United States
Foreign Intelligence Surveillance Court

In Re: Motions to Disclose Aggregate Date regarding FISA Orders	Case No. Misc 13-03; 13-04; 13-05; 13-06; 13-07

Motion for Leave to File an Amicus Brief

Now comes the Amicus, Michael C. Walsh, who moves this Honorable Court for leave to file an *amicus* brief in these consolidated cases.

Proceedings

Several litigants, including Google, Microsoft, Yahoo, Facebook, and others, have filed miscellaneous petitions seeking permission of the Court to publish data relating to orders of the Court. *Court's Order of September18, 2013* (September 18 Order). The filings variously assert First Amendment arguments in support of the release of documents. The Court has consolidated the petitions because of the common legal claims. *September 18 Order.* The litigants have also asked the Court to grant oral argument on the petitions. The Court has also entertained briefs from several *amici* including the Reporters Committee for the First Amendment, the American Civil Liberties Union, Apple, and Dropbox Inc. At least one of the *Amici* has asked permission to participate in oral argument in front of the Court.

Contributing to the Court

The arguments contained within the brief will advance the dialogue of the Court and are "desirable." Fed. R. App. P. 29(b)(2). To the best of the *Amicus*'s research, this submission

raises a completely unique separation of powers argument relating to the Judiciary[1]. The *Amicus* posits an argument that this Court is an Article I court and cannot constitutionally exercise the "judicial power of the United States" without complying with Article III § 1. The argument is "relevant to the disposition of the case" because it relates to the basic jurisdiction of the Court and its ability to entertain any proceedings. Fed. R. App. P. 29(b)(2).

Interests of the *Amicus*

The *Amicus* is an attorney from Lynnfield, Massachusetts. He is currently studying for a Master of Legal Letters at a Boston law school.[2] He has no interest in the outcome of the litigation, and has not coordinated the writing of the brief with any of the parties or any of the other *Amici*. The parties have not consented to the filing of this brief. The *Amicus* is a member in good standing of the bar of Massachusetts (BBO 681001), the bar of the Federal District of Massachusetts, the bar of the Court of Appeals for the First Circuit, and the bar of the Court of Appeals for the Armed Forces. The *Amicus* does not possess a security clearance.

Respectfully Submitted,

Michael Colin Walsh
Walsh & Son LLP
PO Box 9
Lynnfield, MA 01940
617-257-5496
Walsh.lynnfield@gmail.com

Certificate of Service

I, Michael C. Walsh, certify that I have served a copy of this motion and the proposed *amicus* brief by first class mail, postage prepaid, and by electronic mail as follows:

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[1] Prior separation of powers challenges to the Foreign Intelligence Surveillance Act of 1978 have focused on the alleged infringement of the Executive's inherent power to wiretap.

[2] The opinions herein are soley the opinions of the author and do not represent the opinions of Suffolk University Law School nor its faculty.

Christine Gunning
Litigation Security Group
United States Department of Justice
2 Constitution Sq.
145 N St. N.E., Suite 2W-115
Washington, D.C. 20530
Christine.e.gunning@usdoj.gov

I, Michael C. Walsh, further certify that I have served a copy of this motion and the proposed *amicus* brief upon the Parties, both by first class mail, postage prepaid, and by electronic mail as follows:

Albert Gidari
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
agidari@perkinscoie.com
Attorney for Google

James M. Garland
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington D.C. 20004-2401
jgarland@cov.com
Attorney for Microsoft

Marc J. Zwillinger
ZwillGen PLLC
1705 N St., N.W.
Washington D.C. 20036
marc@zwillgen.com
Attorney for Yahoo

Carl J. Nichols
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington D.C. 20006
carl.nichols@wilmerhale.com
Attorney for Facebook

Jerome C. Roth
Munger, Tolles & Olson LLP
560 Mission St., 27th Floor
San Francisco, CA 94105
Jerome.Roth@mto.com
Attorney for LinkedIn

Nicholas J. Patterson
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Nicholas.patterson@usdoj.gov
Attorney for the United States

11/21/13
Michael C. Walsh

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In Re: Motions to Disclose Aggregate Date regarding FISA Orders	Case No. Misc 13-03; 13-04; 13-05; 13-06; 13-07

Brief of the *Amicus Curiae* Michael Walsh

I. The Court lacks jurisdiction because it is unconstitutional under the Separation of Powers Doctrine and Article III.

The *Amicus* submits[1] that this Court has no power to hear, adjudicate, or resolve claims where its very structure violates Article III of the United States Constitution. The Foreign Intelligence Surveillance Court (FISC) and its supervising Court of Review (FICOR or together FISA Courts) are wholly unique[2] in the federal judicial scheme.[3] Under a separation of powers

[1] The *Amicus* submits this brief with the greatest respect for the judges serving on the Court. The thesis of the argument, an unconstitutional lack of structural independence, is in no way a reflection of the work done by the judges of this Court. It is simply an explication of the choices made by the Framers is laying out the constitution. To borrow from Justice Douglas, dissenting, on this very issue, "[this case] has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the [FISC]. The problem is an impersonal one, concerning the differences between an Article I court and an Article III court." Glidden Co. v. Zdanok, 350 U.S. 530, 589-590 (1962). The Glidden plurality similarly noted that the issue was structural, not personal to the judges involved.

> The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation, and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

Glidden, at 533.

[2] Excepting the Alien Terrorist Removal Court which is based explicitly upon the design of the FISA courts. 8 U.S.C. § 1532. The most important substantive difference between the Alien Terrorist Removal Court and the FISC is that the Terrorist Removal Court is subject to regular judicial review in the D.C. Circuit Court of Appeals. 8 U.S.C. § 1535.

[3] The *Amicus* posits a separation of powers violation, because of the structural setup of the court. The Supreme Court has stated in United States v. United States District Court, 407 U.S. 297, 317 (1972),"The Fourth Amendment contemplates a prior judicial judgment not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a

analysis the FISC is an Article I court unconstitutionally exercising the "judicial power of the United States" reserved to Article III courts. The analysis underlying the Supreme Court's Article III separation of powers jurisprudence is a two track theme:[4] (1) the personal right to a neutral decision-maker which is not within the political branches, and (2) the institutional concerns to prevent either erosion or arrogation of judicial power. Independence of the judiciary is of prime importance, providing both procedural and substantive guarantees.

a. Separation of Powers analysis for the Judiciary (the test)

The Supreme Court has rejected any formulaic or talismanic test in favor of a flexible test designed to give meaning to the Framer's purposes. Mistretta v. United States, 488 U.S. 361, 380 (1989). This structural approach sometimes involves carefully analyzing statutory schemes to arrive at a determination of constitutionality. Morrison v. Olson, 487 U.S. 65 (1988) (constitutionality under appointment's clause of judicial appointment of independent counsel). In Judicial Separation of Powers challenges the Court has been careful, and purpose-driven, in its analysis:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III

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separation of powers and division of functions among the different branches and levels of Government." The specific violation posited here is a violation of Article III.

