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CERTIFIED QUESTION JURISDICTION:
A SIGNIFICANT NEW AUTHORITY FOR THE FISA COURT AND FISA COURT OF REVIEW

Deborah Samuel Sills*

The Foreign Intelligence Surveillance Court ("FISC" or "FISA Court") authorizes some of the most vital national security activities in our country. In deciding these significant matters, the FISC regularly balances individual privacy interests with the need to safeguard the security of individuals. While the FISC must decide such fundamental matters impacting both privacy rights and national security interests, until recently, few opportunities for appellate review of FISC decisions existed. In 2015, Congress addressed this absence of meaningful appellate review in the USA FREEDOM Act. The USA FREEDOM Act amended the Foreign Intelligence Surveillance Act ("FISA") of 1978 to include certified question jurisdiction. Since the

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enactment of the USA FREEDOM Act, the FISC already has certified one known question of law to the Foreign Intelligence Surveillance Court of Review ("FISCR" or "FISA Court of Review").

Appellate review of difficult legal issues, through the use of certified question jurisdiction, may lead to greater public confidence in the integrity of the FISC and FISCR processes. Certified question jurisdiction will provide further judicial scrutiny of surveillance techniques and broaden the body of decisional law addressing such issues. In light of rapidly evolving technologies, an expanded body of decisional law will guide the executive branch in developing future surveillance programs, the judicial branch in interpreting whether certain surveillance techniques comply with the Constitution and FISA, and the legislative branch in developing laws regarding the scope of surveillance authorities.

This article provides a historical overview of the establishment of the FISC and FISCR and the evolution of certified question jurisdiction. Further, this article analyzes the language in the USA FREEDOM Act that authorizes certified question jurisdiction. Moreover, this article contends that certified question jurisdiction complies with Article III of the Constitution and discusses how increased opportunities for appellate review of FISC decisions, through the use of certified question jurisdiction, may help alleviate concerns raised about the integrity of the FISC. Finally, this article explores how a recent FISCR decision, In re Certified Question of Law, can guide the FISC and FISCR in determining whether it should certify a question of law to a higher court.

INTRODUCTION

The Foreign Intelligence Surveillance Court ("FISC" or "FISA Court") authorizes some of the most vital national security activities within our country. The FISC considers government requests to conduct electronic surveillance, engage in physical searches, collect business records, and carry out other investigative techniques for foreign intelligence purposes.[1] In deciding these important and often complex matters, the FISC regularly balances individual privacy interests with the need to safeguard individuals in our country. These are difficult issues. And yet, while the FISC must frequently decide such fundamental matters impacting both privacy rights and national

[1] U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov ("The Court entertains applications made by the United States Government for approval of electronic surveillance, physical search, and certain other forms of investigative actions for foreign intelligence purposes.").

security interests, until recently, few opportunities for appellate review of FISC decisions existed. Congress addressed the absence of meaningful appellate review in the USA FREEDOM Act.[2] Specifically, the USA FREEDOM Act, enacted on June 2, 2015,[3] amended the Foreign Intelligence Surveillance Act ("FISA") of 1978 to include, for the first time, certified question jurisdiction.[4] By amending FISA to include certified question jurisdiction, the USA FREEDOM Act increases the opportunities for appellate review of decisions issued by the FISC and the Foreign Intelligence Surveillance Court of Review ("FISCR" or "FISA Court of Review").[5]

Certified question jurisdiction allows one court to ask another court to clarify a question of law, "the resolution of which will assist the certifying court in reaching a judgment in a case pending before it."[6] FISA, as amended by the USA FREEDOM Act, authorizes the FISC, after issuing an order, to certify questions of law to the FISCR.[7] Similarly, FISA, as amended, allows the FISCR to certify questions of

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[2] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 or the USA FREEDOM Act of 2015, H.R. Res. 2048, 114th Cong. (2015) (enacted).

[3] *Id.*

[4] 50 U.S.C. § 1803(j), (k) (2015). Certified question jurisdiction is one of many reforms that were included in the enactment of the USA FREEDOM Act. This paper focuses on certified question jurisdiction. Other modifications to FISA are generally beyond the scope of this paper. *See* Benjamin Wittes and Jodie Liu, *So What's in the New USA Freedom Act, Anyway?*, LAWFARE (May 14, 2015, 11:51 PM), https://www.lawfareblog.com/so-whats-new-usa-freedom-act-anyway.

[5] PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, RECOMMENDATIONS ASSESSMENT REPORT 6 (Feb. 5, 2016) [hereinafter PCLOB, RECOMMENDATIONS ASSESSMENT REPORT]. Overall, the PCLOB noted that all of its recommendations "have been implemented in full or in part, or the relevant government agency has taken significant steps toward adoption and implementation." *Id.* at 1.

[6] Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification*, 78 GEO. WASH. L. REV. 1310, 1315 (2009) (citing James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 1-2 (1949)).

[7] 50 U.S.C. § 1803(j) (2015).

law for review by the Supreme Court.[8] Prior to the enactment of the USA FREEDOM Act, concerns were raised about the lack of appellate review of FISC decisions.[9] Some critics believed that FISC judges might incorrectly interpret the law, and without appellate review, the erroneous interpretations could be perpetuated.[10] Others believed that the dearth of appellate review of FISC decisions weakened the integrity of the FISC.[11] Certified question jurisdiction will provide, and indeed already has provided, greater opportunities for appellate review.[12] This is critical, as the FISC routinely decides serious matters that are often at the intersection between individual privacy rights and the safety of the American public. Moreover, and importantly, these FISCR and possibly Supreme Court decisions will add to the body of decisional law addressing the collection of information pursuant to FISA. Once these decisions are issued, FISC judges, who serve on a rotating basis, will be able to refer to them for guidance. Likewise, an expanded body of decisional law will provide the executive branch with further judicial guidance regarding the acquisition of information under FISA. In light of rapidly changing technologies,

[8] 50 U.S.C. § 1803(k) (2015).

[9] *See, e.g.*, Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, at A1 ("Unlike the Supreme Court, the FISA court hears from only one side in the case — the government — and its findings are almost never made public. A Court of Review is empaneled to hear appeals, but that is known to have happened only a handful of times in the court's history, and no case has ever been taken to the Supreme Court.").

[10] ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT 31 (Brennan Ctr. for Justice 2015) (With little chance for appellate review of FISC decisions in a non-adversarial process, the Brennan Center believed that the "chances that FISA Court judges will misinterpret the law — and perpetuate that misinterpretation in subsequent decisions — [are] high.").

[11] PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, 187 (Jan. 23, 2014) [hereinafter PCLOB, SECTION 215 AND FISC REPORT].

[12] *In re* Certified Question of Law, Docket No. 16-01 (FISA Ct. Rev. 2016).

this judicial guidance will aid the executive branch in developing future surveillance programs.[13]

This Article is divided into six parts. Part I provides an overview of the establishment of the FISC and FISCR. Part I also considers outside events that precipitated a review of the FISC's structure with a focus on the evolution of certified question jurisdiction. Part II discusses how certified question jurisdiction is used in the Supreme Court and federal appellate courts. Part III analyzes the language in the USA FREEDOM Act that provides for certified question jurisdiction. Part IV contends that certified question jurisdiction complies with the constitutional mandates of Article III of the Constitution. Part V discusses three FISCR opinions, including a recently released FISCR opinion addressing a certified question of law from the FISC, *In re Certified Question of Law*.[14] Part V also explains, using the three FISCR decisions as examples, how increased appellate review of FISC decisions may help alleviate concerns raised about the integrity of the FISC. Finally, Part VI explores how *In re Certified Question of Law* can guide the FISC and FISCR in determining whether it should certify a question of law to a higher court.

I. OVERVIEW OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

A. Background of the FISC

Prior to the enactment of FISA in 1978, the executive branch conducted surveillance for foreign intelligence purposes under presidential authorities pursuant to Article II of the Constitution.[15]

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[13] *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring).

[14] *In re* Certified Question of Law, Docket No. 16-01 (FISA Ct. Rev. 2016).

[15] *See e.g.*, United States v. U.S. District Court (Keith), 407 U.S. 297, 308 (1972); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Buck, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890

Judicial approval was not required for the executive branch to acquire such information.[16] In the early 1970s, evidence that the executive branch had been misusing its intelligence and law enforcement authorities led Congress to investigate executive branch activities.[17] In 1975, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the "Church Committee," to perform a comprehensive review of intelligence community activities.[18] The Church Committee released a series of reports documenting the executive branch's misuses of its intelligence authorities within the United States.[19] Meanwhile, the Supreme Court, in *United States v. U.S. District Court (Keith)*, while determining that the Fourth Amendment warrant requirement applied to collection of intelligence related to domestic security, left open the question of the scope of the President's surveillance authorities with respect to collecting foreign intelligence

(1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974); United States v. Truong Dinh Hung, 629 F.2d 908, 914-15 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

[16] PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 3. "Congress created the FISA court in 1978 in response to concerns about the abuse of electronic surveillance. This represented a major restructuring of the domestic conduct of foreign intelligence surveillance, with constitutional implications. Prior to then, successive Presidents had authorized national security wiretaps and other searches solely on the basis of their executive powers under Article II of the Constitution." *Id.* at 13.

[17] STRENGTHENING INTELLIGENCE OVERSIGHT (Michael German, Brennan Ctr. for Justice 2015).

[18] *Id.*

[19] S. Rep. No. 94-755, at 138 (1976). The Church Committee revealed that the Central Intelligence Agency had construed its authorities to investigate "domestic groups whose activities, including demonstrations, have potential, however remote, for creating threat to CIA installations, recruiters, or contractors." *Id.* The committee further reported that the Federal Bureau of Investigation had engaged in illicit strategies of using "media contacts to ridicule and otherwise discredit" activists, including Dr. Martin Luther King, Jr., Stokely Carmichael, and Elijah Muhammad. *Id.* at 87.

information inside our country or abroad.[20] Against this backdrop of misused authorities and open constitutional questions regarding the collection of foreign intelligence information within the United States, the Foreign Intelligence Surveillance Act was enacted in 1978.

As part of FISA, Congress established the FISC.[21] The FISC is comprised of 11 federal district court judges who are designated to serve by the Chief Justice of the Supreme Court.[22] FISC judges serve for a maximum of seven years and their "terms are staggered to ensure continuity on the Court."[23] When the FISC was created, its primary responsibility was to consider executive branch applications for authorization to conduct electronic surveillance in the United States.[24] Since the enactment of FISA, and largely in response to outside events, the scope of the FISC's review of surveillance techniques has increased as the acquisition of foreign intelligence governed by FISA has expanded.[25] For example, FISA was amended in 1994 to include the acquisition of foreign intelligence information through physical searches.[26] In 1998, FISA was modified to include the collection of foreign intelligence information of certain business records and

[20] *Keith*, 407 U.S. at 308.

[21] 50 U.S.C. § 1803(a) (2015); *see* Letter from Judge Reggie Walton, Presiding Judge of the FISC, to Chairman Leahy, Committee on the Judiciary, U.S. Senate (July 29, 2013), http://www.fisc.uscourts.gov/sites/default/files/Leahy.pdf.

[22] 50 U.S.C. § 1803(a)(1) (2015).

[23] *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court (last visited Feb. 27, 2017) ("Each judge serves for a maximum of seven years and their terms are staggered to ensure continuity on the Court"); *see* 50 U.S.C. § 1803(d) (2015).

[24] *See* Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 GEO. J. OF NAT'L SECURITY L. & POL'Y 59, 71-72 (2012).

