which “contain great and hidden treasure,” be available for “any subject . . . for his necessary use and benefit”).

¹¹³ See Donohue, *supra* note 107, at 280 (“Considerations related to the rule of law undergirded the English approach, with the key component being that the law be known.”).

¹¹⁴ See *id.* at 281 (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 471, at 624 (16th ed. 1899)) (explaining that during the reign of Charles II, with the increase in the frequency of actions for malicious prosecution, actions that “could not be supported without the judicial record,” English judges limited the public’s ability to obtain certain records; those limitations, however, “did not travel across the Atlantic”); see also, GREENLEAF, *supra*, at 624 (“[I]n the United States . . . any limitation of the right to a copy of a judicial record or paper . . . would probably be deemed repugnant to the genius of American institutions.”).

¹¹⁵ See *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (“The common law right of public access to judicial documents is firmly rooted in our nation’s history.”); see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country

control of its own records and files.¹¹⁶ Thus, whether the common law right of access applies to a given document turns on whether the document falls within the category of a judicial record, as opposed to another type of official record.¹¹⁷ Courts distinguish judicial records from official records not within their control under Article III.¹¹⁸ In making this distinction, courts consider the role played by the document in the judicial proceeding, examining its relevance, utility, and the extent to which the court relies on it in carrying out its function.¹¹⁹ Courts also consider the extent to which a document contains information useful to the public in understanding the legal issues under consideration and in evaluating the integrity of the proceedings.¹²⁰ The common law recognizes a presumptive right of public access to any material comprising a judicial record.¹²¹

2. The First Amendment Right of Access

Although the common law right of public access to judicial proceedings and records enjoys a long history in the American courts, the Supreme Court has only relatively recently considered the First Amendment dimensions of

recognize a general right to inspect and copy public records and documents, including judicial records and documents.”).

¹¹⁶ See *Nixon*, 435 U.S. at 598 (“Every court has supervisory power over its own records and files . . .”); Rockhill, *supra* note 5, at 477 (“[T]he common law right of access has a history dating back centuries . . .”); Matthew L. Schafer, *National Security and Access, a Structural Perspective*, 11 J. NAT’L SEC. L. & POL’Y 689, 717 (2021) (“[E]ven in the context of national security, when it came to judicial proceedings, it was ultimately courts that retained the power over their proceedings and records.”); cf. Langford, *supra* note 7, at 237 (“[C]ourts’ power to make public their orders, judgments, and opinions is a core judicial power that must be free from interference.”).

¹¹⁷ See *Donohue*, *supra* note 107, at 285 (“Whether the common law right of public access therefore ‘applies to a particular document . . . [depends] on whether th[e] item is considered . . . a judicial record.’” (quoting *Purcell v. Gilead Scis., Inc.*, 415 F. Supp. 3d 569, 574 (E.D. Pa. 2019))).

¹¹⁸ *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (D.C. Cir. 1894).

¹¹⁹ See *Newsday LLC v. County. of Nassau*, 730 F.3d 156, 166–67 (2d Cir. 2013) (stating that to determine whether a document is a judicial record, courts consider “the degree of judicial reliance on the document in question and the relevance of the document’s specific contents to the nature of the proceeding”); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (“[T]he mere filing of a paper or document with the court is insufficient to render [it] a judicial document subject to the right of public access . . . [T]he item filed must be *relevant to the performance of the judicial function and useful in the judicial process* . . .”) (emphasis added).

¹²⁰ See *Newsday*, 730 F.3d at 167 (considering “whether access to the [information] would materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court’s proceedings”).

¹²¹ See *Nixon*, 435 U.S. at 597 (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”); *Donohue*, *supra* note 107, at 287 (“Under the common law, finding that material constitutes a ‘judicial record’ creates a presumptive right of public access.”); Rockhill, *supra* note 5, at 477 (“Indeed even the Supreme Court held . . . that there is a presumptive common [law] right of access to judicial records.”).

that right.¹²² In 1978, in *First National Bank of Boston v. Bellotti*, the Court recognized that the Free Speech Clause of the First Amendment bars the government from restricting the corpus of information available to the public.¹²³ Then, two years later in 1980, in *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court held that the public and press have a First Amendment right of access to criminal trials.¹²⁴ The constitutional right of access to judicial materials is thus rooted in the right of the public, under the First Amendment, to have knowledge related to the operation of justice.¹²⁵

In *Richmond Newspapers*, the Court articulated the novel “experience and logic” test that remains the standard under which courts evaluate First Amendment right of access claims.¹²⁶ In 1986, in *Press-Enterprise Co. v. Superior Court of California for Riverside County*, the Court fleshed out the contours of the experience and logic test, defining the two applicable prongs.¹²⁷ The test examines whether (1) experience, defined as a history of openness in the particular place or process to the public, and (2) logic, defined in terms of whether public access contributes to the functioning of the process at issue,

¹²² See Schafer, *supra* note 116, at 689 (noting that although the United States has an “unbroken, uncontradicted history” of common law public access to court proceedings, “[a]ccess arrived late in the Court’s First Amendment jurisprudence” (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion))).

¹²³ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (finding that the First Amendment has a crucial role “in affording the public access to discussion, debate, and the dissemination of information and ideas,” and that it “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw”).

¹²⁴ See *Richmond Newspapers, Inc.*, 448 U.S. at 571–72, 576 (because criminal processes, to function effectively, must “satisfy the appearance of justice,” the “First Amendment guarantees of speech and press, standing alone, prohibit [the] government from summarily closing courtroom doors which had long been open to the public at the time that [it] was adopted”).