[4] Acknowledging the existence of the two track theme is essential, where it explains that some structural problems may be solved by consent where others may not.

> To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2.... When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Commodity Futures Trading Commn. v. Schor, 478 U.S. 833, 850-851 (1986) (citation omitted); *See* Peretez v. United States, 501 U.S. 923, 936-937 (1991) (criminal defendant may waive right to Article III judge at jury selection). *See Also* Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011)

> courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Schor v. Commodities Future Trading Commission, 478 U.S. 833, 851 (1986) (citations omitted). *See Also* Northern Pipeline v. Marathon Pipeline, 458 U.S. 50 (1982). The test has been criticized but remains law, "This central feature of the Constitution must be anchored in rules, not set adrift in some multifactored 'balancing test.'" Granfinanciera v. Nordberg, 492 U.S. 33, 70 (1989) (Scalia, J. concurring). Because a "federal court may not hypothesize subject matter jurisdiction for the purposes of deciding the merits [of a case]," this Court is obliged to consider its own jurisdiction and power to hear *any* case. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999). Under this test, the Court must conclude that the FISA courts are Article I courts and therefore they cannot exercise the "judicial power of the United States" because they do not honor either the structural principle of independence or the personal right to adjudication. Stern v. Marshall, 131 S. Ct. 2594 (2011).

b. The FISA Courts are Article I courts

The Amicus contends that this Court is a structured as an Article I court, and that the fact that it is staffed by Article III judges does not cure the constitutional problem[5]. Although it is an

[5] This contention has not been given any serious consideration by the federal courts. However, the 9th Circuit in United States v. Cavanaugh, 807 F.2d 787, 792 (9th Cir. 1987), citing to Northern Pipeline v. Marathon Pipeline, 458 U.S. 50 (1982), concluded that because judges assigned to the FISA courts are regular Article III judges they are sufficiently independent to meet the demands of Article III. That analysis is not comprehensive or definitive. This is particularly true where the Northern Pipeline was recently revitalized by the Supreme Court in 2011 in Stern v. Marshall. The 9th Circuit did build upon two Federal District Court decisions that had also approached the issue. For a secondary source analyzing the issue, and coming down on the other side, the reader is directed to John J. Dvorske, *Validity, Construction and Application of Foreign Intelligence Surveillance Act of 1978*,190 A.L.R. Fed. 385 §5[a], (2003). The leading case concluding the FISA courts are Article III courts, United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982), was itself dismissed by FICOR in its first published opinion In Re Sealed Cases, 310 F.3d 717 (FICOR 2002). Both Cavanaugh and, FICOR's 2002 opinion, have met with some hostility by the regular Federal bench given the intervening time and statutory adjustments. *See* Mayfield v. United States, 504 F.Supp.2d 1023, 1040-1041 (D. Oregon 2007) *vacated on other grounds* 588 F.3d 1252 (9th Cir. 2009). In sum, the

Article I court, Article III judges staff it. *See* Ex parte Bakelite Corp., 279 U.S. 438, 460 (1929) (stating that Article III judges may not be assigned to Article I courts); Glidden, at 552 (refusing to widen constitutional doubts by addressing status of judges but not court); Stern, at 2609 "the responsibility for deciding that suit rests with Article III judges **in** Article III courts.") (emphasis added). The Supreme Court has, in the past, retreated from the idea of treating the Article III status of judge as separate from the constitutional character of courts[6]. Indeed, the Glidden court conducted a lengthy analysis of both the status of the judges and the status of the courts challenged, concluding that an individual judge's status depends on where he is primarily assigned to. Indeed the example of the Commerce Court shows as much, when court was abolished the Article III judges were reassigned. Donegan v. Dyson, 269 U.S. 49, 53 (1925)

The FISC is composed of eleven[7] federal district court judges designated by the Chief Justice of the United States. 50 U.S.C. § 1803. The Court of Review may be composed of either district court judges or appeals court judges. Id. By definition these judges have already been selected by the President and confirmed by the Senate. However, when these judges sit on the FISA Courts they serve for a term of years[8]. Id. The absence of life tenure alone caused Chief Justice Marshall to create the doctrine of Article I legislative courts. American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 526 (1828). Chief Justice Marshall did not long consider whether

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state of the law regarding FISC's constitutional status has been given no in-depth analysis and has conflicted the authorities writing upon it. The Court must do its own analysis.

[6] *See* In the Matter of Smith, 72 F.3d 1433 (9th Cir 1996) (Noonan, J. dissenting from denial of *en banc* review) (noting problems of Article III judge sitting as Article II court). United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (US District Judge from New Jersey sitting in Article II court, appointed by ambassador).

[7] The original 1978 FISA act specified 7 judges. The USA PATRIOT act increased the number of judges. 50 U.S.C. § 1803, as amended by Pub. L. 107–56, title II, § 208, Oct. 26, 2001, 115 Stat. 283.

[8] *Hearings before the Senate Intelligence Committee on the 1978 Foreign Intelligence Surveillance Act*, pg. 25-26. (positing 7-year terms); pg. 30-31 (pondering a removal provision for senility or cause, as well as who would have the power to designate the judges); pg. 40 (proposing resurrecting an anti-judge shopping provision from the prior 1976 FISA proposal); pg. 98 (statement of Professor Christopher Pyle attacking "seven hand-picked judges" as well as the structure of the FISA Courts and the possibility of appeal).

the term-limited courts of the Florida territory could be considered under Article III, saying simply:

> The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts...The jurisdiction with which they are invested is not a part of that judicial power which is defined in the [third] Article of the Constitution

Canter, at 526. In similar vein, the Northern Pipeline court also simply looked to the absences of the tenure and salary guarantees to conclude that the Bankruptcy Courts were not Article III court. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60-61 (1982). Therefore, in this particular application, the FISA courts lack the independence and guarantee of tenure granted by Article III, which the Supreme Court has found crucial in its separation of powers jurisprudence.