[25] *Id.*

[26] *See* ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL30465, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 39 (2007).

information from pen register and trap and trace devices.[27] In 2001, Congress expanded the scope of the business records provision through Section 215 of the USA PATRIOT Act.[28] In 2008, the FISA Amendments Act ("FAA") modified FISA to include acquisition of foreign intelligence information of non-U.S. persons reasonably believed to be located outside of the United States without seeking individualized FISC orders for each such acquisition.[29]

Concurrent with the FISC's creation, Congress established the Foreign Intelligence Surveillance Court of Review to review decisions from the FISC.[30] Three federal district or appellate court judges, who are designated by the Chief Justice of the Supreme Court, compose the FISCR.[31] FISCR judges serve for a maximum of seven years.[32] Since its creation, the FISCR has issued only three publicly known decisions. These decisions include *In re Sealed Case*, in which the government appealed an adverse decision to the FISCR;[33] *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, in which a communications service provider challenged a directive issued by the government by appealing to the FISCR; [34] and, following the enactment of the USA FREEDOM Act, *In re Certified Question of Law*, in which the FISC certified a question of law to the FISCR.[35]

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[27] Pub. L. No. 105-272, § 602, 112 Stat. 2396, 241 (1998); s*ee* Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015).

[28] Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified at 50 U.S.C. § 1861 (2012)); *see* Vladeck, *supra* note 27.

[29] 50 U.S.C. § 1881(a) (2008).

[30] 50 U.S.C. § 1803(b) (2015).

[31] *Id.*

[32] 50 U.S.C. § 1803(d) (2015).

[33] *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

[34] *In re* Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008).

[35] *In re* Certified Question of Law, Docket No. 16-01 (FISA Ct. Rev. 2016).

B. Events Leading to a Review of the Structure of the FISC

On June 5, 2013, based upon Edward Snowden's illegal disclosures,[36] *The Guardian* reported that the National Security Agency ("NSA") was "collecting the telephone records of millions" of customers of telecommunications providers.[37] According to *The Guardian*, the communications records of Americans were being collected "indiscriminately and in bulk – regardless of whether they are suspected of any wrongdoing."[38] *The Guardian* reported that the bulk collection program was authorized pursuant to a top secret court order issued by the FISC.[39] In addition to *The Guardian*, other media

[36] The Snowden disclosures have been described as "the most damaging leaks in U.S. intelligence history," and "the most destructive hemorrhaging of American secrets in the history of the Republic." Peter Baker, *Moves to Curb Spying Help Drive the Clemency Argument for Snowden*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/us/moves-to-curb-spying-help-drive-the-clemency-argument-for-snowden.html (quoting John McLaughlin and Michael V. Hayden). The House Permanent Select Committee on Intelligence ("HPSCI") conducted a comprehensive review of Snowden's unauthorized disclosures and concluded that "Snowden caused tremendous damage to national security, and the vast majority of the documents he stole have nothing to do with programs impacting individual privacy interests-they instead pertain to military, defense, and intelligence programs of great interest to America's adversaries." H. PERMANENT SELECT COMM. ON INTELLIGENCE, 114TH CONG., EXEC. SUMMARY OF REV. OF THE UNAUTHORIZED DISCLOSURES OF FORMER NAT'L SECURITY AGENCY CONTRACTOR EDWARD SNOWDEN 1 (Comm. Print 2016). HPSCI further determined that Snowden "handed over secrets that protect American troops overseas and secrets that provide vital defenses against terrorists and nation-states. Some of Snowden's disclosures exacerbated and accelerated existing trends that diminished the IC's capabilities to collect against legitimate foreign intelligence targets, while others resulted in the loss of intelligence streams that had saved American lives." *Id.*

[37] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

[38] *Id.*

[39] *Id.*; Charlie Savage & Edward Wyatt, *U.S. Is Secretly Collecting Records of Verizon Calls*, N.Y. TIMES (June 5, 2013), http://www.nytimes.com/topic/subject/foreign-intelligence-surveillance-act-fisa.

outlets published similar reports. For example, *The New York Times* reported that the "Obama administration is secretly carrying out a domestic surveillance program under which it is collecting business communications records involving Americans" under Section 215 of the USA PATRIOT Act amendments to FISA.[40] Likewise, *The Washington Post* reported that the "revelation has led to a renewed debate over the legality and policy merits of indiscriminate government surveillance of Americans."[41]

Disclosure of the Section 215 bulk collection program, and the fact that it was authorized by the FISC, brought increased scrutiny of the FISC itself. Concerns were raised that the FISC was creating "a secret body of law" where the government was the only party who appeared before the court.[42] Critics were also troubled by the rarity of appellate review of FISC decisions.[43] For example, James G. Carr, a senior federal judge for the Northern District of Ohio who served on the FISC from 2002 to 2008, believed that attorneys should be appointed in FISC proceedings for "novel legal assertions."[44] In his opinion, an adversarial proceeding where novel issues were presented "would result in better judicial outcomes."[45] Moreover, Judge Carr believed that it was equally important for the appointed lawyer to have

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[40] Savage & Wyatt, *supra* note 39; 50 U.S.C. § 1861(a)(1) (2013); 50 U.S.C. § 1861(b)(2)(A) (2013); *see*, *e.g.*, Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 795 (2d Cir. 2015); 50 U.S.C. § 1861 (2015).

[41] Timothy B. Lee, *Everything You Need to Know About the NSA's Phone Records Scandal*, WASH. POST (June 6, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/06/everything-you-need-to-know-about-the-nsa-scandal.

[42] Lichtblau, *supra* note 9.

[43] *Id.*

[44] James G. Carr, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html; *see also* Vladeck, *supra* note 27 ("One of the "more common" suggested "reforms to United States surveillance law and policy has been to provide for more adversarial participation before the FISC.").

[45] *See* Carr, *supra* note 44.

the ability to appeal decisions to the FISCR and Supreme Court.[46] He criticized the fact that, under the procedural authorities at that time, no opportunity for such review existed because only the government could appeal a FISC decision.[47]

A report issued by the Brennan Center for Justice echoed similar concerns.[48] The Brennan Center maintained that an adversarial system ensures that different viewpoints are heard in judicial proceedings.[49] By considering more than one perspective, courts are in a better position to reach more accurate decisions.[50] With respect to appellate review of FISC decisions, the Brennan Center wrote: "Of course, it is well understood that judges make mistakes; that is why the federal judicial system has two levels of appeal. . . . In the FISA context, however, there is no opportunity to appeal an erroneous grant of an application, because the government is generally the only party."[51] With little chance for appellate review of FISC decisions in a non-adversarial process, the Brennan Center believed that the there was a high probability that FISC judges would "misinterpret the law — and perpetuate that misinterpretation in subsequent decisions."[52]

These were not the only concerns raised about the FISC.[53] Critics also believed that the FISC suffered from a lack of

[46] *Id.*

[47] *Id.*; *see also* Vladeck, *supra* note 27.

[48] *See generally* ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT (Brennan Ctr. for Justice 2015).

[49] *Id.* at 31.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See* Carol D. Leonnig et al., *Secret-Court Judges Upset at Portrayal of "Collaboration" with Government*, WASH. POST (June 29, 2013), https://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8_story.html ("Some critics say the court is a rubber stamp for government investigators because it almost never has turned down a warrant application.").

transparency.[54] They found it problematic that the vast majority of FISC decisions were classified and believed such secrecy "hampers democratic self-government and sound policymaking."[55] In a similar vein, critics maintained that the FISC was a "rubber stamp" court because it denied only a "miniscule fraction" of government requests.[56] To support this assertion, critics cited the FISC's high approval rates of the government's surveillance requests.[57] They believed that "the FISC had failed to serve as a meaningful check on the Executive Branch, at least largely because it had too easily accepted and signed off on the government's debatable (if not dubious) interpretations of the relevant statutory authorities."[58]

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[54] GOITEIN AND PATEL, *supra* note 10, at 46.

[55] *Id.*

[56] Herb Lin, *On the FISA Court and "Rubber Stamping,"* LAWFARE (Apr. 13, 2015, 2:07 PM), https://www.lawfareblog.com/fisa-court-and-rubber-stamping; Michael Glennon, *National Security and Double Government*, 5 HARV. NAT'L SECURITY J. 1, 100 (2014) (The FISC "approved 99.9% of all warrant requests between 1979 and 2011.").

[57] *See*, *e.g.*, GOITEIN & PATEL, *supra* note 10.

[58] Vladeck, *supra* note 27, at 1161. Some critics question whether certain of the FISC's actions are permissible under Article III of the U.S. Constitution. For example, these critics believe that the FISC's "move from adjudicating applications for surveillance in individual cases to approving broad programs based on vague standards arguably runs afoul of Article III of the Constitution." GOITEIN & PATEL, *supra* note 10, at 29; *accord* Vladeck, *supra* note 27, at 1178 (["T]he far closer question is whether the FISC is also acting consistently with Article III when it issues production orders under § 215 of the USA PATRIOT Act, or when it issues directives under § 702 of FISA as provided in the FISA Amendments Act."). Professor Vladeck noted that the "harder question" was "whether there is an Article III case or controversy *in the first place* when the government makes applications to the FISA Court." Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A Response to Orin Kerr*, LAWFARE (July 31, 2014, 10:54 AM), https://www.lawfareblog.com/article-iii-appellate-review-and-leahy-bill-response-orin-kerr. Whether there is an Article III case or controversy each time that the government submits an application or request for certification is a complex issue that is beyond the scope of this paper. For the purposes of this paper, it is assumed that when the government submits an application or certification to the FISC, it satisfies the Article III case or controversy requirement.

To address some of these concerns, a bipartisan group of 13 Senators asked the Privacy and Civil Liberties Oversight Board ("PCLOB"), a bipartisan oversight agency within the executive branch,[59] to investigate the Section 215 program. In connection with this review of the Section 215 program, House Minority Leader Nancy Pelosi requested that the PCLOB review the operations and procedures of the FISC.[60] Pelosi encouraged the PCLOB to provide recommendations on how to improve the FISC to help the "American public to better understand FISA Court decisions and the appropriateness of its interpretation of relevant case law."[61] In addition to Congress, President Barack Obama believed that the PCLOB was the appropriate board to review the Section 215 program.[62]

C. PCLOB Recommendation with Respect to Appellate Review of FISC Decisions

As directed by Congress and President Obama, the PCLOB conducted a comprehensive review of the Section 215 program and the FISC.[63] In its review of the FISC, the PCLOB gave significant

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[59] The PCLOB's primary mission is to ensure that the executive branch's efforts to protect the United States from terrorist activities are balanced with "the need to protect privacy and civil liberties." PRIVACY AND CIVIL LIBERTIES BOARD, *About the Board*, https://www.pclob.gov/about-us.html (last visited Feb. 20, 2017). It was established by the Implementing Recommendations of the 9/11 Commission Act, Pub. L. 110-53, signed into law in August 2007 (codified at 42 U.S.C. § 2000ee). *Id.*

[60] Letter from Nancy Pelosi, Minority Leader of the U.S. House of Representatives, to David Medine, PCLOB Chairman (July 11, 2013), https://www.pclob.gov/library/Letter-Pelosi.pdf.

[61] *Id.*

[62] Ezra Mechaber, *President Obama Holds a Press Conference* (Aug. 9, 2013), https://www.whitehouse.gov/blog/2013/08/09/president-obama-holds-press-conference (During an August 9, 2013, press conference, President Obama stated: "I've asked the Privacy and Civil Liberties Oversight Board to review where our counterterrorism efforts and our values come into tension.").

[63] PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 2.

weight to two factors.[64] First, the PCLOB recognized that the FISC, its judges, their staff, and the government lawyers who appear before the court "operate with integrity and give fastidious attention and review" to surveillance applications.[65] Second, despite this favorable observation, the PCLOB believed that it was also "critical to the integrity of the process that the public have confidence in its impartiality and rigor."[66] To improve the integrity of the judicial process, the PCLOB recommended that the structure of the FISC could be improved by: (1) providing a greater range of views and legal arguments to the FISC as it considers novel and significant issues; (2) facilitating appellate review of such decisions; and (3) providing increased opportunity for the FISC to receive technical assistance and legal input from outside parties.[67]

The PCLOB believed that these proposed FISC reforms would help enhance public confidence in the integrity of the FISC's procedures.[68] With respect to facilitating appellate review of FISC decisions, the PCLOB made the following recommendation: Congress should enact legislation to expand the opportunities for appellate review of FISC decisions by the FISCR and for review of FISCR decisions by the Supreme Court of the United States.[69]

In setting forth this recommendation, the PCLOB recognized that the opportunity for appellate review of FISC decisions was much

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[64] *Id*. at 182.