¹²⁵ See *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (“This preference for public access is rooted in the public’s first amendment right to know about the administration of justice. It helps safeguard ‘the integrity, quality, and respect, in our judicial system’ . . . and ‘permits the public to keep a watchful eye on the workings of public agencies.’”) (citations omitted). The First Amendment right of access is grounded in the guarantees of free speech, press, and assembly, as well as the right to petition. See Donohue, *supra* note 107, at 298 (describing the First Amendment grounding as derived from the right to petition, with a “close nexus to free speech and the other associative rights”); see also Krishnan, *supra* note 95, at 723 (suggesting that the Court’s First Amendment access jurisprudence should draw more heavily from “the right to petition the government through lawsuits”); Schafer, *supra* note 116, at 689–90 (noting that the Court’s First Amendment access jurisprudence “has never decisively linked the right of access to . . . [any] First Amendment theory,” such as the marketplace of ideas theory).

¹²⁶ See Rockhill, *supra* note 5, at 473 (citing *Richmond Newspapers* 448 U.S. at 595 (explaining that the “experience and logic” test was first articulated in *Richmond Newspapers*, and that it remains the test that courts use to evaluate right of access claims)); Schafer, *supra* note 116, at 697–700 (providing an analysis of the approaches of each concurring opinion in *Richmond Newspapers*).

¹²⁷ See Rockhill, *supra* note 5, at 473 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986)) (noting that “[t]he Court further expounded on the test in [*Press Enterprise Co.*] . . . [finding] that a First Amendment right of access exists for certain preliminary hearings of criminal trials”).

militate toward a right of access.¹²⁸ Where the two prongs are satisfied, the public enjoys a qualified First Amendment right of access to the proceeding.¹²⁹ Courts use the experience and logic test to determine the right not only to physical access to court proceedings, but also to documents and evidence that constitute the judicial record.¹³⁰ Both prongs of the experience and logic test must be satisfied to establish the right of access, but the first prong carries more weight, in that a poor showing on the second prong can be overcome by a strong showing on the first.¹³¹ The First Amendment access right is qualified, as the right can be overcome through a showing of an overriding government interest in restricting access to a proceeding, with means narrowly tailored to achieve that interest.¹³²

3. Public Access to FISC Opinions

In June 2013, *The Guardian* published two successive articles reporting on materials released by Edward Snowden, shining an international spotlight on FISC operations and precipitating significant public complaint over the FISC's perceived complicity in illegal intelligence activities.¹³³ Shortly after *The Guardian* published these articles, the ACLU and Yale Law School's Media Freedom and Information Access Clinic (MFIA) filed a motion asking the FISC to publish certain opinions.¹³⁴ Several months later, the same two organiza-

¹²⁸ See *Press-Enter. Co.*, 478 U.S. at 8 (describing the two aspects of the analytical approach under which the Court determines whether a First Amendment right of access attaches).

¹²⁹ See *id.* at 9 (finding that “[i]f the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches”).

¹³⁰ See Donohue, *supra* note 107, at 305 (noting that the experience and logic test “is employed to evaluate physical access to judicial proceedings, as well as to documents, videotapes, and other judicial muniments”).

¹³¹ See *id.* (quoting *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 n.2 (9th Cir. 2008) (“Where access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows. It is only where access has traditionally not been granted that we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive.”)).

¹³² See *Press-Enter. Co.*, 478 U.S. at 9 (finding that even when the experience and logic test is satisfied and a First Amendment “right of access attaches, it is not absolute,” and trial courts must therefore “determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access”); Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1106–07 (1996) (citing *Press-Enter. Co.*, 478 U.S. at 14) (describing the qualified nature of the right, the balancing test that courts undertake to determine if the access right should be overridden, and noting that “although the Court has established a formula which, if successfully employed, permits a defendant to close a proceeding to the public, its test is extremely hard to meet”).

¹³³ Glenn Greenwald, Ewan MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<https://perma.cc/J8QP-65ZG>]; Greenwald, *supra* note 6.

¹³⁴ Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court

tions filed a motion requesting access to opinions pertaining to the legal basis for the bulk data collection that Snowden had brought to light.¹³⁵ Ultimately, the FISC determined, based on its application of the experience and logic test, that no First Amendment right of access attached to the requested opinions.¹³⁶

Following Congress's 2015 passage of the USA FREEDOM Act and the government's determination that the statute did not operate retroactively to compel it to review earlier FISC or FISCER opinions for declassification, the ACLU filed a third motion requesting the release of FISC opinions between 2001 and 2015 that included novel or noteworthy legal interpretations.¹³⁷ In response, the FISC dismissed the motion on the grounds that it lacked jurisdiction as a specialized court for addressing narrow questions related to national security surveillance, lacking empowerment by Congress to review constitutional claims.¹³⁸ Subsequently, the ACLU, Yale's MFIA, and the Knight First Amendment Institute at Columbia University asked the Supreme Court to recognize that a qualified First Amendment right of access attached to the requested FISC opinions.¹³⁹ Over the dissent of Justice Neil Gorsuch, joined by Justice Sonia Sotomayor, the Court denied certiorari.¹⁴⁰

II. THE PUBLIC RIGHT OF ACCESS & JUDICIAL REVIEW

The ACLU's Petition for Certiorari (Petition) to the Supreme Court and the government's arguments in response surface two prevailing issues related to the FISC/R, its role in American life, and its position within the governmental structure: (1) the right of the public under the First Amendment to access judicial records; and (2) the power of the judicial branch to exercise its Article

Records at 1, *In re* Ords. of This Ct. Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. June 10, 2013).

¹³⁵ Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records at 1, *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08 (FISA Ct. Nov. 7, 2013).

¹³⁶ See *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, slip op. at 18 (FISA Ct. Feb. 11, 2020), available at Georgetown Foreign Intelligence Law Collection, GID.C.00267 (finding no First Amendment right of access); see also Donohue, *supra* note 107, at 326 (noting that the FISC's "ruling was remarkable, in part, because of the sheer number of FISC/R rulings which at that point had entered the public domain—a matter surely probative of the experience test").