The FISA courts arose from a suggestion by the Supreme Court. While imposing the full judicial warrant requirement of the Fourth Amendment upon domestic surveillance, the Court suggested that Congress was free to legislate and give concessions in the name of security. U.S. v. U.S. Dist. Ct., at 323. Among the suggestions was a specially designated court which could hear all applications. In this respect, the Court suggested designating the District of Columbia District Court or the District of Columbia Circuit Court of Appeals as an appropriate reviewing court. Id. Congress eventually enacted a special court (a separate entity) rather than simply designating a court. The final result was actually a "compromise provision" between the House and Senate versions of the bill. H. R. Rep. No. 95-1720, pg 26 (conference committee report). The Senate had sought a new special court, while the House wanted to simply designate a regular Article III district judge, in each circuit, to hear surveillance applications. Part of House

acquiescence to the Senate's special court was the recommendation of the General Counsel of the Administrative Office of the United States Courts, who expressed concern about a district judge exercising power beyond his geographical district.[9] H. R. Rep. No. 95-1283, pg. 71 (report of House Intelligence Committee). The FISA Courts are specialized courts of limited subject-matter jurisdiction. Their very nature and structure, with the important lack of Article III safeguards of tenure and salary, make both FISC and FICOR Article I legislative courts.

c. The exercise, by the FISA Courts, of regular Article III court power is unconstitutional under the Separation of Powers

i. Judicial Independence

"[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." Northern Pipeline, at 60 (discussing the importance of the tenure and salary guarantees of Article III). Judicial Independence is not only a foundational concern but is, in part, one of the primary motivations of the American Revolution.[10] United States v. Will, 449 U.S. 200, 217-219 (1980) (delineating history and background of Compensation Clause). In terms of lacking independence from the appointing authority, the FISA courts impose a grave separation of powers problem. All of the judges are selected by the Chief Justice. 50 U.S.C. § 1803(a)(1). While the FISC is large enough to create the

[9] A special court of nation-wide jurisdiction of course answers all geographical problems. However, this distinction counts against the FISA Courts on matters of tenure. If a separate court is required to creatively solve jurisdiction problems, to stand on its own jurisdictional merits, then the FISC must also separately be considered in their special and limited FISA tenure.

[10] The Court, in U.S. v. Will, 449 U.S. 200 (1980), traced the colonial history of judicial independences and the later revocation of it. The Court also quoted the Declaration of Independence in listing the faults of King George IIII, "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Will, at 219. This basic foundational attempt to remedy colonial wrongs explains the starkness of the litmus test of tenure and salary guarantees used by the Canter and Northern Pipeline courts. *See* Stern, at 2609. "[A] tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." Glidden, at 552...

randomization of assignments familiar to Article III district Courts, the Court of Review is only large enough to sit in one panel of three, and all three judges are personally selected by the Chief Justice.[11] It places the litigant in an awkward position of arguing to an untenured[12] court, with appeal to a single untenured panel selected by the same appointing authority, and then applying to the same appointing authority, the Chief Justice,[13] along with the full U.S. Supreme Court. 50 U.S.C. § 1803 (b). Such an arrangement does not promote confidence in either the independence[14] or impartiality of the FISA court structure.[15]

Impartiality was a sticking point for the FISA Courts at their inception.[16] The FISC has recently made strides toward independence.[17] It has physically moved out of the Executive, the

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[11] Consider the testimony of Stephen Rosenberg on behalf of the New York Bar Association on this point:

> Also in order to permit the application of diversified approaches, we favor a requirement that the number of designated district judges be increased to ten, to be selected from each of the ten judicial circuits by the Chief Judge of each circuit. Selection by the Chief Judge of each circuit, rather than the Chief Justice of the United States, avoids placing the Chief Justice of the United States in the position of having to pass upon petitions for certiorari from the determinations of the very judges he has personally selected. Likewise, we favor a requirement (which is probably implicit anyway) that the three judges designated to serve on the special court of review not include any of the judges designated to hear applications and grant orders.

Hearings before the Senate Intelligence Committee on the 1978 Foreign Intelligence Surveillance Act, pg. 137.

[12] For FISA court purposes, discounting the regular life tenure of Article III judges.

[13] *See* Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. Pa. J. Const. L. 341 (2004) (arguing that the Chief Justice's appointment power is against the grain of judicial norms, that Congress should employ alternate structural schemes, and that if unchanged the power could be abused). Ruger concludes that "There is some evidence that the two Chief Justices who have exercised this power of appointment most often have occasionally used it to advance their substantive policy preferences." Ruger, at 397. Indeed, the FISC and FICOR feature prominently into the Article's analytic portion.

[14] "But as Chief Judge Kaufman noted, 'it is equally essential to protect the independence of the individual judge, even from incursions by other judges. The heart of judicial independence, it must be understood, is judicial individualism,' and **giving one judge power over another chills judicial individualism**.... A judge must be free to decide a case according to the law as he sees it, without fear of personal repercussion or retaliation from any source." In Re: Clay, 35 F.3d 190, 192 (5th Cir. 1994) *quoting* Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979) (emphasis added).

[15] Consider the Northern Pipeline case quoting Alexander Hamilton in the Federalist Papers: "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other be fatal to [the courts'] necessary independence." 458 U.S. at 58, *quoting* The Federalist No. 78, p. 489 (H. Lodge ed. 1888).

[16] Indeed, the House Intelligence Committee thought that it would be acceptable for the FISC to have Executive staff perform regular court functions to aid in security. *See* House Rep. 95-1283, pg. 72 ("The security provisions could include the use of executive branch personnel to perform the duties normally exercised by a court's own reporter, stenographer, or bailiff") In the same breath, the House Intelligence Committee thought that giving the Chief Judge

Department of Justice, and into the federal courthouse.[18] Nonetheless even the Court's physical location is something of a mystery.[19] The FISC took a large step forward in 2010 when it revised its rules. However, even those rules provide that to file a document or a motion with the Court, the clerk's office must be contacted to arrange filing. A casual comparison of the relevant court rules proves as much: FISC Rule 7(k): "A party may obtain instructions for making submissions permitted under the Act and these Rules by contacting the Clerk at (202) 357-6250" with Fed. R. Civ. Pro. Rule 77: "Every district court is considered always open for filing any paper...Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom... The clerk's office...must be open during business hours every day..."

The FISC and FICOR, by definition and design, lack the structural guarantees of independence that Article III provides—salary and tenure. Provision for the removal of either FISC judges or FICOR judges is not specified within the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 *et seq.* However, the Chief Justice "designate[s]" the judges to serve on both courts. § 1803. It appears that removal, before the expiration of the set term of seven years, may be made by the Chief Justice at any time without any limitation on his exercise of

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of FISC power over the security arrangements would preserve judicial independence. Id. The Legislature's line drawing between the branches is rough and imperfect.