[65] *Id*.

[66] *Id.* (noting that "The PCLOB heard from three judges who formerly served on the FISC. Judge James Robertson, who served on the FISC from 2002 through 2005, participated in the Board's July 9, 2013, public workshop; Judge James Carr, who served on the FISC from 2002 through 2008, participated in our November 4, 2013, public hearing; Judge John Bates, who served on the Court from 2006 to February 2013 and as its presiding judge from 2009 to 2013, met with the Board on October 16, 2013.").

[67] *Id.*

[68] *Id*. at 14.

[69] *Id*. at 187.

more limited than appellate review of federal courts decisions.[70] Indeed, the PCLOB observed that, at the time it issued its report, only two FISC decisions had been appealed to the FISCR since the creation of the FISC and FISCR.[71] The PCLOB noted that almost all advocates of FISC reform, including judges who have served on the court, agree that there should be increased opportunities for appellate review of FISC and FISCR decisions.[72] The PCLOB believed that providing for "greater appellate review of FISC and FISCR rulings will strengthen the integrity of judicial review under FISA."[73]

To address these concerns, the PCLOB proposed two ways in which a "special advocate" could seek appellate review of a FISC decision: (1) "by directly filing a petition for review with the FISCR of orders that the Special Advocate believes are inconsistent with FISA or the Constitution;" or (2) "by requesting that the FISC certify an appeal of its order."[74] With respect to this second suggestion, *i.e.*, certified question jurisdiction, the PCLOB contemplated that Congress could enable FISC judges to certify their decisions to the FISCR.[75] Further, the PCLOB suggested that Congress could modify 28 U.S.C. §1254(2) to add the FISCR as a court authorized to certify a question of law to the Supreme Court for its review.[76] The PCLOB believed that it should be within the FISC or FICSR's discretion whether to certify a question for review.[77] Moreover, in making its recommendation, the PCLOB assumed that, similar to "traditional litigation in federal court, a FISC order would take effect immediately

[70] *Id.*
[71] *Id.* at 199. Subsequent to the PCLOB's report, the FISCR publicly released a third decision, *In re* Certified Question of Law, Docket No. 16-01 (FISA Ct. Rev. 2016).
[72] PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 187.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 188.
[76] *Id.*
[77] PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 188.

unless the court granted a stay of its order."[78] Accordingly, if a FISC decision were appealed or if the FISC certified a question for review by the FISCR, FISC-approved authorization to conduct surveillance should typically be allowed to begin pending further review by the higher court.[79]

The idea of certified question jurisdiction was discussed by Professor Stephen Vladeck during a public hearing conducted by the PCLOB on November 4, 2013.[80] At the hearing, Professor Vladeck noted that certified question jurisdiction could be a possible option for appellate review of FISC decisions.[81] Certified question jurisdiction would permit the FISC to certify "particularly difficult legal questions to FISCR."[82] He believed that such certification could be modeled on 28 U.S.C. §1254(2), which permits federal appellate courts to certify legal questions to the Supreme Court.[83] In addition, Professor Vladeck advocated that 28 U.S.C. §1254(2) could be modified to permit the FISCR to certify questions to the Supreme Court "if there were cases where FISCR thought it was a sufficiently important question to raise it to the justices' attention."[84] He recognized, however, that the Supreme Court has not answered a certified question since 1981, but

[78] *Id*. at 189.
[79] *Id*.
[80] *Privacy and Civil Liberties Oversight Board: Public Hearing on Consideration of Recommendations for Change: The Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, 239-40 (Nov. 4, 2013) (statement of Stephen Vladeck, then a professor at American University Washington College of Law and now at the University of Texas School of Law), https://www.pclob.gov/library/20131104-Transcript.pdf.
[81] *Id*.
[82] *Id.* at 239-40.
[83] *Id.*
[84] *Id*. at 259-60.

he offered that "at least FISCR would have the ability to try to get their attention."[85]

II. CERTIFIED QUESTION JURISDICTION IN FEDERAL APPELLATE COURTS AND THE SUPREME COURT

To understand the significance of certified question jurisdiction with respect to FISC and FISCR decisions, this article will first discuss how this procedural tool is used in other courts. Certified question jurisdiction essentially allows "one court to put questions of law to another court, the resolution of which will assist the certifying court in reaching a judgment in a case pending before it."[86] A statute providing for certified question jurisdiction was first enacted in 1802, allowing federal circuit court judges to certify questions to the Supreme Court.[87] This statute provided in pertinent part that the Supreme Court "'shall . . . finally decide[ ]' questions put to it by circuit court judges unable to reach agreement on the matter."[88]

For approximately 90 years, certification was the only statutory procedure by which cases could advance to the Supreme Court.[89] Even after other ways to reach the Supreme Court emerged, certification was frequently used until the mid-1930s. For example, between 1927 and 1936, 72 questions from federal appellate courts were certified for review by the Supreme Court.[90] After the mid-1930s, however, the number of questions certified to the Supreme Court decreased substantially. The following decade, between 1937 and

[85] *Id.* at 260.
[86] Tyler, *supra* note 6, at 1319-20.
[87] *See* 28 U.S.C. § 1254(2) (1988).
[88] Tyler, *supra* note 6, at 1323 (quoting Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159); *see also* Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 486 (2010) (quoting Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159).
[89] Nielson, *supra* note 88, at 485.
[90] *Id.* at 486 (quoting Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1710 (2000)).

1946, a total of 20 cases were successfully certified.[91] Since 1946, the Supreme Court has only accepted four certified questions, and it has not accepted a case for certification since 1981.[92] Currently, cases certified to the Supreme Court are "nearly unheard of."[93] In fact, Professor Aaron Nielson of the J. Reuben Clark Law School, Brigham Young University Law, pronounced in 2010 that certification to the Supreme Court was "dead" with "little hope of resurrection."[94]

Although declared "dead" in legal scholarship, [95] the procedure for certifying questions to the Supreme Court remains viable law. The process for certification is now codified at 28 U.S.C. § 1254(2) and provides:

> By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.[96]

Many agree that certifying questions to the Supreme Court is a valuable procedural mechanism.[97] As noted by Professor Nielson, "Supreme Court precedent . . . can be opaque. In such circumstances, why not just let appellate courts ask the Supreme Court what the law is?"[98] Likewise, Professor Amanda Tyler of Berkeley Law believes that

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[91] *Id.* at 486-87 (citing James William Moore & Allan D. Vestal*, Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 25-26 n.99 (1949)).

[92] *Id.* at 486. (citing Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000)).

[93] *Id.*

[94] *Id.* at 487.

[95] *Id.* at 485; Tyler, *supra* note 6, at 1312.

[96] 28 U.S.C. § 1254(2) (1988).

[97] Nielson, *supra* note 88, at 491 (quoting United States v. Seal*e*, 558 U.S. 985 (2009) (Stevens, J., dissenting from dismissal of certified question)).

[98] Nielson, *supra* note 88, at 491.

certification to the Supreme Court "deserves a good dusting off."[99] She emphasizes that many federal court judges believe that they receive insufficient guidance from the Supreme Court on certain legal issues.[100] Certification would allow federal appellate judges to request direction from the Supreme Court on legal matters that they believe are significant and unresolved.[101]

Justice John Paul Stevens agreed with the importance of certification as a procedural tool. When the Supreme Court dismissed a request for certification in 2009, Justice Stevens reflected in his dissenting opinion:

> The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification. Section 1254(2) and this Court's Rule 19 remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case.[102]

Justice Stevens worried that the Supreme Court "has, in effect, abandoned this important means by which lower court judges can

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[99] Tyler, *supra* note 6, at 1312. Professor Tyler further wrote: "I recommend that the courts of appeals consider reviving certification by dusting off this tool and using it to place before the Supreme Court those issues that they believe warrant the Court's timely attention. In turn, I suggest that the Supreme Court abandon its practice of routinely dismissing such requests out of hand and take more seriously invitations from appellate judges to provide direction on matters of great concern to them." *Id.* at 1319.

[100] Tyler, *supra* note 6, at 1315 (citing Honorable Gerald B. Tjoflat, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, Remarks at The George Washington University Law School Conference: Re- thinking the Law Governing the Structure and Operation of the Supreme Court: Altering the Certiorari Process (Nov. 20, 2009) (transcript on file with The George Washington Law Review)).

[101] *Id.* at 1326.

[102] United States v. Seale, 558 U.S. 985, 986 (2009).

prod the Court to take up issues of great importance to the lower courts."[103] Justice Stevens was not alone in his assessment of the value of certified question jurisdiction. Justice Oliver Wendell Holmes, Jr. observed that "[certified] questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way."[104] Likewise, Chief Justice William Howard Taft believed that "certification would serve as a means pursuant to which the courts of appeals could exercise their own 'discretion' to 'place' particular legal issues before the Supreme Court."[105]

In addition to procedures authorizing federal appellate courts to certify questions to the Supreme Court, most states have adopted certification procedures that allow a federal court to request the State's highest court to resolve a novel state-law issue.[106] The state's highest court has the option of deciding whether to resolve the certified question with the understanding that the litigants will return to federal court to continue their proceedings.[107] The evolution of this process is explained as follows:

> Certification developed in this country in response to difficulties arising out of the 1938 case *Erie Railroad Co. v.*

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[103] Tyler, *supra* note 6, at 1321 (citing *Seale*, 558 U.S. at 986 (Stevens, J., dissenting from dismissal of certified question)).

[104] Tyler, *supra* note 6, at 1323 (quoting Chi., Burlington & Quincy Ry. v. Williams, 214 U.S. 492, 495-96 (1909) (Holmes, J., dissenting)).

[105] Tyler, *supra* note 6, at 1324 (citing *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10,749 Before the H. Comm. on the Judiciary*, 67th Cong. 20 (1922)).

[106] Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (citing Beth A. Hardy, *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217 (1990)); *see* Deborah J. Challener, *Interactive Federalism and the Certification of State Law Questions in Diversity Cases,* MISS. COLL. SCH. OF LAW RESEARCH PAPER 1, 31 (2009).

[107] Eric Eisenberg, *A Divine Comity: Certification (At Last) In North Carolina*, 58 DUKE L.J. 69, 71 (2008). Some certification procedures allow other states' appellate courts to certify as well. *Id.* (citing W. VA. CODE ANN. § 51-1A-3 (LexisNexis 2000) (allowing interstate certification.)).