¹³⁷ Motion of the American Civil Liberties Union for the Release of Court Records at 1, *In re* Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L., No. Misc. 16-01 (FISA Ct. Oct. 18, 2016).

¹³⁸ *In re* Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L., No. Misc. 16-01, slip op. at 3 (FISA Ct. Sept. 15, 2020), available at Georgetown Foreign Intelligence Law Collection, GID.C.00285.

¹³⁹ Petition for a Writ of Certiorari at 21, *American Civil Liberties Union v. United States*, 142 S. Ct. 22 (2021) (No. 20-1499).

¹⁴⁰ *ACLU*, 142 S. Ct. at 22.

III function of judicial review.¹⁴¹ Section A of this Part examines the ACLU's arguments in support of its Petition.¹⁴² Section B of this Part details the government's arguments raised in opposition to the ACLU's Petition.¹⁴³ Section C of this Part summarizes the concerns raised in Justice Gorsuch's dissent to the Court's denial of certiorari.¹⁴⁴

A. The ACLU's Petition for Certiorari

In its Petition for Certiorari to the Supreme Court, the ACLU framed its argument by detailing the expanded role of the FISC/R, specifically pointing to the court's role in authorizing bulk collection of Americans' sensitive metadata.¹⁴⁵ The organization also noted that the FISA Amendments Act of 2008 has expanded the FISC/R's mandate to include regular review and approval of the government's general procedures for its surveillance activities.¹⁴⁶ The import of this expanded mandate, the ACLU argued, is that the court now authors opinions that interpret FISA, additional federal statutes, and the Constitution.¹⁴⁷ These interpretations bear on the liberties and privacy of U.S. citizens and residents, and therefore are of public importance.¹⁴⁸

Although the USA FREEDOM Act requires a declassification review of FISC opinions that contain novel or significant constructions of law, the ACLU's Petition emphasized that this review is conducted not by the ruling

¹⁴¹ See *id.* at 23 (Gorsuch, J., dissenting) ("This case presents questions about the right of public access to Article III judicial proceedings of grave national importance. . . . [E]ven more fundamentally, this case involves a governmental challenge to the power of this Court to review the work of Article III judges in a subordinate court."). Furthermore, the two issues—the right of access to judicial records and the separation of powers issue implicated by the interference with the judicial branch's power of judicial review—have a symbiotic relationship. See Schafer, *supra* note 116, at 716 (arguing that "[e]nforcing a right of access to judicial proceedings and records advances separations of power by clearly delineating separate spheres of power between the judiciary and executive and ensuring that the executive is accountable to the judiciary").

¹⁴² See *infra* notes 145–161 and accompanying text.

¹⁴³ See *infra* notes 162–166 and accompanying text.

¹⁴⁴ See *infra* notes 167–173 and accompanying text.

¹⁴⁵ See Petition for a Writ of Certiorari, *supra* note 139, at 3 (noting the evolution of FISC's role, with particular emphasis on its having "interpreted some provisions of FISA to permit it to authorize sweeping surveillance programs that entailed the mass collection of sensitive records about millions of Americans' expressive and associational activities" following the terrorist attacks of September 11, 2001).

¹⁴⁶ See *id.* at 2–3 (citing 50 U.S.C. § 1881a(j)) (noting that the "FISC's role has changed fundamentally," from a body analogous to the warrant-granting function of federal district judges to a court that, under Section 702, "authorizes the surveillance program as a whole").

¹⁴⁷ See *id.* at 4 (noting that the FISC now "writes opinions that include significant interpretations of FISA, other federal statutes, and the Constitution").

¹⁴⁸ See *id.* (observing that the FISC's "opinions sometimes authorize broad surveillance regimes, with far-reaching implications for U.S. citizens and residents who are not the ostensible targets of the government's surveillance").

court, but by executive branch officials.¹⁴⁹ Furthermore, the government determined that the USA FREEDOM Act's declassification review provision did not retroactively compel it to publish FISC/R opinions and orders issued between September 11, 2001 and the Act's passage.¹⁵⁰ The ACLU pointed out that the public has therefore been denied access to these legal interpretations bearing on individual rights, without the judicial branch having determined that this concealment is justified.¹⁵¹

In addition to their impact on the privacy and First Amendment expressive and associational rights of Americans, the FISC/R's rulings approved programs that do not comport with public understanding of the laws governing American life.¹⁵² The ACLU therefore asserted that recognizing a qualified First Amendment right of access to those rulings is critical to restoring trust in the legitimacy of the government's surveillance programs, the FISC/R, and the democratic process.¹⁵³ Acknowledging that any documents released to the public would contain redactions, the ACLU nevertheless argued that those redactions should not exceed what was necessary for preserving national security.¹⁵⁴ The ACLU stressed the importance of judicial review in making determinations about the necessary extent of redactions.¹⁵⁵

¹⁴⁹ See *id.* at 5 (noting the statutorily mandated declassification review but pointing out that it is carried out by the executive branch). The USA FREEDOM Act requires the Director of National Intelligence to consult with the Attorney General to "conduct a declassification review of [every FISC/R] decision, order, or opinion" that contains "a significant construction or interpretation of any provision of law . . . and, consistent with that review, make [the decision, order, or opinion] publicly available to the greatest extent practicable." 50 U.S.C. § 1872(a).

¹⁵⁰ See Petition for a Writ of Certiorari, *supra* note 139, at 8 n.3 (citing Gov't Mem., Elec. Frontier Found. v. DOJ, No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF no. 28) (noting that the government asserts that 50 U.S.C. § 1872(a) does not apply retroactively, and therefore "does not require it to declassify FISC opinions predating the passage of the USA Freedom Act").