[17] Over this last summer a number of documents relating to the FISA trial court have either been leaked by former NSA Analyst Edward Snowden (currently wanted for violations of the espionage act) or declassified by the Government in response to public and congressional outrage. Even before the leaks, the FISA trial court has been making slow but determined steps forward in promoting transparency. The FISA trial court now (started June 2013) has a public webpage which lists portions of its doings which are declassified and available for public view. http://www.uscourts.gov/uscourts/courts/fisc/index.html The Chief Judge has publicly sought to avoid charges that it is a rubber stamp, including writing official letters to the Senate Select Committee on Intelligence, as well as the occasional press interview. *See also* Matt Sledge, *FISA Court: We only approve 75% of Government Warrants without change* (Huffington Post October 15, 2013) (reporting on Chief Judge Walton's correspondence with the Senate) available at http://www.huffingtonpost.com/2013/10/15/fisa-court_n_4102599.html

[18] Del Quentin Wilber, *Surveillance Court Quietly Moving* (Washington Post March 2, 2009). Available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030101730.html

[19] *See* Eric Mills, *The Door to the FISA Court* (July 21, 2013) available at https://konklone.com/post/the-door-to-the-fisa-court (describing Mr. Mills attempts to locate the physical office of the FISC, complete with drawings of the door since recording devices are not allowed in the federal court house). There is no publicly available information on any physical arrangements for the Court of Review, if there are any facilities separate from the FISA trial court.

discretion.[20] 28 U.S.C. § 295. Not only are FISC and FICOR judges term-limited, but there is no protection against their dismissal by the appointing authority.[21] These arrangements, in effect, make judges subject to the whims, and predilections, of the appointing authority.

ii. Right to Personal Adjudication by an Article III Court

The FISC's structure also violates the personal right to adjudication by an Article III court. "[T]he responsibility for deciding that suit [involving private rights] rests with Article III judges in Article III courts." Stern at, 2609

> [The Court has] emphasized the importance of the personal right to an Article III adjudicator...our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.

Peretez v. United States, 501 U.S. 923, 929 n. 6 (1991) (citations and quotations omitted). In judicial separation of powers, there is not merely a structural concern, but also an individual personal right to be heard by an Article III judge. Northern Pipeline at 58; Schor, at 848 (personal right of individual litigants). It is an established principle of constitutional and

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[20] 28 U.S.C. § 295 is part of Chapter 13 of the Judicial Code, which is entitled "Assignment of Judges to Other Courts." This Chapter normally lets judges serve temporarily on other courts and is a regular feature of the federal judiciary. However, unlike other sections within the chapter, §295 refers to both "designations and assignments." §295 covers a number of different circumstances and simply provides that the appointing authority may revoke those designations or assignments previously made by him.

[21] This lack of protection is revealed in the following exchange from the Senate hearings:

> Attorney General Bell. Would you think that we could agree that the judge would serve at the pleasure of the Chief Justice and for no longer than 7 years?
> Senator Morgan. It would suit me better, because I think the Attorney General and this committee and the Congress-
> Attorney General Bell. Also, you could have a judge that might become senile or become an invalid, have a stroke or something, so you need some way that you could change the judges.
> Senator Morgan. Without having to wait for the 7.
> Attorney General Bell. For the 7 years to run. I think at the pleasure of the Chief Justice would be a good proposal for it.

Hearings before the Senate Intelligence Committee on the 1978 Foreign Intelligence Surveillance Act, pg. 31.

administrative law that a litigant is always entitled[22] to a day in an Article III court and some kind of meaningful review, if the litigant wishes to seek it.[23] The mere fact that the FISA Courts act mostly *ex parte* strongly indicates an inability to accommodate the personal right to litigate.

iii. Essential Attributes of Judicial Power – Article III Judicial Review

One of the Supreme Court's Schor factors is the reservation of the "essential attributes of judicial power" to the Article III courts. One of those 'essential' attributes is the ability to issue binding final judgment in a case. Article I courts are made constitutional by subjecting them to regular Article III judicial review.[24] The FISC's only reviewing court is FICOR which suffers the same problem of being constituted in the form of an Article I court. Judicial tenure, which the Supreme Court's jurisprudence has determined to be an important in the judiciary's independence, is a singularly absent in Article I courts such as the FISA Courts. The FISA Courts also bear a number of other structural irregularities which mark them as Article I courts. They are courts of limited jurisdiction. Most, but not all, proceedings before FISC and FICOR

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[22] Powell v. Alabama, 287 U.S. 45, 68 (1934) ("[T]he rule that no one shall be personally bound until he has had his day in court was as old as the law"); Colorado River Water District v. United States, 424 US 800, 817 (1976) ("the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); Chevron Oil Co. v. Hudson, 404 U.S. 97, 108 (1971) (discussing litigant who "slept on his rights," denying retroactive application of law to "preserve his right to a day in court."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (duty of judiciary to decide cases).

[23] In some cases, this review takes the form of *de novo* review in a Federal District Court, as from a magistrate judge. Otherwise review may sometimes be had in an administrative review petition addressed to a Court of Appeals, where deference[23] is given to adjudication of the agency. In a more extreme example, even Article I military courts are subject to review with appropriate deference. Schlesinger v. Councilman, 420 U.S. 738 (1975). Other cases may be adjudicated by the agencies, but require application to the Article III courts for enforcement, like IRS (26 U.S.C. § 7604) and Social Security (42 U.S.C. § 405[g]) decisions. Even special courts like the Alien Terrorist Removal Court (8 U.S.C. § 1535) the Tax Court (26 U.S.C. § 7482), the Court of Claims (28 U.S.C. § 1295[a][3]), the Board of Contract Appeals (28 U.S.C. § 1295[a][10]), the Court of Veterans Appeals (38 U.S.C. § 7292), and others are reviewed by the Federal Circuit Courts—regularly constituted Article III tribunals.

[24] "Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided and we have suggested that it may be required to provide, for Art. III judicial review." Northern Pipeline, at 70, n. 23. Although level of deference is a statutory concern, it has distinctly constitutional shades. "[A] delegation does not violate Art. III so long as the ultimate decision is made by the district court." United States v. Raddatz, at 683 (holding federal magistrate act constitutional, in large part, because of *de novo* review). The so-called constitutional fact doctrine was initially enunciated in Crowell, and is still valid subject to the qualifications of Raddatz.

are *ex parte*. The vital protections of an open court, embedded in the First and Sixth Amendments, is turned on its head in FISA court proceedings which are secret and governed by statutorily authorized security arrangements.