> *Tompkins*. *Erie* demands that a federal court decide substantive state law questions exactly as a state court would. Obeying *Erie* is straightforward if state law is clear, but predicting how the state supreme court would decide an unclear issue is neither easy nor value-free.[108]

In *Clay v. Sun Insurance Office Ltd*., a 1960 decision, the Supreme Court encouraged federal courts to certify "uncertain" or "unresolved" state law questions to a state's highest court.[109] The *Clay* decision "touched off a steady movement toward consensus: the Uniform Certification of Questions of Law Act appeared in 1967, to be adopted by eighteen states, the District of Columbia, and Puerto Rico over the following twenty years."[110] Currently, all states except North Carolina have adopted certification procedures.[111]

Certification of questions to a state's highest court is a valuable procedural tool. As Justice Ruth Bader Ginsburg remarked in *Arizonans for Official English v. Arizona*, the certification of a "novel or unsettled" question of state law may provide "authoritative answers by a State's highest court."[112] She believed that such a certification process plays an important role in "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." [113] Likewise, as Justice William Douglas reflected in *Lehman Brothers v. Schein*, the certification process "in the long run save[s] time, energy, and resources and helps build a cooperative

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[108] *Id.* (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 785 n.2 (5th Cir. 2000)).
[109] Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).
[110] Eisenberg, *supra* note 107, at 74.
[111] Eisenberg, *supra* note 107, at 102 ("North Carolina is the only state never to have enacted a certification procedure.").
[112] Arizonans for Official English v. Arizona, 520 U.S. 43, 77 (1977) (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).
[113] *Id.* at 76 (citing Beth A. Hardy *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217 (1990)); *see* Bellotti v. Baird, 428 U.S. 132, 148 (1976).

judicial federalism."[114] Justice William Rehnquist echoed these same views in his concurrence in *Lehman Brothers*, writing that state certification procedures "are a very desirable means by which a federal court may ascertain an undecided point of state law."[115]

III. INCLUSION OF CERTIFIED QUESTION JURISDICTION IN THE USA FREEDOM ACT

The USA FREEDOM Act amended FISA to include, for the first time, certified question jurisdiction.[116] By amending FISA to include certified question jurisdiction, the USA FREEDOM Act increased the opportunities for appellate review of FISC and FISCR decisions.[117] Specifically, FISA now authorizes the FISC, after issuing an order, to certify questions of law to the FISCR.[118] The Act authorizes the FISCR in turn to certify questions of law to the Supreme Court.[119] Certification of questions from the FISCR to the Supreme Court is based upon existing procedures for certified questions of law from federal appellate courts to the Supreme Court.

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[114] *Lehman Bros.*, 416 U.S. at 391 (citing J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967)); Philip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963); Note, *Florida's Interjurisdictional Certification: A Reexamination To Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969)).

[115] *Id.* at 394.

[116] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, H.R. Res. 2048 or USA FREEDOM ACT of 2015, 114th Cong. (2015) (enacted) 50 U.S.C. § 1803(j), (k) (2015).

[117] PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5. Overall, the PCLOB noted that all of its recommendations "have been implemented in full or in part, or the relevant government agency has taken significant steps toward adoption and implementation." *Id.* at 1.

[118] 50 U.S.C. § 1803(j) (2015).

[119] 50 U.S.C. § 1803(k) (2015).

As noted in its legislative history, the USA FREEDOM Act expands the opportunities for appellate review of FISC and FISCR decisions through certified question jurisdiction.[120] Congress believed that certified question jurisdiction would enhance the public's trust in the FISC to "get the question right."[121] Congress considered appellate review, including certified question review, an essential safeguard.[122] As explained in the legislative history, appellate review, including certified question review of FISC decisions, "will help ensure that strictures of our Constitution are obeyed in spirit and letter. It will help ensure that programs designed to keep Americans safe can command the respect and trust they need to be effective."[123]

Based upon these beliefs, Congress included certified question jurisdiction in the USA FREEDOM Act as follows:

> (j) Review of FISA court decisions:
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> Following issuance of an order under this chapter, a court established under subsection (a) [*i.e.*, FISC] shall certify for review to the court established under subsection (b) [*i.e.*, FISCR] any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this subsection, the court established under subsection (b) may give binding instructions or require

[120] 161 CONG. REC. S3092, S3142 (daily ed. May 20, 2015) (statement of Sen. Manchin).
[121] *E.g.*, 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal).
[122] 161 CONG. REC. S2772, S2778, (daily ed. May 12, 2015) (statement of Sen. Daines) ("The lack of an adversarial process, as well as transparency and effective appellate review, is one of the reasons the USA FREEDOM Act is absolutely necessary.").
[123] 161 CONG. REC. S3092, S3164 (daily ed. May 20, 2015) (statement of Sen. Blumenthal).

> the entire record to be sent up for decision of the entire matter in controversy.[124]
>
> (k) Review of FISA court of review decisions
>
> (1) Certification
>
> For purposes of section 1254(2) of Title 28, the court of review established under subsection (b) [*i.e.*, FISCR] shall be considered to be a court of appeals.
>
> (2) Amicus curiae briefing
>
> Upon certification of an application under paragraph (1), the Supreme Court of the United States may appoint an amicus curiae designated under subsection (i)(1), or any other person, to provide briefing or other assistance.[125]

As provided in the USA FREEDOM Act, only the FISC and the FISCR—not the litigants—have the authority to certify a question of law to a higher court.[126] Moreover, the FISC and FISCR are afforded broad discretion in determining whether to certify a question of law. For example, the FISC shall certify "any question of law that may affect resolution of the matter in controversy *that the court determines warrants such review* because of a need for uniformity or because consideration by the

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[124] 50 U.S.C. § 1803(j) (2015). Pursuant to the FISCR Rules of Procedures, when "the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCR will certify, by appropriate order, the procedures to be followed." FISCR R.P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT) (Feb. 29, 2016).

[125] 50 U.S.C. § 1803(k) (2015).

[126] The FISC may only certify a "question of law" that "may affect resolution of the matter in controversy." 50 U.S.C. § 1803(j) (2015). With respect to certifying questions from the FISCR to the Supreme Court, the USA FREEDOM Act requires that the FISCR may only seek certification of questions of law. 50 U.S.C. § 1803(k)(1) (2015) ("For purposes of section 1254(2) of Title 28, the court of review established under subsection (b) shall be considered to be a court of appeals.").

[FISCR] would serve the interests of justice."[127] Similarly, the FISCR has complete discretion whether to certify questions to the Supreme Court. As provided in the statute, the FISCR may certify questions of law to the Supreme Court "*as to which instructions are desired*."[128] Indeed, the legislative history notes that it is within the FISC and FISCR judges' discretion whether to certify a legal issue to a higher court.[129]

Moreover, the USA FREEDOM Act gives the FISCR or Supreme Court, as applicable, discretion whether to accept or deny consideration of the certified question, whether to only consider the certified question in and of itself and not the entire matter, or whether to consider the "entire matter in controversy."[130] The USA FREEDOM Act provides in pertinent part that the reviewing courts "*may* give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."[131] This language directly mirrors the language in 28 U.S.C. § 1254(2), the statute authorizing federal appellate courts to certify questions to the Supreme Court.

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[127] 50 U.S.C. § 1803(j) (2015) (emphasis added).

[128] 28 U.S.C. § 1254(2) (1988) (emphasis added); *see also* 50 U.S.C. § 1803(k)(1) (2015).

[129] H.R. REP. NO. 114-109, at 25 (2015). In its legislative history, 50 U.S.C. § 1803(j) "authorizes the FISC, *in the judge's discretion* and following issuance of a FISA order, to certify a question of law to the FISCR if such question of law may affect the resolution of the matter in controversy because of a need for uniformity or to serve the interests of justice. This section also *permits* the FISCR to certify questions of law to the U.S. Supreme Court and authorizes the Supreme Court to appoint an individual to serve as an amicus curiae from among those designated by the FISC and FISCR under this section. This provision is based upon and conforms to existing procedures for certified questions of law from the Federal Courts of Appeals to the U.S. Supreme Court in Section 1254(2) of Title 28, United States Code." *Id.* (emphasis added).

[130] 28 U.S.C. § 1254(2) (2015); *see also* 50 U.S.C. § 1803(j), (k) (2015).

[131] 28 U.S.C. § 1254(2) (2015) (emphasis added); *cf.* 50 U.S.C. § 1803(j), (k) (2015).

An amicus curiae, or "friend of the court," may also play a role when the FISC or FISCR seeks to certify a question of law to a higher court. While the decision on whether to appoint an amicus curiae is independent of the certification proceedings, the FISC or FISCR has the discretion to appoint an amicus curiae "to assist such court in the consideration of any application for an order or review that, *in the opinion of the court, presents a novel or significant interpretation of the law*, unless the court issues a finding that such appointment is not appropriate."[132] As such, while the processes for appointing an amicus curiae and certifying a question are distinct, if the FISC or FISCR believes that the legal issue being certified "presents a novel or significant interpretation of the law," the FISC or FISCR may appoint one.[133] In addition to this provision, for certifications from the FISCR to the Supreme Court, the USA FREEDOM Act provides that the Supreme Court "*may* appoint an amicus curiae" to assist in the proceedings.[134] These authorities can be summarized as follows:

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[132] 50 U.S.C. § 1803(i)(2)(A) (2015). This section is narrower than recommended. The PCLOB recommended that "when a legal question is accepted for review by the FISCR, the Special Advocate would be permitted to participate in the matter, just as in the FISC." PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5.

[133] 50 U.S.C. § 1803(i)(2)(A) (2015).

[134] 50 U.S.C. § 1803(k)(2) (2015) (emphasis added). Since USA FREEDOM Act's enactment, six people have been designated eligible to serve as amici curiae pursuant to 50 U.S.C. § 1803(i)(1). U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT, *Amici Curiae*, http://www.fisc.uscourts.gov/amici-curiae (last accessed Feb. 20, 2017) (lists individuals designated as eligible to serve pursuant to 50 U.S.C. § 1803(i)(1) (2015)). The PCLOB envisioned a more predominant role for amici curiae than what Congress passed in the USA FREEDOM Act. With respect to the involvement of amici curiae in appellate review, the PCLOB noted that the USA FREEDOM Act "provides fewer guarantees than the Board's proposal that any participating amicus curiae will be allowed to participate in the appellate review process." PCLOB, RECOMMENDATIONS ASSESSMENT REPORT, *supra* note 5. Amici curiae will have less involvement "both in the decision about whether to certify a question of law for review, and in the proceedings that take place once a question has been certified." *Id.* Unlike the recommendation, the USA FREEDOM Act "provides no mechanism for an amicus curiae to request certification of a FISC or FISCR decision, and it

Question	FISA Court	FISA Court of Review	Supreme Court
What type of issue may be certified to a higher court?	"[A]ny question of law that may affect resolution of the matter in controversy."[135]	"[A]ny question of law in . . . which instructions are desired." [136]	Not applicable
When may certified question jurisdiction be exercised?	(1) When there is a "need for uniformity" or (2) when consideration of a legal issue by the FISCR "would serve the interests of justice." [137]	At "any time" for "any question of law in any . . . case as to which instructions are desired." [138]	Not applicable
Who has the discretion to certify an issue to a higher court?	FISC[139]	FISA Court of Review[140]	Not applicable
What is the higher court's responsibility upon receiving a certified question of law?	Not applicable	Complete discretion whether to accept; *may* give "binding instructions or require the	Complete discretion whether to accept; *may* give "binding instructions or require the

provides no mechanism by which an amicus curiae can challenge the FISC's decision not to certify a legal question for appellate review." *Id.*

[135] 50 U.S.C. § 1803(j) (2015).

[136] 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

[137] 50 U.S.C. § 1803(j) (2015).

[138] 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

[139] 50 U.S.C. § 1803(j) (2015).

[140] 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

		entire record to be sent up for decision of the entire matter in controversy."[141]	entire record to be sent up for decision of the entire matter in controversy." [142]
When may an amicus curiae be appointed?	When, in the opinion of the court, the legal issue "presents a novel or significant interpretation of the law." [143]	When, in the opinion of the court, the legal issue "presents a novel or significant interpretation of the law." [144]	The Supreme Court "*may* appoint an amicus curiae" or "other person, to provide briefing or other assistance." [145]

IV. CERTIFIED QUESTION JURISDICTION AT THE FISC AND FISCR IS CONSTITUTIONAL

On July 29, 2014, prior to the enactment of the USA FREEDOM Act, Senator Patrick Leahy proposed legislation amending FISA to include, among other modifications, certified question jurisdiction ("Leahy bill"). [146] The proposed language for certified question jurisdiction in the Leahy bill was similar to the provisions that ultimately were included in the USA FREEDOM Act.[147] Concerns

[141] 50 U.S.C. § 1803(j) (2015).

[142] 28 U.S.C. § 1254(2) (1988); 50 U.S.C. § 1803(k)(1) (2015).

[143] 50 U.S.C. § 1803(i)(2)(A) (2015).

[144] *Id.*

[145] 50 U.S.C. § 1803(k)(2) (2015).