¹⁵¹ See *id.* at 8 ("Although the FISC's rulings on these matters may have broad implications for the rights of Americans, the public has been entirely deprived of access to them without any judicial determination that such secrecy is justified.").

¹⁵² See *id.* at 10 (noting that the FISC has been called upon to review and approve surveillance programs that are "in tension with the public understanding of the statutes at issue"); see also, e.g., *ACLU v. Clapper*, 785 F.3d 787, 818 (2d Cir. 2015) (holding the government's call-records surveillance program unlawful and rejecting the FISC's secret interpretation of the law, calling it a "drastic expansion," "sweep[ing] further than those statutes have ever *been thought to reach*") (emphasis added). Scholars have noted that the FISC's ruling on sections of the USA PATRIOT Act "created a parallel regime of secret law that differed materially from the law on the books." See GOITEIN, *supra* note 89, at 58 (describing the FISC's ruling on Section 215, made public by the Snowden disclosures).

¹⁵³ See Petition for a Writ of Certiorari, *supra* note 139, at 10 ("Public access to these opinions is critical to the legitimacy of the FISC and FISC/R, to the legitimacy of the government's surveillance activities, and to the democratic process.").

¹⁵⁴ See *id.* at 10, 26 (recognizing the national security concerns inherent in FISC opinions, but requesting that the FISC, rather than the executive branch, undertake its own review of the requested opinions, and redact only content necessary for preserving national security).

¹⁵⁵ See *id.* at 26 n.7 (citing the FISC's "recent practice" as demonstrative of the need for judicial review of redaction determinations). The ACLU noted that initially, when it moved for disclosure of FISC opinions discussing Section 215 of the USA PATRIOT Act, the government argued that the

The ACLU argued that as an Article III court, the FISC/R can act on its inherent powers, including exercising control of its own records.¹⁵⁶ This inherent power of control over a court's records by necessity encompasses jurisdiction to adjudicate claims for access to those records.¹⁵⁷ On this basis, the ACLU argued that the FISC/R has jurisdiction to determine whether a First Amendment right of access attaches to its decisions.¹⁵⁸

The Petition argued that the Supreme Court had jurisdiction to review and correct the errors of the FISC/R pursuant to a statutory writ of certiorari.¹⁵⁹ In the alternative, the ACLU argued that the Court could exercise jurisdiction pursuant to the All Writs Act, with four independent bases for jurisdiction.¹⁶⁰ These four jurisdictional bases included: (1) the Court's inherent jurisdiction to review lower courts' denial of jurisdiction; (2) the Court's constitutionally-authorized appellate jurisdiction over inferior Article III tribunals; (3) the Court's power to adjudicate claims of access to judicial records; and (4) in aid of the Court's jurisdiction under the First Amendment to review a denial of a right guaranteed by that provision.¹⁶¹

B. The Government's Response to the ACLU's Petition for Certiorari

In its opposition to the ACLU's Petition, the government asserted that the Supreme Court does not have jurisdiction to issue a statutory writ of certiorari to review FISC/R decisions.¹⁶² In response to the ACLU's alternate asserted

opinions must be withheld entirely from the public because of national security concerns. *Id.* It was only when FISC Judge Saylor "questioned this contention" that the government "agreed that the opinions could be published with redactions." *Id.* (citing *In re Ords.* Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, 2014 WL 5442058, at *2-3 (FISA Ct. 2014)). Subsequently, Judge Saylor questioned the extent of the government's redactions, and "the government agreed that many of the redactions were unnecessary." *Id.*

¹⁵⁶ See *id.* at 14 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)) ("[L]ike all Article III courts, the FISC has inherent authority over its own records.").

¹⁵⁷ See *id.* (citing *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988)) (arguing that "[t]he power to control a court's records necessarily includes jurisdiction to decide claims for access to those records"); see also Langford, *supra* note 7, at 271 (concluding that "every Article III court necessarily has ancillary jurisdiction to consider constitutional access claims with respect to those records over which they exercise control").

¹⁵⁸ See Petition for a Writ of Certiorari, *supra* note 139, at 15 (noting that the FISC "previously observed [that] 'it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files'" (quoting *In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d 484, 486-87 (FISA Ct. 2007))).

¹⁵⁹ *Id.* at 27-29 (citing 28 U.S.C. § 1254(1), 50 U.S.C. § 1803(b)).

¹⁶⁰ *Id.* at 29 (citing 28 U.S.C. § 1651).

¹⁶¹ *Id.* at 29-31.

¹⁶² See Brief for the United States in Opposition at 12, *ACLU*, 142 S. Ct. 22 (arguing that neither of the statutes provide the basis for the Court to exercise certiorari jurisdiction, because the Court's statutory certiorari jurisdiction "extends to all 13 courts of appeals for the federal judicial circuits," but "does not extend to the FISA Court of Review" (citing 28 U.S.C. § 1254(1); 50 U.S.C. § 1803(b)));

basis for jurisdiction, under the All Writs Act, the government likewise argued that the Petition did not satisfy the requirements necessary for the Court to exercise jurisdiction under the Act.¹⁶³ This latter assertion was based on the premise that issuing a writ of mandamus would not be in furtherance of the Court's jurisdiction.¹⁶⁴

The government pointed out that the ACLU's requested relief—that the Court find a qualified First Amendment right of access to significant FISC/R opinions and orders—was unnecessary because of the executive branch's commitment to as much transparency as national security allows regarding the work of the FISC/R.¹⁶⁵ Furthermore, the government's reply pointed to the Freedom of Information Act (FOIA) as an alternative judicial means for the public to seek access to these materials.¹⁶⁶

C. The Gorsuch/Sotomayor Dissent from the Supreme Court's Denial of Certiorari

The government prevailed in opposing the ACLU's Petition—the Supreme Court denied certiorari without explanation, over a dissent authored by Justice Gorsuch and joined by Justice Sotomayor.¹⁶⁷ After noting that the FISC/R had its genesis in public outcry over abuses by the intelligence community, the dissenters emphasized the FISC/R's subsequent evolution.¹⁶⁸ From a body charged with the limited task of warrant-making, the FISC/R today has a significantly expanded role in American life, evaluating surveillance programs that impact the privacy and First Amendment expressive and associative rights of every American.¹⁶⁹

see also Donohue, *supra* note 107, at 330 (describing the government's argument as “an extraordinary assertion: that the highest court in the land lacked the ability to examine Article III judicial rulings”).