As with the bankruptcy courts in Northern Pipeline, applying the Schor test renders FISC unconstitutional as exercising the "judicial power of the United States" even though it is an Article I legislative court.[25] Article III tenure and salary guarantees are absent. 50 U.S.C. §1803(d) (Judges to serve terms limited to three to seven years and ineligible for redesignation). The Court is adjudicating important and personal constitutional rights, a privilege normally reserved to regular Article III courts. Schor, at 851. The Court also maintains a docket, has rules, and controls its own documents— all of which are attributes of Article III courts thus making the Article I court presumptively unconstitutional.[26]

Presumably protecting a contempt power, Congress sought to guarantee "the inherent authority of [FISC] to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court." 50 U.S.C. § 1803(h). A power to enter, and enforce, binding judgments is another important distinguishing hallmark of the essential attributes of judicial power traditionally reserved to the Article III courts. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219 (1995) (concluding that law requiring re-opening of closed cases violates

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[25] In Mistretta v. United States, the Supreme Court went to a great deal of trouble, in finding the U.S. Sentencing Commission constitutional, to note that the federal judges on the commission were acting outside of their regular employment. "[W]e conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions... The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges... Such power as these judges wield as Commissioners is not judicial power; it is administrative power...the judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission. In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." Mistretta, 488 U.S. at 404. In contrast to the Sentencing Commission, the FISA court judges are selected to sit on a special court and (unconstitutionally) exercise judicial power, rather than administrative.

[26] Under Schor's multi-factor test.

Judiciary's Article III power to finally decide cases). The FISC's power to enforce its orders, finally, and without recourse to regular Article III Courts, on its face violates Article III.

Even though FISC is an Article I court no review, as of right, by an Article III court is provided. The judicial review encompassed by the Foreign Intelligence Surveillance Act is nothing more than application to FISC for further review. 50 U.S.C. § 1861(f). Some provision is made for appeal to FICOR (50 U.S.C. §§1803(b), 1861[f][3]), and then for discretionary review by the Supreme Court. However, the Supreme Court's review is not as of right and only §1861 orders may be appealed—all other orders falling under §1803 may only be appealed by the government, not by affected parties.

"[T]he concerns that drove Congress to depart from the requirements of Article III," are already well known as the congressional attempt to control executive surveillance power following the United States v. United States District Court case and the scandals around Watergate and the Church Committee. Schor, at 851. Congress decided to strip the executive of that power, and otherwise control the remainder. 50 U.S.C. § 1812 (exclusive means of surveillance). However, rather than simply designating a regular Article III court, as the Supreme Court suggested in United States District Court, 407 U.S. at 323, Congress created FISC and FICOR from scratch. From a separation of powers perspective, the Court should regard it as suspicious that Congress, while punishing and confining the Executive, still mistrusted the Judiciary, requiring a special court.

iv. Special Courts

As the Tudor and Stuart Monarchs developed England into a modern administrative state, they also turned to specialized courts to assist the burgeoning bureaucracy. "A number of courts challenged the King's Bench for authority in those days. Among these were the Council, the Star

Chamber, the Chancery, the Admiralty, and the ecclesiastical courts." Pulliam v. Allen, 466 U.S. 522, 530 (1984) (noting necessity of judicial immunity for judicial independence). Therefore, the Colonists were eminently familiar with the benefits and disadvantages of specialized courts. When America's Revolutionary generation sought to carve out a new form of government for themselves, they also sought to prevent what they regarded as injustices of the past.

The Framers were very comfortable with their regular common-law courts that had stood up to the executive overreaching up to the English Civil War. Anything which departed from the regular common-law courts was viewed with suspicion. The Court of the Star Chamber "was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying 'political' defenses, the Star Chamber has for centuries symbolized disregard of basic individual rights." Faretta v. California, 422 U.S. 806, 821 (1975) (describing practices of forcing counsel upon unwilling defendants). The Star Chamber not only violated an early conception of the separation of powers, by mixing judicial and executive functions, it was also against the grain of the common-law courts.

The reason for this comfort with regular common-law courts comes, in part, from the fact that the common-law courts had repeatedly stood up against the abuses of the Stuart Kings. In Dr. Bonham's Case (1610) 8 Co. Rep 114a, 2 Brownl. 255, 77 Eng. Rep. 646 (C.P. 1610) the Court of Common Pleas claimed the right to void statutes of Parliament which were against the common-law rights of Englishmen. In Darnell's Case, 3 How. St. Tr. 1 (K.B. 1627) the King's Bench held that the King could not detain citizens illegally on his special command, and further that he must answer the Writ of *Habeas Corpus*. In the Case of Proclamations, [1610] EWHC KB J22, (1611) 12 Co. Rep. 74, 77 Eng. Rep. 1352 (K.B. 1611), the King's Bench held that the King was subject to both the Legislature (by way of statute) and the Judiciary (through common-

law), lacking power to unilaterally proclaim an alteration of the law of either. In the contemporaneous Case of Prohibitions, [1607] EWHC KB J23, 12 Co. Rep. 64, 77 Eng. Rep. 1342 (K.B. 1607), the King's Bench held that the King may not usurp the functions of the Judiciary, "The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England."

After experiencing the deluge of rebellion by the common-law courts and the Judiciary, the King, to great popular outrage, removed Lord Coke who had been the great champion of the people's common-law rights. The Parliamentary party in opposition, which eventually executed Charles I in 1649, took a great deal of intellectual support from the court decisions. Indeed, Lord Coke contributed to writing the famed Petition of Right, 1627 III Char. 1 c. 1, in which the Parliament complained about illegal taxation, lack of due process, and interference by the executive with judicial work. It is due to that famous removal that the Framers granted Article III judges life tenure.

Later kings, less flamboyant in their abuses, actually co-opted the Judiciary resulting in tyranny of a different kind. This too the Framers sought to prevent.

> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence [para.] 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with

> Congress or the Executive, but rather with the "[c]lear heads ... and honest hearts" deemed "essential to good judges." 1 *Works of James Wilson* 363 (J. Andrews ed. 1896).

Stern, 131 S. Ct. at 2609. The Framers saved these concepts and embedded them in our frame of government. The concerns echo through the ages. While the Star Chamber was mistrusted for its deviation from common-law tradition, the modern explication of the same principle is found in the Schor Court's factor test, "the concerns that drove Congress to depart from the requirements of Article III." Schor, at 851. While special courts may be necessary, and even allowable under Article III, they are accommodated warily as a deviation from the constitutional norm.

v. Other Special Courts

There is only a slim body of cases which discuss the FISA courts, and even fewer that focus on any kind of separation of powers claims, much less the specific Article III claim asserted here. From the slim pickings in which there is any substantive analysis the Court is presented with *dicta* from one of its prior orders[27] this year (case Misc. 13-02, Saylor, J.), *dicta* from FICOR's 2002 opinion,[28] and the short analysis of three pre-PATRIOT Act District Court decisions. This Court (Bates, J.) relied on short quotes from those District Court cases when, in issuing this Court's 3rd public opinion, it considered a similar records request by the ACLU. In Re: Motion for Release of Records, 526 F.Supp.2d 484, 486 (2007).