[146] On July 29, 2014, Senator Patrick Leahy introduced the USA FREEDOM Act of 2014, S. 2685, 113th Cong. (2014).

[147] With respect to certified question jurisdiction, the statutory language proposed by Senator Leahy in USA FREEDOM Act S. 2685 was as follows:

> (j) **Review of FISA Court Decisions**.—After issuing an order, a court established under subsection (a) shall certify for review to the court established

were raised, however, that the proposed certification process set forth in the Leahy bill violated Article III's case or controversy requirement.[148] The Supreme Court has long recognized that the

under subsection (b) any question of law that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this paragraph, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(k) **Review of FISA Court of Review Decisions**.—

(1) **CERTIFICATION**.—For any decision issued by the court of review established under subsection (b) approving, in whole or in part, an application by the Government under this Act, such court may certify at any time, including after a decision, a question of law to be reviewed by the Supreme Court of the United States.

(2) **SPECIAL ADVOCATE BRIEFING**.—Upon certification of an application under paragraph (1), the court of review established under subsection (b) may designate a special advocate to provide briefing as prescribed by the Supreme Court.

(3) **REVIEW**.—The Supreme Court may review any question of law certified under paragraph (1) by the court of review established under subsection (b) in the same manner as the Supreme Court reviews questions certified under section 1254(2) of title 28, United States Code. § 2685.

[148] Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 137 (3d Cir. 2009) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1 (5th ed. 2007)). For views expressing that the certified jurisdiction provision set forth the in Leahy bill violated Article III, see Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?*, LAWFARE (July 30, 2014, 4:26 PM), https://www.lawfareblog.com/article-iii-problems-appellate-review-leahy-bill; Letter from the Honorable John D. Bates, U.S. Dist. Judge for the U.S. Dist. Court for the Dist. of Columbia, served on FISC from 2006 to 2013, to the Honorable Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Aug. 5, 2014), http://online.wsj.com/public/resources/documents/Leahyletter.pdf (Judge Bates, former Chief Judge of the FISC, believed that proposed language might have some constitutional infirmities. In the August 5, 2014, letter to Senator Leahy, Judge Bates wrote: "the certification provision appears to raise serious legal questions that may not be resolvable through clarifying changes to the proposed statutory language. Insofar as it may contemplate appellate review, including Supreme Court review, of issues in absence of a case or controversy, it is

exercise of judicial authority under Article III of the Constitution "depends on the existence of a case or controversy."[149] The requirement for "litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III."[150] A case "is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[151] Courts may not render advisory opinions, and may not "proceed to hear an action if, subsequent to its initiation, the dispute loses 'its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.'"[152]

Professor Orin Kerr, George Washington University Law School, was one legal scholar who expressed concern that certification procedures recommended in the Leahy bill violated Article III's case or controversy requirement. Professor Kerr noted that after the FISC issued an order authorizing the government to conduct surveillance, no application would be pending before the FISC.[153] Accordingly, Professor Kerr was concerned that the FISCR would be issuing an advisory opinion because no application would be pending at the time that the FISCR issued its decision.[154] He believed the goal of the bill was "to overcome the lack of an adversarial process by giving lower courts a way to bring the case upstairs."[155]

To correct this perceived constitutional weakness, Professor Kerr recommended three modifications to the Leahy bill: (1) require

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potentially inconsistent with the requirements of Article III of the Constitution.").

[149] Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

[150] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 212-13 (2000).

[151] *Id.* (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)).

[152] *Id.* (quoting Hall v. Beals, 396 U.S. 45, 48 (1969) (per curium) (citing *Preiser*, 422 U.S. at 401; Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)).

[153] Kerr, *supra* note 148.

[154] *Id.*

[155] *Id.*

the FISC to "conduct a review of orders in place when a certified decision is handed down;"[156] (2) "make clear that the certification [standard] is limited to legal questions that are outcome-determinative to some aspect of the order issued, not just any legal issues that strike the FISC as interesting;"[157] and (3) require that the entire application with recommended legal issues be reviewed by the FISCR so that the appellate court would "have de novo review of the whole application."[158] Professor Kerr believed that these modifications would address the "advisory opinion problem."[159]

In contrast to Professor Kerr's contentions, Professor Vladeck believed that Senator Leahy's proposal did not present a constitutional problem.[160] He contended that certifying a question from the FISC to the FISCR would not raise Article III justiciability issues as long as the court that certified the question of law did so "in the context of an ongoing case-or-controversy."[161] Professor Vladeck maintained that the appellate court derives jurisdiction from the certifying court,[162] and that the FISC retained jurisdiction after an application for surveillance was approved. He explained his reasoning as follows:

> FISA Court orders are best viewed as *prospective*, not retrospective. That is to say, they authorize government action going forward (often for a specific period of time) that is subject to compliance with various procedural rules imposed (and administered) by the FISA Court. Thus, if the government's application suffices to create a case or controversy for Article III purpose. . . , that case or controversy does not cease to exist once

[156] *Id.*
[157] *Id.*
[158] Kerr, *supra* note 148.
[159] *Id.*
[160] Steve Vladeck, *Article III, Appellate Review, and the Leahy Bill: A Response to Orin Kerr*, LAWFARE (July 31, 2014, 10:54 AM), https://www.lawfareblog.com/article-iii-appellate-review-and-leahy-bill-response-orin-kerr.
[161] *Id.*
[162] *Id.*

> the application is *granted*; to the contrary, it exists for so long as the government is *acting* under the relevant application.[163]

Professor Vladeck believed that "*if* there is a case or controversy in the FISA Court, it should follow that the FISA Court has the power to certify relevant questions of law to the FISA Court of Review (and it, in turn, to the Supreme Court)."[164]

A review of the structure of the FISC and its rules supports Professor Vladeck's position that a justiciable case or controversy continues after the FISC authorizes surveillance.[165] As recognized by Professor Vladeck, FISC decisions authorize the government to conduct surveillance prospectively. The ongoing surveillance conducted by the government is subject to FISC rules.[166] For example, pursuant to FISC Rule 13, after the FISC approves an application for surveillance, the government has a continuing obligation to immediately notify the FISC if the government learns that it violated the FISC order or applicable statute while conducting the surveillance.[167] This is a continuing responsibility for the duration of

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[163] *Id.* (emphasis in the original). Professor Kerr cites *California Medical Association v. Federal Election Commission* to support his position that federal courts do not have the authority to decide cases "unless the justiciability requirements of Article III have been met." Kerr, *supra* note 148 (citing Cal. Med. Ass'n v. FEC, 453 U.S. 182, 192 n.14 (1981)). In response, Professor Vladeck points out that *California Medical* stands for the proposition that, under the certification provision at issue in that case, a party must first have standing in the underlying case before it can certify a question in that case to another court for review. In other words, Professor Vladeck reads *California Medical* to mean that the justiciability requirement for certification is satisfied if the requirements for justiciability (*e.g.*, standing; case and controversy; matter before the court is not frivolous, hypothetical) are met in the underlying case. Vladeck, *supra* note 160.

[164] Vladeck, *supra* note 160 (emphasis in the original).

[165] *Id.*

[166] *Id.*

[167] FISA Ct. R.P. 13 (Correction of Misstatement or Omission; Disclosure of Non-Compliance). Under FISC Rule 13(b), if "the government discovers that any authority or approval granted by the Court has been implemented in a manner that

the approved application. If, for instance, the FISC authorizes the government to conduct electronic surveillance on a certain target for sixty days, the government must notify the court of any unauthorized collection that might occur during that 60-day period. Thus, FISC oversight continues even after the requested surveillance sought in an application is authorized.

As another example, after the FISC approves an application for a physical search, it continues to oversee that application. Pursuant to FISC Rule 16, after a FISC-authorized search is conducted, a search return must be submitted to the FISC within a certain amount of time.[168] As such, after an application for physical search is approved, the FISC continues to monitor the government's conduct in at least two ways. First, under FISC Rule 13, if the government exceeds FISC authorization while conducting the search, the government must notify the court of the compliance mistake. Second, pursuant to FISC Rule 16, the government must file a search return with the FISC after it conducts the physical search. As demonstrated by these rules, and consistent with Professor Vladeck's position, FISC control of an application continues, *e.g.*, is "*prospective*," after the FISC approves the application.

Moreover, if the FISC certifies a question to the FISCR, and the FISCR subsequently determines that the application should not have been approved, the government would be bound by the latter court's determination. Again, this assertion lends support to the position that a FISCR opinion would not be advisory, but rather would address an ongoing case or controversy. For example, in May 2006, pursuant to Section 215 of the USA PATRIOT Act, the FISC

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did not comply with the Court's authorization or approval or with applicable law, the government, in writing, must immediately" notify the FISC of such non-compliance. *Id.*

[168] FISA Ct. R.P. 16 (Returns). Under FISC Rule 16, a search return "must be made and filed either at the time of submission of a proposed renewal application or within 90 days of the execution of a search order, whichever is sooner." *Id.*

authorized the bulk collection of all telephone metadata from a certain communications service provider.[169] Under this FISC order, the provider was required "to produce call detail records, every day, on all telephone calls made through its systems or using its services where one or both ends of the call are located in the United States."[170] This collection was part of a "broader program of bulk collection of telephone metadata from other telecommunications providers carried out pursuant to §215."[171]

Hypothetically, if certified question jurisdiction had been an option in 2006, the FISC could have certified this novel legal question to the FISCR. In its certification to the FISCR, the FISC could have asked whether, as a matter of law, this type of bulk collection was consistent with the statutory language of Section 215 and the Constitution. It is uncertain what the FISCR would have decided.[172] If, however, the FISCR determined that the program was beyond the scope of what was permitted by the statute or was unconstitutional, and ordered the collection to cease, the government would have been required to stop collection. The FISCR decision would have been

[169] Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 795 (2d Cir. 2015).
[170] *Id.* at 795-96 (quoting *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things From Verizon Bus. Network Servs., Inc., No. BR 13–80, slip op. at 2 (FISA Ct. Apr. 25, 2013)).
[171] *Id.* at 796.
[172] *See e.g.*, Obama v. Klayman, 800 F.3d 559 (D.C. Cir. 2015) (reversing the U.S. District Court for the District of Columbia and finding that subscribers failed to establish a substantial likelihood of success on the merits on the issue of standing with respect to the government's bulk collection under FISA); *Clapper*, 785 F.3d at 787 (concluding that the collection of telephone metadata was not relevant to authorized counterterrorism investigations, and thus, collection of information exceeded authority granted by FISA); *In re* Application of the F.B.I., No. BR 15-75, 2015 WL 5637562, at *13 (FISA Ct. June 29, 2015) (concluding the government's acquisition of non-content call detail records did not violate FISA or the Fourth Amendment).

binding on the ongoing FISC-authorized surveillance rather than advisory.[173]

Taking this hypothetical one step further, under the current certification procedures, regardless of what had been decided, the FISCR could have stayed its decision and certified the legal question to the Supreme Court. Again, while it is unclear how the Supreme Court would have ruled, or whether it would have accepted the issue at all, a process would have been in place for the Supreme Court to consider the issue. If the Supreme Court accepted review and determined that the program complied with the statute and the Constitution, such decision would have deflected future legal disputes as to the legality of the Section 215 bulk collection program. It also would have provided the government with definitive guidance as to the legality of this Section 215 program and would have decided "a real and substantial controversy."[174]

Conversely, if the Supreme Court concluded that the Section 215 bulk collection program violated a statute or the Constitution, the government would have been ordered to cease the collection. Again, this would have protected the government against future criticism about acquisition of this type of information under Section 215. Regardless of the outcome, as demonstrated by this example, the Supreme Court's decision would have been more than an advisory opinion. It would have been binding on the government and would have affected a current collection. As such, certifying a legal question from the FISC to the FISCR, and from the FISCR to the Supreme Court, is consistent with Article III.

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[173] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 212-13 (2000).

[174] Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971) (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937))).