¹⁶³ Brief for the United States in Opposition, *supra* note 162, at 14.

¹⁶⁴ *Id.* at 11.

¹⁶⁵ *See id.* (“The Executive Branch is committed to providing the public as much transparency about the FISC's work as is consistent with the Nation's security.”); *see also* Donohue, *supra* note 107, at 330 (describing the government's claim of transparency as “remarkable” because of its “suggestion that it is committed to providing the public with as much information about the FISC as possible”).

¹⁶⁶ *Compare* Brief for the United States in Opposition, *supra* note 162, at 11 (arguing that “there is also a readily available judicial process under the Freedom of Information Act” (citing 5 U.S.C. § 552))), *with* Donohue, *supra* note 107, at 330 (“Looking at the FOIA cases working their way through the courts, the Executive appears to be anything but transparent in terms of how it is handling requests.”).

¹⁶⁷ *See ACLU*, 142 S. Ct. at 23 (Gorsuch, J., dissenting) (stating that the Court's determination to deny certiorari allows the government's “extraordinary claim” to go unchallenged).

¹⁶⁸ *See id.* (noting that “changes in technology” and “various legislative amendments” have caused the role of the FISC to expand).

¹⁶⁹ *See id.* (“Today, the FISC evaluates extensive surveillance programs that carry profound implications for Americans' privacy and their rights to speak and associate freely.” (citing *ACLU v. Clapper*, 785 F.3d 787, 818 (2d Cir. 2015))).

The dissent expressed astonishment at the FISC/R's refusal to consider the question of control of its own records, and the assertion that it lacked jurisdiction over the First Amendment claims.¹⁷⁰ The dissenters expressed further confusion at the government's claim that the Court lacks the jurisdictional power to review the FISC/R's decision.¹⁷¹ Justice Gorsuch raised concerns about the denial of a First Amendment right of access to Article III judicial proceedings, but moreover, about the challenge embedded in the government's argument to the Court's power of judicial review.¹⁷² In a dissent replete with concern for individual civil liberties, Justice Gorsuch raised alarms about the denial of a right guaranteed under the First Amendment and about the erosion of the structural protection of individual liberties that the separation of powers provides.¹⁷³

III. THE FISC HAS JURISDICTION TO DECIDE CLAIMS FOR A QUALIFIED PUBLIC RIGHT OF ACCESS

The Supreme Court's denial of certiorari throws into sharp relief several of the most pressing issues surrounding the FISC's role in American life and within the structure of government.¹⁷⁴ Section A of this Part examines in turn the implications of the Supreme Court's denial of certiorari.¹⁷⁵ Section B of this Part argues that in light of the recent reauthorization of Section 702 of the USA FREEDOM Act, the issues surfaced in the ACLU's petition take on renewed urgency.¹⁷⁶

A. Broader Implications of the Supreme Court's Denial of Certiorari

Subsection 1 of this Section examines the separation of powers implications of the Supreme Court's denial of certiorari.¹⁷⁷ Subsection 2 of this Section explicates the need for a First Amendment right of access to FISC/R opin-

¹⁷⁰ See *id.* (noting that not only did the FISC/R ultimately refuse to recognize a qualified right of public access to the court's opinions, but it also refused to consider the question on the basis that it lacked jurisdiction to do so).

¹⁷¹ See *id.* (observing that "[o]n the government's view, literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts").

¹⁷² See *id.* (expressing alarm over the government's challenge to the Court's power to review the work of an Article III court).

¹⁷³ See *id.* ("This case presents questions about the right of public access to Article III judicial proceedings of grave national importance. Maybe even more fundamentally, this case involves a governmental challenge to the power of this Court to review the work of Article III judges in a subordinate court.").

¹⁷⁴ See *id.* (pointing to the "grave" issues raised by the FISC/R's denial of jurisdiction to decide a right of access claim and the government's argument that the Supreme Court likewise lacks such jurisdiction).

¹⁷⁵ See *infra* notes 177–202 and accompanying text.

¹⁷⁶ See *infra* notes 203–212 and accompanying text.

¹⁷⁷ See *infra* notes 180–188 and accompanying text.

ions.¹⁷⁸ Subsection 3 of this Section asserts that the government’s arguments in opposition to the ACLU’s petition are unavailing.¹⁷⁹

1. Separation of Powers

To bolster its assertion that a judicial finding of a qualified First Amendment right of access to FISC/R opinions and orders was unnecessary, the government pointed to two extant pathways for the public to access such materials.¹⁸⁰ These two pathways are the executive branch’s commitment to transparency and the mechanism available under FOIA for the public to request access to government materials.¹⁸¹ The history of secrecy surrounding the FISA’s implementation and the FISC/R’s role in authorizing the executive branch actions that compromised Americans’ privacy and civil liberties, however, call into question the asserted strength of the executive branch’s commitment to transparency.¹⁸² Moreover, FOIA’s purpose is to provide access to executive branch documents—not judicial records.¹⁸³

The government’s argument—that the executive branch, either through a claimed commitment to transparency or through the mechanisms laid out under FOIA, can control public access to Article III documents—is an affront to the separation of powers.¹⁸⁴ For the branch of government not vested with force or will, power is derived from its judgment, which is bound up in the written record of its work.¹⁸⁵ The public has a constitutional right to access and inspect the work of one of its three co-equal governing branches.¹⁸⁶ Courts’

¹⁷⁸ See *infra* notes 189–194 and accompanying text.