The trio of cases[29], Meaghey, Kevork, and Falvey appear to be the only cases touching the Article III status of the FISC. The Meaghey case is the leading case[30] and it reasoned by

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[27] Judge Saylor concluded in response to an ACLU request for the release of information, that FISC could inherently control its own docket and papers, and further that the ACLU lacked Article III standing to pursue the claim.

[28] FICOR simply and without analysis applied the confines of Article III jurisdiction to questions relating to intrusion into the Executive's sphere. In re Sealed Case, 310 F.3d 717, 731 (FICOR 2002) (applying to the FISC "the constitutional bounds that restrict an Article III court").

[29] United States v. Falvey, 540 F.Supp. 1306, 1313 n. 16 (E.D.N.Y. 1982); In Matter of Kevork, 634 F.Supp. 1002, 1014 (C.D. Cal. 1985); United States v. Megahey, 553 F.Supp. 1180, 1197 (E.D.N.Y. 1982).

[30] The Falvey case's analysis is confined to a footnote dismissing a criminal defendant's "tortuous" argument that FISC was not a court and could not, under Articles I and III, make search warrant determinations. 540 F.Supp. at,

analogy to other special courts that Congress has created. United States v. Megahey, 553 F.Supp. 1180, 1197 (E.D.N.Y. 1982). The *Amicus* wishes to make the point that to relying on such comparisons is dangerous, particularly where the Supreme Court has over the years struggled with just such analysis. *See* Rochelle Cooper Dreyfus, *Specialized Adjudication*, 1990 Brigham Young L. Rev. 377 (1990) (analyzing FISC, Court of Claims, Railroad Special Court and other special courts).

Congress has tried on other occasions to create special courts, and a mix of special courts exists today. Some of these courts, such as the Commerce Court, are Article III courts while others are Article I courts, like the Tax Court. Analogous to the FISA courts, both the World War II era Emergency Court of Appeals and the Nixon-era Temporary Emergency Court of Appeals were staffed by Article III judges assigned from other courts.[31] A chart composed by the *Amicus* of other special courts is attached to this filing. The Supreme Court has prevaricated on whether the Claims Court was an Article III court or not. In deciding whether the Court of Customs Appeals was a constitutional court or not, the Supreme Court analogized to the Claims Court which it said was an Article I court. Ex Parte Bakelite Corp., 279 U.S. 438, 452 (1929). The Supreme Court, just four years later, in Williams v. United States, 289 U.S. 553 (1933), retreated from that the Bakelite *dicta.* Indeed, the Williams court noted that it had prevaricated on the Claim Court's status. 289 U.S. at 569-571. The Congress tried to clear up the confusion in the 1950's by passing a series of acts[32] which simply declared the Article III status of several courts. Glidden, 370 U.S. at 532, n1. The World War II era Emergency Court of Appeals was

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1313 n. 16. The other two cases contain original analysis in which they both compare FISC with certain other special courts that exist. It is also worth noting that FICOR, in 2002, was dismissive of both the Megahey and Falvey courts' analysis, on other grounds, and that FICOR did not even cite to Kevork.

[31] Research suggests that the World War 2 era court and the Nixon-era court both required Article III judges assigned to them on a part-time but indefinite basis, which makes them less structurally problematic than FISC.

[32] Specifically the acts cited in the Glidden footnote were: "Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U. S. C. § 171 (Court of Claims); Act of August 25, 1958, § 1, 72 Stat. 848, added to 28 U. S. C. § 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, § 1, 70 Stat. 532, added to 28 U. S. C. § 251 (Customs Court)."

created as an Article III court. Glidden, at 561 *citing to* Lockerty v. Phillips, 319 U.S. 182 (1943). Even the much maligned Commerce Court, which only existed for three years and was abolished after one of its judges was impeached, was an Article III court and its judges were reassigned to constitutional courts[33] after the abolition. Glidden, at 560-561. The Emergency Court of Appeals, like the Nixon-era Temporary Emergency Court of Appeals, simply sat as a centralized Article III appellate court, reviewing judgments of regular district courts, thereby insulating any constitutional inadequacies. Therefore this Court, in examining this claim, must be careful in following the analysis of the trio of district court opinions, because, as the Glidden case and the attached chart show, such analysis can be quite perilous.

vi. The Public Rights doctrine is not applicable

"The independent judiciary is structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis." Nash v. Califano, 613 F. 2d 10, 15 (2nd Cir. 1980) (citing to the Declaration of Independence). The public rights doctrine exists as an exception to the important safeguard of an impartial forum provided by Article III. Those public rights which may be decided by Congress exclusively within its own constitutional competence are not required to be determined by adjudication at all, much less within an Article III court. Northern Pipeline, at 68. The archetype of the public rights doctrine is a congressional regulatory scheme creating new rights, which is entirely within Congress's right to decide, and the Article I court exists simply as a "less drastic expedient." Id., at 68. The doctrine has been roundly criticized. "The public rights/private rights dichotomy of Crowell and Murray's Lessee is a deceptively weak decisional tool. Regardless, it is unpersuasive here." In Re: Clay, 35 F. 3d 190, 194 (5th Cir. 1994), citing to Crowell v. Benson, 285 U. S. 22, (1932) and to Murray's

[33] "While the [Commerce] court was abolished, no attempt was made to abolish the offices of the judges." Donegan v. Dyson, 269 U.S. 49, 53 (1925) (*habeas* petition claiming invalidity of criminal trial because former Commerce Court judge presided after designation).

Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272 (1856) . The scope of the doctrine is unclear. "Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions." Stern, at 2611.

The public rights doctrine, and Article I legislative courts, simply have no power to evaluate basic constitutional rights, such as the First Amendment issues litigated here or the Fourth Amendment search and seizure guarantees implicit in the whole statutory scheme. The public rights doctrine may except a case from the Article III courts, but does not impact other independent constitutional guarantees. Granfinanciera v. Nordberg, 492 U.S. 33 (1989) (Seventh Amendment). More importantly, the Article III courts, and those courts alone, retain the power to determine constitutional rights. "[C]ases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." Crowell, at 60. It is an "untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved." Crowell, 285 U. S., at 60-61.