Significantly, some of Professor Kerr's suggestions to improve the Leahy bill were codified in the USA FREEDOM Act.[175] In his article, Professor Kerr recommended adding language that would "make clear that the certification [standard] is limited to legal questions that are outcome-determinative to some aspect of the order issued, not just any legal issues that strike the FISC as interesting."[176] The USA FREEDOM Act includes this recommendation. The USA FREEDOM Act requires that the FISC "shall certify for review" to the FISCR only "question[s] of law that *may affect resolution of the matter in controversy*."[177]

Professor Kerr further recommended that legislation should require that the FISC send up the entire application to the FISCR with recommended legal issues for the higher court's consideration "rather than certifying abstract questions."[178] Professor Kerr believed that this was necessary so that the FISCR would be able to exercise *de novo* review of the complete application.[179] However, to some extent, this recommendation was present in the Leahy bill, and was also included in the USA FREEDOM Act. With respect to this recommendation, both the Leahy bill and the USA FREEDOM Act state in pertinent part that when a question of law is certified to the FISCR, the FISCR "may give binding instructions *or require the entire record to be sent up for*

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[175] *See* 50 U.S.C. § 1803; Kerr, *supra* note 153; Wittes & Liu, *supra* note 4.

[176] Kerr, *supra* note 148.

[177] 50 U.S.C. § 1803(j) (emphasis added). *See* Wittes & Liu, *supra* note 4. ("[T]he scope of appellate review of FISA Court decisions is slightly narrower under the new House bill [the USA FREEDOM Act] than the Leahy bill. For one thing, the new House bill adds a limitation not present in the Leahy bill that the FISA Court shall certify for appellate review (by the FISA Court of Review) only those questions of law 'that may affect resolution of the matter in controversy.' This limitation is in addition to the requirements originally set out in the Leahy bill that certification for review be made when the FISA Court determines there is a 'need for uniformity' or review 'would serve the interests of justice.'").

[178] Kerr, *supra* note 148.

[179] *Id.*

decision of the entire matter in controversy."[180] This language provides the FISCR with the option of reviewing the entire application as recommended by Professor Kerr. As such, if the FISCR believes that this type of an in-depth review is necessary, it is within the higher court's discretion to grant it.

It is noted that if the FISC were to deny the government's application for surveillance, certified question jurisdiction would not be an option for the FISC. If an application for surveillance is denied, the government would not have the legal authority to begin the requested surveillance. The Article III case or controversy requirement is present only if the government's application for surveillance is approved by the FISC, allowing the government to conduct surveillance. In other words, as stated by Professor Vladeck, the case or controversy requirement "exists for so long as the government is *acting* under the relevant application."[181] Under Article III, courts may not issue advisory opinions, and may not consider a matter "if, subsequent to its initiation, the dispute loses 'its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.'"[182] Without a FISC-authorized surveillance, the FISCR would be issuing an advisory opinion in contravention of the Article III mandate. However, if the government's request for surveillance were denied, while certified question jurisdiction would not be available, the government would have the options of requesting a rehearing

[180] 50 U.S.C. § 1803(j) (2015) (emphasis added).

[181] Vladeck, *supra* note 160 (emphasis in original).

[182] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 212-13 (2000) (quoting Hall v. Beals, 396 U.S. 45, 48 (1969) (per curiam)) (citing Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)).

before the entire FISC sitting *en banc* or appealing the adverse FISC decision to the FISCR.[183]

In sum, a review of the certification process supports the position that it complies with the mandates of Article III of the Constitution. The FISC procedural rules, such as FISC Rules 13 and 16, support the contention that, once an application for surveillance is approved, it remains a "live controversy."[184] Moreover, the FISCR opinions are not advisory opinions,[185] but rather would address an ongoing case or controversy. If the FISC certifies a question to the FISCR, and the FISCR subsequently determines that the application should not have been approved, the ongoing surveillance would be affected by the latter court's determination. Finally, the language of the USA FREEDOM Act itself provides that the FISC certify to the FISCR only "question[s] of law that *may affect resolution of the matter in controversy*."[186] These factors, taken together, demonstrate that the paradigm set forth in the USA FREEDOM Act for the certification process satisfies the case or controversy requirement of Article III.[187]

V. CERTIFIED QUESTION JURISDICTION ADDRESSES CONCERNS RAISED ABOUT THE LACK OF APPELLATE REVIEW

A. Three Known Appellate Decisions Issued by the FISCR

Prior to the USA FREEDOM Act, if the FISC issued an adverse judgment against a party, two options for review were

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[183] 50 U.S.C. §1803(a)(2)(A) (2015) (providing that the FISC may "hold a hearing or rehearing, en banc, when ordered by a majority of the judges that constitute such court upon a determination that-- (i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (ii) the proceeding involves a question of exceptional importance"); under FISC Rules 54 through 59, a party my file an appeal to the FISCR. FISCR R.P. 54-59 (APPEALS) (Nov. 1, 2010).

[184] *Laidlaw Envtl. Servs.*, 528 U.S. at 213.

[185] *Id.*

[186] 50 U.S.C. § 1803(j) (2015) (emphasis added); *see* Wittes & Liu, *supra* note 4.

[187] *See Preiser*, 422 U.S. at 401.

available. First, the FISC could reconsider the issue in a rehearing before the entire FISC, sitting *en banc*.[188] Publicly released FISC decisions suggest that the FISC has sat en banc in only one known proceeding.[189] Second, a party could appeal an adverse decision to the FISCR.[190] With respect to the latter option, since the creation of the FISC and FISCR in 1978, parties have appealed adverse decisions to the FISCR in only two publicly known matters. The first publicly known appeal from a FISC decision was in 2002 in *In re Sealed Case*, approximately 24 years after the FISC and FISCR were established.[191] In this case, the FISC issued an adverse finding against the government, imposing restrictions between intelligence investigations and law enforcement investigations, referred to as "the wall."[192] The government believed that these restrictions exceeded the scope of what was mandated by FISA and the Constitution, and appealed the FISC's decision.[193] After reviewing the government's legal arguments, the

[188] 50 U.S.C. §1803(a)(2)(A) (2015); *see* Vladeck, *supra* note 27, at 1166.

[189] Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L. J. 2189, 2193 (2015). In *All Matters Submitted to the Foreign Intelligence Surveillance Court*, all seven FISC judges concurred in court's decision. *In re* All Matters Submitted to the FISA Court, 218 F. Supp. 2d 611 (FISA Ct. Rev. 2002). On appeal, the FISCR referred to the May 17, 2002, FISC decision as an "en banc order." However, the FISCR noted that at the time this FISC decision was made, the statute did not provide for en banc proceedings. *In re* Sealed Case, 310 F.3d 717, 721 n.5 (FISA Ct. Rev. 2002). Specifically, the FISCR wrote: "The argument before all of the district judges, some of whose terms have since expired, was referred to as an 'en banc' although the statute does not contemplate such a proceeding. In fact, it specifically provides that if one judge declines to approve an application the government may not seek approval from another district judge, but only appeal to the Court of Review. 50 U.S.C. §§ 1803(a), (b)." *Id.*

[190] Vladeck, *supra* note 27, at 1166.

[191] *In re* Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002).

[192] *Id.* at 721.

[193] *Id.* at 721-22. The FISC concluded that FISA did not require the government to "demonstrate to the FISA court that its primary purpose in conducting electronic surveillance was not criminal prosecution." *In re Sealed Case* ended the "wall" between criminal and foreign intelligence investigations that arose through the

FISCR agreed with the government's position, finding that the "restrictions imposed by the FISA court are not required by FISA or the Constitution."[194] Accordingly, the FISCR remanded the case to the FISC for further proceedings consistent with its decision.[195]

The second publicly known appeal to the FISCR occurred in 2008 in *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*.[196] In this case, the government issued directives to a certain communications service provider pursuant to amendments to FISA known as the Protect America Act of 2007 ("PAA").[197] The now expired PAA authorized the United States to direct communications service providers to provide foreign intelligence concerning individuals reasonably believed to be located outside the United States.[198] When the communications service provider received the directives from the government, it challenged their legality before the FISC. The FISC upheld the directives and ordered the communications service provider to respond to the government.[199] The communications service provider appealed the FISC decision.[200] The FISCR, after balancing "the nation's security interests against the Fourth Amendment privacy interests of United States persons,"

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interpretation of the primary purpose test set forth in United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982)). *Id.* at 736.

[194] *Id*. at 720 ("But the court neither refers to any FISA language supporting that view, nor does it reference the Patriot Act amendments, which the government contends specifically altered FISA to make clear that an application could be obtained even if criminal prosecution is the primary counter mechanism.").

[195] *Id*. at 719-21.

[196] *In re* Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1006 (FISA Ct. Rev. 2008).

[197] *Id. See* Protect America Act of 2007, Pub. L. No. 110–55, 121 Stat. 552. The PAA expired in February 2008. On July 10, 2008, the successor statute to the PAA, the FISA Amendments Act of 2008, was enacted. 50 U.S.C. § 1881(a)-(g). For an in-depth discussion of the history of the FAA, *see* Gannon, *supra* note 24.

[198] *In re Directives*, 551 F.3d at 1006.

[199] *Id.*

[200] *Id.*

agreed with the FISC and concluded that the directives were lawful.[201] Accordingly, the FISCR affirmed the lower court's decision and ordered the provider to comply with the directives.[202]

Following the enactment of the USA FREEDOM Act, another option now exists for appellate review: the FISC or FISCR can certify a question of law to a higher court. Since the creation of this procedural tool at the FISC and FISCR, the FISC already has certified a question of law order to the FISCR, and the FISCR has issued a response to the certification.[203] In *In re Certification of Question of Law to the Foreign Intelligence Court of Review*, the FISC asked the FISCR to determine whether FISA permitted a certain technique associated with the use of pen register and trap and trace devices ("PR/TT").[204] Specifically, the FISC certified the following legal issue to the FISCR:

> Whether an order issued under 50 U.S.C. § 1842,[205] may authorize the Government to obtain all post-cut through

[201] *Id.*

[202] *Id*. at 1016-18.

[203] On August 22, 2016, the Office of the Director of National Intelligence publicly released the certified question of law order from the FISC to the FISCR, and the corresponding FISCR opinion in response to the FISC certification. IC ON THE RECORD, *Release of FISC Question of Law & FISCR Opinion* (Aug. 22, 2016), https://icontherecord.tumblr.com. Under 50 U.S.C. § 1872, "the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 1871(e) of this title) that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term', and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872 (2015).

[204] *In re* Certification of Question of Law to the FISCR, Docket No. PR/TT 2016-[redacted], at 2 (FISA Ct. Feb. 12, 2016), https://www.dni.gov/files/icotr/PCTD%20FISCR%20Certification%2020160818%20pdf.

[205] Under 50 U.S.C. § 1842, the government may seek authorization from the FISC for "the installation and use of a pen register or trap and trace device for any

> digits,[206] subject to a prohibition on the affirmative investigative use of any contents thereby acquired, when there is not technology reasonably available to the Government that would permit:
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> (1) a PR/TT device to acquire post-cut-through digits that are non-content DRAS [dialing, routing, addressing, or signaling] information, while not acquiring post-cut-through digits that are contents of a communication; or
>
> (2) the Government, at the time it receives information acquired by a PR/TT device, to discard post-cut-through digits that are contents of a communication, while retaining those digits that are non-content DRAS information.[207]

The FISC explained that, since 2006, and most recently on January 21, 2016, it had authorized the government to "record and decode all post-cut through digits" acquired by a PR/TT device.[208] The FISC prohibited, however, "any affirmative investigative use of post-cut through digits acquired through pen register authorization that do not constitute call dialing, routing, addressing, or signaling

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investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1842 (2016).

[206] As explained by the FISC, "Post-cut through digits are digits entered by a caller after a phone call has been initially placed (or 'cut-through'). Sometimes those digits represent instructions about processing the call to the number the caller is ultimately trying to reach: for example, a caller connects with an international calling card service, then is prompted to enter the number of the person with whom the caller actually wants to speak. Other times, those digits can represent substantive content unrelated to processing a phone call: for example, a caller connects with a bank's automated service and, in response to prompts, enters digits that signify, 'Transfer $1000 from my savings account to my checking account.'" *In re* Certification of Question of Law to the FISCR, Docket No. PR/TT 2016-[redacted], at 3.