¹⁷⁹ See *infra* notes 195–202 and accompanying text.

¹⁸⁰ See Brief for the United States in Opposition, *supra* note 162, at 11 (arguing that the Court need not grant the ACLU’s requested relief, because there are “adequate alternative means of access . . . available”).

¹⁸¹ See *id.* (citing 5 U.S.C. § 552) (pointing to the executive branch’s transparency commitment and the FOIA process as ready and alternative available means for the public to seek access to FISC/R opinions, such that the Supreme Court need not intervene).

¹⁸² See Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 2022 SUP. CT. REV. 351, 365–66 (2022) (providing an overview of the controversies surrounding FISA’s implementation, the FISC/R’s role in authorizing bulk collection of Americans’ data, and information obtained via FOIA litigation).

¹⁸³ See 5 U.S.C. § 552 (instructing “agenc[ies]” to make public certain information following procedures outlined in the legislation); Donohue, *supra* note 107, at 330 (“[T]he entire purpose of FOIA is to allow the public access to Executive Branch documents—not to judicial materials.”).

¹⁸⁴ See Donohue, *supra* note 107, at 330 (“The idea, moreover, that the government can prevent the public from going directly to the courts to obtain the judicial record raises serious separation of powers concerns.”).

¹⁸⁵ See THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment”); Donohue, *supra* note 107, at 311 (“[A]ll courts *have* at some level is their decisionmaking ability, which is transmitted through the record.”).

¹⁸⁶ See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including

inherent power over their own records, in this context, takes on constitutional proportions.¹⁸⁷ For these reasons, any encroachment on this power by the other branches, as the government's argument contemplates, offends the separation of powers, with the effect of diminishing the individual rights of the public to understand the laws governing them.¹⁸⁸

2. First Amendment Right of Access

In addition to its purpose being to facilitate access to executive branch rather than judicial branch documents, FOIA's ambit specifically excludes matters concerning national security.¹⁸⁹ FOIA contains eleven exclusions that the government can invoke to prevent the public from accessing national security records.¹⁹⁰ In 1973, in *Environmental Protection Agency v. Mink*, the Supreme Court developed the test for when executive agencies may withhold records on national security grounds under the FOIA exclusions.¹⁹¹ The test allows the President to determine by executive order documents to be kept secret, effectuating a broad and permissive exception to FOIA's disclosure mandates.¹⁹² The suggestion that a determination on the applicability of a constitutional right—namely, the First Amendment right of access to judicial records—be made not by the judicial branch, but by the executive branch, risks hollowing out the

judicial records and documents.”). Furthermore, because the judicial branch lacks enforcement power, scholars have noted that “the effectualness of the federal judicial power turns entirely on the public’s perception and acceptance of its exercise.” Langford, *supra* note 7, at 246. For the courts to function as an effective check on the other branches of government, “they must be able to cultivate and wield institutional legitimacy by issuing public judgments . . .” *Id.*

¹⁸⁷ See *Nixon*, 435 U.S. at 598 (“Every court has supervisory power over its own records and files . . .”).

¹⁸⁸ See Donohue, *supra* note 107, at 330–31 (arguing that if the government could restrict access to the records owned by another branch, “it would be a significant mechanism of control, sufficient to override the other branches’ powers”).

¹⁸⁹ See Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 WEEKLY COMP. PRES. DOC. 895, 895–96 (July 4, 1966) (“[D]emocracy works best when the people have all the information that the security of the Nation permits At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets [T]his bill in no way impairs the President’s power under our Constitution to provide for confidentiality when the national interest so requires I have always believed that freedom of information is so vital that only the national security, not the desire of public or private citizens, should determine when it must be restricted.”).

¹⁹⁰ See 5 U.S.C. § 552(b)(1)–(9); *id.* § 552(c) (providing exclusions concerning law enforcement and national security).

¹⁹¹ See 410 U.S. 73, 81–82 (1973) (construing the provision of FOIA allowing agencies to withhold records specifically authorized under criteria established by an “Executive order to be kept secret in the interest of the national defense or foreign policy”).

¹⁹² See *id.* at 82 (holding that the determination for when the agencies may withhold records turns on “whether the President has determined by Executive Order that particular documents are to be kept secret”); Donohue, *supra* note 107, at 331 (“Case law has similarly paved the way for material to remain hidden from public view on national security grounds.”).

substance of the right.¹⁹³ The danger is amplified because, in the context of FOIA litigation, the executive branch is precisely the body against which the right is being asserted.¹⁹⁴

3. The Government's Arguments Are Unpersuasive and Carry Dangerous Implications

The government asserted that the FISC/R lacks jurisdiction to review and adjudicate a First Amendment right of access claim to its opinions and orders, that the Supreme Court lacks jurisdiction to review the FISC/R's determination, and finally, that a First Amendment right of access does not attach to the FISC/R's opinions and orders.¹⁹⁵ The arguments are not only dangerous to the separation of powers and, as a result, to individual liberties, but they are also unpersuasive, just as Justices Gorsuch and Sotomayor laid out in their dissent.¹⁹⁶

¹⁹³ See Brief for the United States in Opposition, *supra* note 162, at 11 (arguing that the Supreme Court should not exercise jurisdiction to review the FISC/R's denial of jurisdiction to adjudicate a First Amendment claim, because FOIA provides "a readily available judicial process"). The case law interpreting FOIA's exclusions in effect gives the President the power to exempt, by Executive Order, national security matters from FOIA's disclosure mandates. See *Mink*, 410 U.S. at 82 (holding that the determination of whether the FOIA exclusion applies depends on the President having "determined by Executive Order that particular documents are to be kept secret").