While Crowell's constitutional fact doctrine has been qualified, in United States v. Raddatz, 447 U.S. 667 (1980), it still remains a potent force of constitutional law and the reach of Article III judicial power. Indeed, in Raddatz, the Supreme Court held it constitutional for Congress to delegate motions to suppress to a non-Article III magistrate, precisely because the magistrate is under the control of an Article III judge[34] who is the ultimate decision-maker. 447

[34] Raddatz relied heavily on the close association of the magistrate and the Article III court, terming the magistrate an "adjunct" of the Court. Even in other strands of Article III power case law, the supremacy (through lack of

U. S., at 683. The Raddatz idea of an "adjunct" certainly could not be applied to the FISC and FICOR, unless the Supreme Court were to functionally take a close supervisory role. "[T]he Court's scrutiny of the adjunct scheme in Raddatz—which played a role in the adjudication of *constitutional* rights—was far stricter than it had been in Crowell." Northern Pipeline, at 82-83 (emphasis original). The Northern Pipeline court thought that analysis of constitutional rights was pertinent to determining the public-private rights distinction. Id. "[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) *quoting* Johnson v. Robison, 415 U.S. 361, 368 (1974). No such control, or review, by an Article III court exists, as of right, over FISC or FICOR. *See* Thunder Basin, at 215 (noting problems with agency constitutional adjudication are, in any event, solved by review in Article III Court of Appeals). "Likewise, the [Civil Service Act] provides review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' claims that [the] requirement[s] are unconstitutional." Elgin v. Department of the Treasury, 132 S.Ct. 2126, 2137 (2012). "The Constitution assigns that job—resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law'—to the Judiciary." Stern, at 2609 *quoting* Northern Pipeline, at 86-87 (Rehnquist, J. concurring).

It would raise "serious constitutional questions" if "absolutely no judicial consideration" of *constitutional claims* were to be the statutory construction. Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (emphasis added). Yet that is precisely what Congress has provided for in the FISA scheme, where it intends that FISC's warrants be given substantial Fourth Amendment

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deference) and finality of judicial determination are paramount. "[W]e see nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain." Elgin, at 2138.

deference,[35] similar to a magistrate's decision but without the important constitutional review controls of an Article III tribunal. *See* Shadwick v. Tampa, 407 U.S. 345 (1972) (concluding that municipal clerk is sufficiently detached and independent to issue search warrant because of relation to judicial branch). In basic formulation, Congress may not create tribunals that do not conform to Article III structures and then vest in them the sole power to decide the extent and scope of the important constitutional rights that Article III tribunals are designed to protect. Our citizens and lawful residents should not be given any reason to suspect that their constitutional rights are being litigated in anything less than a fully-tenured, completely independent and impartial Article III tribunal.

Summary

Despite being exclusively staffed by the personages of Article III judges, the FISA courts are Article I courts because they lack the structural safeguards of tenure and salary required by Article III. It follows that the FISC may not exercise the "judicial power of the United States" under Article III, because it is not an Article III court. The FISC is not adorned with any of the saving graces identified by the Supreme Court, such as being an adjunct to Article III courts, being reviewed by an Article III court on appeal, or being in the category of public rights. Lacking structural independence and the right to personal adjudication, the Court violates Article III and is unconstitutional.

Respectfully Submitted,

Michael C. Walsh

[35] Where the Court must conclude that both FISA courts are Article I legislative courts, several questions left unanswered by the Shadwick case are posed. "Nor need we determine whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. ...Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations. Here, however, the clerk is an employee of the judicial branch of the city of Tampa, disassociated from the role of law enforcement. On the record in this case, the independent status of the clerk cannot be questioned." 407 U.S. at 352. Thus not only is the FISC's independence a question under the Article III separation of powers analysis, it is a strict question imposed by the personal constitutional right contained in the 4th Amendment.

Appendix A

Table of Special Federal Courts

Table of Special Federal Courts[i]

Court	Dates	Tenure of Judges	Status	Notes
Foreign Intelligence Surveillance Court	1978-Present	Article III Judges serving limited terms of 3-7 years with no reappointment		Established by Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801, *et seq.*
Foreign Intelligence Surveillance Court of Review	1978-Present	Article III Judges serving limited terms of 3-7 years with no reappointment	Has issued two public opinions to date.	Also established by FISA, 50 U.S.C. § 1803.
Alien Terrorist Removal Court	1996-Present	Article III district judges serving limited terms of 5 years.	Reportedly has never met.	Established pursuant to Anti-terrorism and Effective Death Penalty Act of 1996. Codified at 8 U.S.C. §1532. Review provided for in the Court of Appeals for the Federal Circuit, and discretionary review by the Supreme Court. 8 U.S.C. § 1535.
Emergency Court of Appeals	1942-1962	Article III Judges designated	Abolished by the Court's own order following completion of its work.	Terminated following conclusion of litigation under expired laws-- Order terminating work found at 299 F.2d 20; last case Rosenzweig v. General Services Administration, 299 F.2d 22 (ECA 1961). *See* Notes to 50 app U.S.C. §§ 921-926 (Emergency Price Control Act of 1942)
Temporary Emergency Court of Appeals	1972-1992	Article III judges designated for part-time indefinite service	Court abolished by Federal Court Improvement Act, jurisdiction and judges subsumed into Federal Circuit	
Commerce Court	1910-1913	Judges of this short-lived court were fully-tenured Article III judges.	Abolished by statute, after one of its members was impeached. Judges	

			transferred to other constitutional courts. Donegan v. Dyson, 269 U.S. 49, 53 (1925)	
Court of Claims	1855-1982	Judge were to serve during good behavior, but definitely Article I judges. After Court was declared Article III court in 1953, Judges enjoy life tenure.	Congress reversed Supreme Court in 1953, declaring Court to be Article III court. Act of July 28, 1953, 67 Stat. 226.	The nature of the Court evolved. Originally acting as a board presenting recommendations for claims to Congress. After authorization of Commissioner to hear claims, Court acted as appellate board from Commissioners. Appellate jurisdiction was given to Federal Circuit, while trial level jurisdiction given to newly constituted Article I Court of Federal Claims.
Court of Federal Claims	1982-Present	Judges serve 15 year terms.	Article I court, successor to trial level jurisdiction of Court of Claims	
Tax Court of the United States	1942-1968		An independent agency within the Executive Branch, serviced by the Treasury.	Established in executive branch as independent agency, successor to the Board of Tax Appeals. Revenue Act of 1942, 56. Stat. 957.
U.S. Tax Court	1968-Present	Judges appointed to 15 year terms.	Established by statute as an Article I court within the Judicial Branch.	Reconstituted from the Tax Court of the US under the Tax Reform Act of 1969, 83 Stat. 730-731. Review provided for in U.S. Courts of Appeal of right, and by discretion in Supreme Court. 26 U.S.C. § 7482.
Customs Court (formerly Board of General Appraisers).	1890-1980	Judges have life tenure, since declaration of Article III status.	Status unclear due to confused Supreme Court decisions. Declared to be Article	Initially an executive agency, abolished by statute.