[207] *Id.* at 14.

[208] *Id.* at 2.

information, unless separately authorized" by the FISC.[209] In contrast, other courts have decided "similar, if not identical, issues differently."[210] These other courts have denied government requests to obtain post-cut through digits that are considered content in applications for the installation and use of PR/TT devices in support of criminal (as opposed to foreign intelligence) investigations.[211] Moreover, the FISC noted that, recently, some FISC judges have "expressed concerns about continuing to authorize acquisition of such digits under PR/TT orders."[212]

In its request for certification, the FISC noted that due to differing legal conclusions by the FISC and other courts, a "'significant

[209] *Id.* The FISC noted that the "Government has never sought FISC authorization to use such information. The FISC-imposed prohibition on use varies from the language typically proposed by the Government, which would prohibit 'any affirmative investigative use of post-cut-through digits acquired through pen register authorization that do not constitute call dialing, routing, addressing, or signaling information, except in rare cases in order to prevent an immediate danger of death, serious physical injury, or harm to national security.'" *Id*. at 2-3 n.1 (citing Jan. 21, 2016, Application at 28).

[210] *Id*. at 9-10 (citing *In re* Applications of the U.S., 515 F. Supp. 2d 325 (E.D.N.Y. 2007); *In re* Application of the U.S., 622 F. Supp. 2d 411 (S.D. Tex. 2007); *In re* Application of the U.S., 441 F. Supp. 2d 816 (S.D. Tex. 2006); *In re* Application of the U.S., No. 6:06-mj-1130 (M.D. Fla. May 23, 2006) (Spaulding, Mag. J.), *aff'd*, No. 6:06-mj-1130 (M.D. Fla. June 20, 2006) (Conway, J.)) ("Other courts, however, have seen similar, if not identical, issues differently and denied Government requests to acquire post-cut-through digits that constitute contents in applications for the installment and use of PR/TT devices in support of law enforcement investigations under 18 U.S.C. § 3122.").

[211] *Id.*

[212] *In re* Certification of Question of Law to the FISCR, Docket No. PR/TT 2016-[redacted], at 13. ". . . FISC judges discussed the issues presented by post-cut-through digits at their semi-annual conference on October 27, 2015. Following that discussing, it was the consensus of the judges that further briefing was warranted in view of concerns expressed by some judges about continuing to authorize the acquisition of post-cut-through digits under PR/TT orders." *Id*. at 5 (citations omitted).

interpretation of the law may well be presented."[213] The FISC believed that these divergent opinions met the standard for certifying the legal issue to the FISC and that FISCR review "would serve the interests of justice."[214] After reviewing the FISC's certification order, the FISCR accepted the certified question.[215] In addition, the FISCR determined that the certified question presented a significant interpretation of law, and appointed an amicus curiae to contribute to the interpretation of the issue.[216] After thoroughly analyzing the legal issue before it, taking into account the legal arguments of both the amicus curiae and the government, the FISCR concluded that the order described in the FISC's certification complied with both the applicable statute and the Constitution.[217]

B. Certified Question Jurisdiction Will Help Alleviate Concerns about the FISC

Certified question jurisdiction will help improve public confidence in FISC and FISCR processes. A recurring criticism of the FISC is that it is a "rubber stamp" court; critics state that only an extremely small percentage of government requests are denied.[218] Appellate review of FISC decisions, as demonstrated by the detailed analysis conducted in *In re Sealed Case*, *In re Directives*, and *In re Certification of Question of Law,* will further dispel the "rubber stamp" misperception. Appellate scrutiny of FISC opinions will ensure that the bases for FISC decisions are evaluated for legal accuracy. As an example, assume that the FISC approves a novel, complex technique

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[213] *Id.* at 12.

[214] *Id.* at 13. Specifically, the FISC believed that the "disagreement between the FISC and other courts provides reason to believe that consideration of these issues by the FISCR would serve the interests of justice." *Id.*

[215] *In re Certified Question of Law*, Docket No. 16-01, at 7.

[216] IC ON THE RECORD, *supra* note 203.

[217] *In re Certified Question of Law*, Docket No. 16-01, at 2. Specifically, the FISCR concluded that "section 1842 authorizes, and the Fourth Amendment does not prohibit, an order of the kind described in the FISC's certification." *Id.*

[218] Lin, *supra* note 56.

for conducting surveillance. The FISC believes that appellate review of its decision "would serve the interests of justice." With certified question jurisdiction, the FISC now has a procedural tool to seek review of its decision.[219] The FISCR accepts review of the legal issue and affirms the lower court's decision. In this hypothetical scenario, the novel technique will receive scrutiny from both a federal district court judge at the FISC, and from a three-judge panel composed of federal district and/or appellate court judges at the FISCR. Even if the surveillance is ultimately approved, both the FISC and FISCR evaluated the surveillance to ensure compliance with FISA and the Constitution.

Government officials familiar with FISC procedures have explained why the FISC is not a "rubber stamp" court. Timothy Edgar, formerly a senior attorney with the American Civil Liberties Union and later with Office of the Director of National Intelligence, "believed the FISA court was a rubber stamp until he saw the process firsthand when he became a senior civil-liberties official in the Office of the Director of National Intelligence in 2006."[220] After seeing how the process works, Mr. Edgar stated: "It's definitely not a rubber stamp" court.[221] Mr. Edgar explained:

> The reason so many orders are approved . . . is that the Justice Department office that manages the process vets the applications rigorously. The lawyers there see themselves not as government advocates so much as neutral arbiters of the law between the executive branch and the courts . . . so getting the order approved by the Justice Department lawyers is perhaps the biggest hurdle to approval.[222]

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[219] 50 U.S.C. § 1803(j) (2015).

[220] Evan Perez, *Secret Court's Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013), http://www.wsj.com/articles/SB10001424127887324904004578535670310514616.

[221] *Id*.

[222] *Id*.

Likewise, a July 29, 2013, letter from FISC Judge Reggie Walton to Senator Patrick Leahy further dispels the "rubber stamp" misperception.[223] Judge Walton explained that the FISC's approval rates of applications "reflect only the number of final applications submitted to and acted on by the Court. These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them."[224] In fact, "the approval rating for Title III wiretap applications . . . is higher than the approval rate for FISA applications. . . .[F]rom 2008 through 2012, only five of 13,593 Title III wiretap applications were requested but not authorized."[225]

Concerns were also raised about the lack of transparency of FISC decisions; critics pointed out that "nearly all of [the FISC's] decisions are classified."[226] They believed that the classification of

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[223] Letter from Judge Reggie Walton, *supra* note 21, at 1. In the July 29, 2013, letter, Judge Walton described the internal operations of the FISC and noted that "matters before the Court are thoroughly reviewed and analyzed by the Court." *Id*.

[224] *Id*. at 1-2.

[225] *Id*. at 3 n.6 (citing Administrative Office of the United States Courts, *Wiretap Report 2012*, Table 7) (referring to Title III of the Omnibus Crime Control and Safe Streets act of 1968, as amended, which is codified at 18 U.S.C. §§ 2510-2522)). Likewise, the PCLOB wrote: "[T]he approval rate for wiretap applications in ordinary criminal cases is higher than the approval rate for FISA applications. Moreover, the FISA statistics do not take into account the changes to the final applications that are ultimately submitted, made as a result of the back and forth between the FISC legal staff and government attorneys. Nor does the percentage of approvals take into account the applications that are withdrawn or never submitted in final form due to concerns raised by the court or its legal staff. The FISA court has recently kept track of such actions and has found that, during the three month period from July through September 2013, 24.4% of matters submitted to the FISA court ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of court inquiry or action." PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 179-80 (citing Letter from Reggie Walton, then-Presiding Judge of the FISC, to Chairman Leahy, Committee on the Judiciary, U.S. Senate (Oct. 11, 2013)).

[226] GOITEIN & PATEL, *supra* note 10, at 46.

FISC opinions "hampers democratic self-government and sound policymaking."[227] The USA FREEDOM Act addresses this concern as well. Under the USA FREEDOM Act, the government must make "publicly available to the greatest extent practicable" each FISC or FISCR decision "that includes a significant construction or interpretation of any provision of law."[228] Notably, the three FISCR decision—*In re Sealed Case*, *In re Directives*, and *In re Certification of Question of Law*—have all been declassified, to the extent possible, and publicly released. The public release of FISC and FISCR decisions, as practicable, will increase transparency of the court and provide insight into the legal rationale for the government's collection of information under FISA.[229] As more decisions are released, public knowledge of the judicial branch's legal reasoning may improve the general perception of the government's surveillance programs.

Finally, critics asserted that attorneys, such as special legal advocates, should be appointed in FISC proceedings, especially in ones

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[227] *Id.*

[228] 50 U.S.C. § 1872 (2015).

[229] Additional FISC filings and opinions that have been released are available at U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT., *Public Filings - U.S. Foreign Intelligence Surveillance Court* (beginning June 2013), http://www.fisc.uscourts.gov/public-filings. For example, on April 19, 2016, the Director of National Intelligence, in consultation with the Attorney General, publicly released three FISC opinions, in redacted form, including: (1) a June 18, 2015, FISC Memorandum Opinion associated with a pen register and trap-and-trace case; (2) a November 6, 2015 FISC Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications; and (3) a December 31, 2015, FISC Memorandum Opinion approving the Government's first application for orders requiring the production of call detail records under the new business records standards set forth in Sections 101 and 103 of the USA FREEDOM Act. IC ON THE RECORD, *Release of Three Opinions Issued by the Foreign Intelligence Surveillance Court* (Apr. 19, 2016), https://icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign.

involving novel legal issues, to provide opposing legal views.[230] Responding to the concerns raised about the lack of adversarial proceedings, pursuant to the USA FREEDOM Act, the FISC or FISCR can appoint an amicus curiae to assist in the consideration of certain matters, including questions of law that are certified to a higher court. Specifically, if a certified question of law involves "a novel or significant interpretation of the law," which it likely will, the FISC or FISCR has the discretion to appoint an amicus curiae to aid in such proceeding.[231] Indeed, as noted above, in *In re Certification Question of Law*, the FISCR determined that the certified question presented a significant interpretation of law, and appointed an amicus curiae to assist with the legal interpretation of the issue.[232] Similarly, for certifications from the FISCR to the Supreme Court, the USA FREEDOM Act provides that the Supreme Court "may appoint an amicus curiae" or "other person, to provide briefing or other assistance."[233] Consideration of certified questions of law, by a three-judge appellate panel, and perhaps even by the Supreme Court, likely in an adversarial proceeding, will help create a more robust body of decisional law, enhancing the overall soundness of the FISC.

VI. GUIDANCE CAN BE DEVELOPED FROM IN RE CERTIFICATION OF QUESTION OF LAW

As discussed in the previous section, the FISCR recently accepted a certified question of law and issued an opinion regarding whether the government was permitted to obtain all post-cut-through digits associated with the use of PR/TT devices. This matter is instructive in establishing standards for the process of certifying questions of law to a higher court. Based upon this matter, as well as

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[230] *See, e.g.*, Carr, *supra* note 44; *see* GOITEIN & PATEL, *supra* note 10 (clarifying that an "adversarial system . . . ensures that all relevant facts and legal arguments are aired, which in turn enables the tribunal to reach an accurate decision.").

[231] 50 U.S.C. § 1803(i)(2)(A) (2015).

[232] IC ON THE RECORD, *supra* note 203.