¹⁹⁴ See 5 U.S.C. § 552 (instructing executive branch agencies, rather than judicial entities, to make public certain information following procedures outlined in the legislation). A federal court's decision in at least one recent FOIA litigation proceeding made clear that the FOIA process is not an adequate alternative to a right of public access litigated under the First Amendment or common law tests. See *Elec. Frontier Found. v. U.S. Dep't of Just.*, 376 F. Supp. 3d 1023, 1033 (N.D. Cal. 2019) (finding that "[w]here the government invokes FOIA exemptions in cases involving national security issues, [courts] are required to accord substantial weight to the agency's affidavits" (alteration in original) (quoting *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 769 (9th Cir. 2015))). Because of the deference that courts afford the executive branch when it invokes national security as a response to FOIA litigation, courts do not, for example, "conduct a page-by-page review of an agency's work." *Id.* at 1036 (quoting *Hamdan*, 797 F.3d at 779). At least one petitioner in FOIA litigation seeking FISC documents "cannot enforce" the USA FREEDOM Act's declassification provision against the executive branch to compel it to undertake the procedure for FISC opinions issued between 2001 and the Act's passage in 2015. *Id.* at 1030.

¹⁹⁵ Brief for the United States in Opposition, *supra* note 162, at 11. Scholars have raised the point that the "collapse of the institutional press," coupled with the erosion of intra-governmental checks on the executive branch have led to a disequilibrium in the application of the First Amendment, favoring government secrecy over press, and individual, freedom. See Christina Koningisor & Lyrissa Lidsky, *First Amendment Disequilibrium*, 110 VA. L. REV. 1, 6 (2024) ("This combination of a hollowed-out press and an unchecked executive has given rise to a First Amendment disequilibrium—a development that has been largely overlooked by the courts."). This disequilibrium constitutes a grave threat "to democratic self-governance." *Id.* at 7.

¹⁹⁶ See Donohue, *supra* note 107, at 330 ("The idea, moreover, that the government can prevent the public from going directly to the courts to obtain the judicial record raises serious separation of powers concerns."); *American Civil Liberties Union v. United States*, 142 S. Ct. 22, 23 (2021) (Gorsuch, J., dissenting) (describing the government's arguments as "extraordinary" and urging the Court to take up the ACLU's petition).

The FISC/R are Article III courts, exercising the judicial power of the United States, with the concomitant powers and responsibilities that inhere in Article III status.¹⁹⁷ As such, the FISC/R have inherent power over their own records, a power that cannot be divested by the other branches.¹⁹⁸ This power encompasses jurisdiction to adjudicate constitutional claims for public access to these records.¹⁹⁹ Allowing another branch to intrude upon this right diminishes the force and efficacy of Article III's grant of power, in no small measure because the judicial branch derives its authority from the written record of its work.²⁰⁰ The government was therefore incorrect in asserting that the FISC/R lack the jurisdiction to review a claim for public access to its records, and the FISC/R erred in denying its own jurisdiction.²⁰¹ Furthermore, given that the FISC/R are Article III bodies, the Supreme Court has jurisdiction to review their decisions, regardless of the subject matter of those decisions.²⁰²

B. Re-Examining the Denial of Certiorari in Light of the Reauthorization of Section 702

In asserting that both the Supreme Court and the FISC/R lack jurisdiction to review a claimed violation of a constitutional right of public access, the government pointed to the circumscribed nature of the FISC/R's statutory mandate.²⁰³ Essentially, the government's argument was that Congress, through FISA, set out limits, defined by subject matter, within which the

¹⁹⁷ See Donohue, *supra* note 107, at 336 (describing the FISC/R as Article III courts).

¹⁹⁸ See *id.* at 337 (describing the power that a court possesses over its own records as "beyond the reach of the other branches").

¹⁹⁹ See *id.* ("Even as they exercise inherent authority over their own records, the FISC/R, as specialized Article III courts, have a nonstatutory obligation to hear cases arising under common law and the Constitution that are properly before them.").

²⁰⁰ See *id.* ("If the other branches could effectively bury judicial decisions, it would render Article III impotent.").

²⁰¹ See *id.* at 347 ("An Article III court may ultimately decide that certain particulars encapsulated in its muniments may be withheld, but the right of the People to seek them is not in question—nor is FISC/R's jurisdiction over their own records.").

²⁰² See 28 U.S.C. §§ 1251, 1254, 1257(a), 1259 (granting jurisdiction). Article III's framers debated and decided against an amendment that would have subjected the Supreme Court's appellate jurisdiction, aside from cases in which the Supreme Court exercised original jurisdiction to "be exercised in such a manner as the Legislature shall direct." See Langford, *supra* note 7, at 245 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 425 n.9 (Max Farrand ed., 1911)). Scholars have pointed out that "a legislative capacity to control the 'manner' in which federal courts exercised '[t]he Judicial Power' would have entirely neutralized the independence . . . and effectualness qualities of federal judicial decisionmaking." See *id.* at 425 (alteration in original) (quoting James S. Liebman & William F. Ryan, "Some Effectual Power: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 754 (1998)).

²⁰³ See Brief for the United States in Opposition, *supra* note 162, at 23 (arguing that because the FISC/R is a "court of limited and specialized jurisdiction," it, and the FISC, have "jurisdiction only over certain enumerated matters" prescribed by the legislature).

FISC/R exercises jurisdiction.²⁰⁴ Adjudicating a claim under the First Amendment for public access to the court's records, the argument ran, falls outside that limited subject matter.²⁰⁵

This argument is atavistic, failing to reckon with the FISC's expanded role, but instead treating it as though it were the same court that it was at its 1978 inception.²⁰⁶ Today's FISC regularly handles matters that impact the First Amendment associative and communicative rights of all Americans and makes consequential determinations about not just isolated government actions, but also sweeping surveillance programs.²⁰⁷ The reauthorization in April 2024 of Section 702, with protections of individual liberties largely unchanged, has caused consternation among privacy and civil liberties advocates.²⁰⁸ Under Section 702, the FISC annually reviews and certifies the government's electronic surveillance activities on a programmatic basis, rather than as individualized applications to conduct surveillance of a particular target.²⁰⁹ The FISC's role is therefore highly consequential not only in determining the legality of the government's conduct, but in interpreting the law governing it.²¹⁰ The FISC/R opinions that have been

²⁰⁴ See *id.* (asserting the limited nature of the FISC/R's jurisdiction as related to national security surveillance applications).

²⁰⁵ See *id.* at 25 (stating that "[n]either the FISC nor the FISA Court of Review (nor any other lower court) has inherent jurisdiction over cases" and arguing that the cases the ACLU cited in support of the FISC's jurisdiction over a First Amendment claim are unpersuasive because they "all involved . . . [matters] over which the court had already properly exercised jurisdiction").

²⁰⁶ See Donohue, *supra* note 107, at 341 (describing the government's argument as problematic because it "mischaracterizes the nature of the FISC/R" and its evolution from something "akin to a specialized warrant-granting body" into a court that "rule[s] on complex constitutional questions which, daily, impact U.S. citizens" and "engage[s] in statutory construction," reflecting its "full power as [an] Article III entit[y]").

²⁰⁷ See *supra* notes 66–68 and accompanying text (describing the expanded role of the FISC/R as a result of both statutory amendments and technological changes that have expanded both the FISC/R's legislatively enacted role and the surveillance capabilities that the government wields).

²⁰⁸ See, e.g., Press Release, Brennan Ctr. for Just. at NYU Law, House Passes Section 702 Reauthorization Bill Without Protections Against Warrantless Spying on Americans (Apr. 12, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/house-passes-section-702-reauthorization-bill-without-protections-against> [<https://perma.cc/HU26-57NC>] ("Federal agencies routinely get around the Fourth Amendment's prohibition on warrantless domestic surveillance by searching Americans' data acquired under Section 702 . . .").

²⁰⁹ See 50 U.S.C. § 1881a(h) (laying out the programmatic certification procedure under which the Attorney General and Director of National Intelligence seek annual authorization from the FISC).

²¹⁰ See *id.* Privacy and civil liberties advocates point to instances in the FISC's history when disclosure of opinions issued in secret revealed that "there was at times a tension between the analysis they contained and a plain reading of the law." See GOITEIN, *supra* note 89, at 58 (noting that the "most infamous" such instance relates to the FISC's interpretation of the PATRIOT Act, when the court, "[a]t the government's urging, . . . interpreted [the Act] to allow the NSA's collection of nearly every American's phone records"). The FISC's interpretation of the law governing the government's conduct was removed enough from the text of the statute that "[n]o layperson (and few lawyers) could have been expected to derive [it]." *Id.* According to Senators Ron Wyden and Mark Udall, "when the government relies on significant interpretations of public statutes that are kept secret from the American public, the government is effectively relying on secret law." Letter from Sen. Ron Wyden & Sen.

released thus far demonstrate the degree to which the government has and has not complied with its legal obligations.²¹¹ Each of these factors militates toward the FISC both asserting jurisdiction to decide a public right of access claim and finding that such a right attaches to its opinions.²¹²

CONCLUSION

The Foreign Intelligence Surveillance Court regularly evaluates government programs that have the potential to impact the privacy, communicative, and associative rights of every American. The court's role has evolved to include issuing decisions interpreting constitutional provisions—including the First, Fourth, and Fifth Amendments—that bear heavily on individual civil liberties. History has shown that, expressed commitments to transparency notwithstanding, the executive branch has not been forthcoming about the surveillance programs it undertakes and the legal interpretations undergirding those programs. A fundamental tenant of democratic governance is that the public must be aware of the laws that govern it. Thus, the Court should find that a qualified First Amendment right of access attaches to significant orders and opinions issued by the FISC/R. Furthermore, the suggestion that neither the FISC/R nor the Supreme Court is empowered to adjudicate whether such a right exists offends the separation of powers, undermines the Article III powers of the judicial branch, and threatens individual liberties.

SARA WOMBLE

Mark Udall to Att'y Gen. Eric Holder 2 (Sep. 21, 2011), <https://www.wyden.senate.gov/imo/media/doc/09212011%20DOJ%20Holder%20Letter.pdf>.

²¹¹ See Donohue & McCabe, *supra* note 45, at 557 (“FISC/FISCR opinions reveal the extent to which government actions comport with—or violate—court directions and the law.”); *see, e.g.*, Supplemental Opinion and Order, *In re Application of the FBI for an Ord. Requiring the Prod. of Tangible Things* [REDACTED], No. BR 09-15, at 3–4 (FISA Ct. 2009), *available at* Georgetown Foreign Intelligence Law Collection, GID.C.00048 (finding that only 53 of the 189 NSA analysts who were given access to search query results “had received the required training”); Bates Mem. Op., GID.C.00092, at 3, 18 (“NSA exceeded the scope of authorized acquisition continuously during the more than [REDACTED] years of acquisition”; intelligence agencies “accessed unminimized U.S. person information”; NSA disseminated “reports containing U.S. person information”).

²¹² See Donohue, *supra* note 107, at 347 (arguing that “[i]t is time for the Supreme Court to step forward to shore up one of the rights deemed most important at the time of the Founding: the right to petition the government for redress”).