[233] 50 U.S.C. § 1803(k)(2) (2015).

the language in FISA, the following eight factors should be considered in deciding whether a legal question should be certified to a higher court, and whether that court should accept the certified question: (1) whether the issue presents a question of law;[234] (2) whether there is a lack of uniformity between the FISC and other courts or the FISCR and other federal appellate courts;[235] (3) whether there are varying opinions among FISC and/or FISCR judges themselves about the legality of a surveillance technique;[236] (4) whether the decision was reached in an ex parte proceeding or with the assistance of an amicus curiae;[237] (5) whether the legal issue was novel or significant;[238] (6)

[234] The FISC "shall certify for review . . . *any question of law* that may affect resolution of the matter in controversy." 50 U.S.C. § 1803(j) (2015) (emphasis added).

[235] The FISC "shall certify for review . . . any question of law that may affect resolution of the matter in controversy that the court determines warrants such review *because of a need for uniformity*." *Id.* (emphasis added). *See In re* Certification of Question of Law to the FISCR, Docket No. PR/TT 2016-[redacted], at 13 (believing that the "disagreement between the FISC and other courts provides reason to believe that consideration of these issues by the FISCR would serve the interests of justice.").

[236] *See id.* "FISC judges discussed the issues presented by post-cut-through digits at their semi-annual conference on October 27, 2015. Following that discussing, it was the consensus of the judges that further briefing was warranted in view of *concerns expressed by some judges* about continuing to authorize the acquisition of post-cut-through digits under PR/TT orders." *Id.* at 5 (emphasis added) (citations omitted).

[237] In considering the government's application in the post-cut-through digits matter, the FISC "did not appoint an amicus curiae pursuant to § 1803(i)(2)(A) because it found that it was not appropriate to do so under applicable time constraints and in view of the requirement under § 1803(c) to proceed as expeditiously as possible." *Id.* at 12.

[238] The PCLOB recognized that the structure of the FISC could be improved by "facilitating appellate review" of such decisions involving "novel and significant issues." PCLOB, SECTION 215 AND FISC REPORT, *supra* note 11, at 182. Further, considering whether a legal issue is novel or significant mirrors the statutory language of when an amicus curiae may be appointed to assistant with a pending legal issue before the FISC. The USA FREEDOM Act states that the FISC or FISCR can appoint an amicus curiae to assist with "any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law." 50 U.S.C. § 1803(i)(2)(A) (2015). In this matter, however, the FISC noted that

whether an application of a new or complex technology is needed to conduct surveillance;[239] (7) whether the privacy interests of U.S. persons are impacted and, if so, to what extent;[240] and (8) whether consideration of the legal issue by a higher court would "serve the interests of justice."[241] Not all factors must be present to warrant certification as long as the statutory requirements are met.

In addition to the substantive consideration of when to certify a question of law to a higher court, the FISCR should develop procedural guidelines. Currently, the FISCR rule for certification provides: "Where the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCR will certify, by appropriate order, the

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the issue was not novel because the same issue had been considered since 2006. The FISC wrote: "[F]rom the FISC's perspective, this matter does not present a 'novel . . . interpretation of law.'" *In re* Certification of Question of Law to the FISCR, Docket No. PR/TT 2016-[redacted], at 12.

[239] As noted in the legislative history to the USA FREEDOM Act, as "technology evolves, we cannot say with certainty what the next big privacy issue will be." 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal). Likewise, Justice Samuel Alito has observed that "[r]ecent years have seen the emergence of many new devices that permit the monitoring of a person's movements." United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring). For example, in *Jones*, Justice Alito noted that: "In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen. Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States." *Id.* at 963 (Alito, J., concurring).

[240] 18 U.S.C. § 1801(i) (2015); *In re Certified Question of Law*, Docket No. 16-01, at 3 (reviewing whether a FISC order considered "the investigative needs of the government and the privacy interests of the people.").

[241] 50 U.S.C. § 1803(j) (2015). The FISC "shall certify for review . . . any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because . . . consideration by the [FISCR] . . . would serve the interests of justice." *Id.* (emphasis added).

procedures to be followed."[242] In developing procedural guidelines, the FISCR could model its rules on the Supreme Court's procedures for certified question jurisdiction. For example, a FISCR rule could provide in part:

> The FISC may certify to the FISCR a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision.[243]

The FISCR could also develop procedural rules based upon the language of the statute. For example, additional procedural rules could state:

> The FISC shall certify for review by the FISCR any question of law that may affect resolution of the matter in controversy that the FISC determines warrants such review because of a need for uniformity or because consideration by the FISCR would serve the interests of justice. [244]
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> Upon certification of a question of law, the FISCR may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.[245]

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[242] FISA Ct. Rev. R.P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT).

[243] Proposed rule based on SUP. CT. R. 19 (PROCEDURE ON A CERTIFIED QUESTION).

[244] 50 U.S.C. § 1803(j) (2015). Pursuant to the FISCR Rules of Procedures, when "the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCR will certify, by appropriate order, the procedures to be followed." FISA Ct. Rev. R.P. 5(b) (MEANS OF REQUESTING RELIEF FROM THE COURT). Proposed rule based in large part on 50 U.S.C. § 1803(j) (2015).

[245] *Id*.; proposed rule based in large part on 50 U.S.C. § 1803(j).

To demonstrate how the eight factors set forth above can be applied, and how the certification process works, consider the following hypothetical.

> The FBI recently developed a surveillance technique using new technology. Soon thereafter, the FBI learned of an individual named Sam living in Ohio who is believed to be planning terrorist activities that may pose an immediate and serious threat to the security of the United States and many individuals. The FBI believes that there is an urgent need to use this new technology to conduct electronic surveillance of Sam as expeditiously as possible to protect numerous people. Conversely, however, in using this new technology, it is likely that the FBI will also acquire information concerning individuals, including U.S. persons, likely not associated with Sam.
>
> The FBI submits an application to the FISC seeking the use of this new technology to conduct electronic surveillance of Sam. The FISC recognizes that the use of this new technology may infringe upon the privacy interests of U.S. persons. The FISC also believes, however, that the use of this new technology will provide the FBI with critical foreign intelligence information. The FISC agrees with the assessment that immediate use of this new technology is vital to our national security interests and the protection of individuals in our country, and decides this legal issue quickly. Due to the exigency of the matter, there is no time for the FISC to appoint an amicus curiae.
>
> After balancing privacy and national security interests, the FISC, in an ex parte proceeding, approves the FBI's use of this new technology to conduct electronic surveillance of Sam. As part of its order, the FISC mandates procedures to protect U.S. privacy interests. Specifically, the FISC requires that any information collected concerning U.S. persons, other than Sam, may not be used or disseminated unless additional procedural safeguards are satisfied. The FISC authorizes the surveillance to begin immediately; the FBI begins its surveillance.

> Meanwhile, the FISC, following the guidance set forth in the revised FISCR procedural rules, concludes that consideration of this legal issue by the FISCR "would serve the interests of justice" and certifies this legal issue for appellate review. Specifically, the FISC asks whether this new surveillance technique is permissible under FISA and the Fourth Amendment.
>
> The FISCR determines that it is appropriate to consider the certified question. Further, because the issue presents a novel and significant question of law, pursuant to 50 U.S.C. §1803(i), the FISCR appoints an amicus curiae to provide written and oral legal arguments as to the legality of this new technique. After considering the legal positions of both the amicus curiae and the government, and weighing the privacy and national security interests involved, a three-judge panel on the FISCR concludes that the new surveillance technique is permissible under FISA and the Fourth Amendment. The FISCR affirms the lower court's decision.
>
> Because this new technology may impact the privacy interests of many U.S. persons, may have far-reaching legal implications beyond the current electronic surveillance of Sam, and presents novel legal issues, the FISCR certifies the question of law to the Supreme Court. In a break from its tradition since 1981, the Supreme Court accepts the certified question of law. Similar to the FISCR, the Supreme Court appoints an amicus curiae to present oral and written argument. Additionally, the Supreme Court permits other amici curiae to submit briefs. After fully deliberating the novel legal issues, and considering the impact on both privacy and national security interests, the Supreme Court upholds the decision of the FISCR.

In this hypothetical, the FISC's determination to certify the question is consistent with the eight factors set forth above. For example, the legal issue was significant and involved a new technology that may have impacted the privacy interests of many U.S. persons. Additionally, due to the necessity of beginning surveillance

immediately, the FISC did not have time to appoint an amicus curiae. Consequently, the FISC proceedings were ex parte and only the government's view was presented to the court. Because the government received a favorable decision in these ex parte proceedings, certified question jurisdiction was the only avenue for FISCR review. It would have been senseless for the government to appeal a favorable decision. Without certified question jurisdiction, the FISC's decision—made in an ex parte proceeding and involving novel questions of law impacting the privacy interests of many U.S. persons —would have been final.

Once the FISCR accepted the question for review, it appointed an amicus curiae to address the novel and significant legal issues. The amicus curiae provided an opposing view concerning the legality of the surveillance technique. This, in turn, enabled the FISCR to consider the constitutional and statutory issues from different perspectives. The FISCR, with the assistance of an amicus curiae and a sufficient amount of time, thoroughly considered the legality of the matter. Following careful deliberations by a three-judge panel, the FISCR issued a thoughtful opinion upholding the FISC's decision. In contrast to the lower court, the FISCR was able to appoint an amicus curiae and consider the legal issues in an adversarial proceeding.

Similarly, the Supreme Court considered written briefs and oral argument in an adversarial proceeding. Going forward, the Supreme Court's decision will provide valuable guidance concerning this new surveillance technique and possibly similar surveillance programs. For example, as technology evolves, the Supreme Court's opinion will guide the executive branch in developing future investigative methods. The decision will also provide insight to Congress in drafting new legislation regarding the scope of surveillance authorities. With respect to the judicial branch, the Supreme Court's decision will provide direction to FISC and FISCR judges, as well as all courts, when analogous legal issues are presented. Moreover, the Supreme Court decision may help instill public

confidence that the executive branch had been acting within its statutory and constitutional mandates. As demonstrated by this hypothetical, because the legal issues were considered by the FISCR and Supreme Court in adversarial proceedings, the use of certified question jurisdiction may lead to greater public confidence in the integrity of FISC and FISCR processes in authorizing surveillance techniques.[246]

VII. CONCLUSION

The FISC handles some of the most complex national security cases in our country. On an almost daily basis, it decides whether surveillance is permissible and against whom the surveillance can be conducted. In making its decisions, the FISC continually balances the privacy interests of individuals with the need to safeguard the security of our country and the American public. As eloquently described by the FISCR in *In re Directives*:

> Our government is tasked with protecting an interest of utmost significance to the nation—the safety and security of its people. But the Constitution is the cornerstone of our freedoms, and government cannot unilaterally sacrifice constitutional rights on the altar of national security. Thus, in carrying out its national security mission, the government must simultaneously fulfill its constitutional responsibility to provide reasonable protections for the privacy of United States persons. The judiciary's duty is to hold that delicate balance steady and true.[247]

[246] *See, e.g.,* 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal) ("We need a FISA Court that we can trust to get the question right. Trust, confidence, and the integrity of the judicial system that authorizes the surveillance of Americans' private lives is at issue here.").

[247] *In re* Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1016 (FISA Ct. Rev. 2008).

The use of certified question jurisdiction will aid in the adjudication of these challenging legal issues.

If the FISC certifies more legal issues for appellate review, the FISCR, and perhaps even the Supreme Court, will develop guidance on how to evaluate the legality of complex and novel surveillance techniques. Well-defined and thorough judicial guidance is essential to ensure that acquisition of foreign intelligence information is consistent with the Constitution and FISA. In a society where technology is evolving at a rapid pace, further judicial guidance will help the government develop future surveillance programs consistent with the law. Moreover, appellate review of difficult legal issues, through the use of certified question jurisdiction, may lead to greater public confidence in the integrity of the FISC and FISCR processes.[248] Trust of our judicial system, especially one that regularly balances our fundamental interests of privacy and national security, is fundamental to our democratic principles. [249]

[248] 161 CONG. REC. S3092, S3163 (daily ed. May 20, 2015) (statement of Sen. Blumenthal).
[249] *Id.*