			III court by Act of July 14, 1956, § 1, 70 Stat. 532,	
Court of International Trade	1980-Present	Nine Judges with Life Tenure.	Declared by statute to be an Article III court	Successor to Customs Court. Established by Customs Court Act of 1980, 94 Stat. 1727. Codified at 28 U.S.C. § 251. Review by Court of Customs and Patent Appeals, later by Federal Circuit after Custom and Patent Appeals Court was abolished.
Railroad Special Court	1974-1996	Article III district judges, appointed by the Judicial Panel on Multi-District litigation, to sit as special panel with powers of district court. Expanded from original panel of 3 judges to 6 judges.	Upheld as a special exercise of Congress's bankruptcy power. Rail Act Cases, 419 U.S. 102, 153 (1974). Despite grant of "exclusive jurisdiction" availability of Tucker Act remedy was prominent in analysis. Id., at 156. The Special Court, when challenged as a violation of Article III because it was called on to answer legislative public interest questions, found itself constitutional. In the Matter of Penn Central, 384 F.Supp. 895, 911-912 (Rail. Spec. Ct.1974). Special Court also felt	Established in 1974. Codified at 45 U.S.C. § 719. Judges appointed by Judicial panel in In Re: Rail Litigation, 373 F. Supp. 1401 (JPML 1974). Abolished effective 1996, with jurisdiction and cases subsumed into the District Court for the District of Columbia.

			"free...to look down the road, without the same concern for considerations of prematurity or ripeness." Id., at 917.	
Court of Customs and Patent Appeals (Patent appeals added in 1929)	1909-1982		Determined to be an Article III court, by the Supreme Court in Glidden Co. v. Zdanok, 370 U. S. 530 (1962), reversing itself in Ex parte Bakelite Corp., 279 U. S. 438 (1929) following Congressional enactment.	Abolished by §122 of the Federal Court Improvement Act of 1982, 96 Stat. 25, 36. Jurisdiction and judges subsumed into new Federal Circuit. Created to hear appeals from trial level Customs Court. Tariff Act of 1909, 36 Stat. 11, 105.
Court of Appeals Armed Forces (formerly the Court of Military Appeals).	1950-Present	Judges serve 15 year term, removable for misconduct.	Article I court	Found at 10 U.S.C. § 942. Supervises all four military service courts of criminal appeals: Army, Navy, Air Force, and Coast Guard. Review to the Supreme Court only if Court of Appeals for the Armed Forces grants some kind of relief.
Court of Appeals of Veterans Claims	1988-Present	Judges serve 15 year term, removable for cause.	Declared to be an Article I court by Congress at 38 U.S.C. §7251.	Established in 1988, 102 Stat. 4105. Review by the Court of Appeals for the Federal Circuit, and discretionary review by Supreme Court. 38 U.S.C. § 7292.
Court of Military Commission Review	2006-Present	Provisions for the tenure of judges is unclear, but appears to be largely indefinite. 10 U.S.C. § 949b(b)(4).	Essentially analogous to Article I courts-martial. Recently modified to allow appointment of civilian judges as well	Codified at 10 U.S.C. § 950f. Review by the District of Columbia Court of Appeals provided for in 10 U.S.C. § 950g. Discretionary review to Supreme Court. Id.

			as military appellate judges by §1034 of the National Defense Authorization Act of 2012, 125 Stat. 1573.	
Territorial Courts	Various	Tenure for these courts varies based on the enabling statute, with some judges being given statutory life tenure as a matter of grace.	Normally established under Congress's extraordinary power pursuant to Article IV. Downes v. Bidwell, 182 U.S. 244 (1901) (Article III does not reach or confine Congress's territorial power under Article IV).	
Consular Courts	Various-1956 (consular judicial jurisdiction was negotiated by treaty with each foreign country).	Consuls and Ministers, executive officials subject to Senate confirmation, who were statutorily tasked with special responsibilities of fairness in judicial cases.	Executive officials acting judicially. They may be argued as Article II Courts.	In 1906, Congress regularized the consular courts by an act which made the jurisdiction and procedure of consular courts uniform. Appeals from consular courts were made to ministers, who were also granted judicial authority. Statutes, codified at 22 U.S.C. § 145-177 (repealed 1956). *See* Reid v. Covert, 354 U.S. 1, 54-64 (1957) (Frankfurter, J. concurring) (comprehensive exposition of consular courts).
United States Court for China	1906-1943	Appointed by President and confirmed by Senate to ten year terms, removable by President for cause. 34 Stat. 814, 816, §§ 6-7.	Article I Court created to exercise extraterritorial jurisdiction granted to the United States by treaty with China.	The Court for China not only exercised civil and criminal jurisdiction over United States Citizens, it also supervised and heard appeals from the Consular Courts in China and Korea.

United States Court for Berlin	1955-1990 (only convened once)	Tenure provisions are unclear, but only judge ever appointed was Judge Herbert Stern, of D. N.J. sitting by designation.	An Article II Court established by the Executive, appointment of judges made by the Ambassador to Western Germany.	Court only convened once, United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979), to hear an airplane hijacking case. The Court examined its own existence and jurisdiction, and then granted right to jury trial. Judge Stern wrote a book about the trial, *Judgment in Berlin* (1984) which chronicles the behind the scenes attempt by the State Department to pressure the judge.
Chickasaw and Choctaw Citizenship Court	1902-1904	Five judges appointed simply during the initially-limited term of the court. The Court's life was extended by 1 year from 1903 to 1904.	Held to be constitutional as an Article I Court in Wallace v. Adams, 204 U.S. 415 (1907). Established at 32 Stat. 641, 647-648, Chapter 1362, § 33.	Congress had reached an agreement with the Indian Nations that would divide up the land held in common by the Tribes to all members. Congress has allowed the US Court for the Indian Territory to make determinations about who were proper members of the Tribes. The Tribes returned to Congress proving several clear instances of speculators fraudulently deceiving territorial court to get a share of land. Congress created a Citizenship Court, gave the Tribes standing, allowing them to re-litigate closed cases. Also created special appellate jurisdiction over the territorial court. The Tribes also received special statutory authorization to run a test case through the Court system. Ex Parte Joins, 191 U.S. 93 (1903)
Court of Private Land Claims	1891-1904	Five judges appointed to 4 year term to expire with the abolition of the court. The Court and judges were continued until 1904.	Held to be an Article I legislative court in Coe v. United States, 155 U.S. 76 (1894)	Example noted by Supreme Court in Ex Parte Bakelite Corp., 279 U.S. 438, 456 (1929) where the Court pointed out that Congress need not create courts to decide matters within its purview.

District of Columbia	Variously constructed over time, still presently existing.	Judges serve a term of 15 years, appointed by the President.	District of Columbia courts are Article I courts, under Congress's plenary authority to regulate the District.	The District of Columbia has a two tier court system, with regular Article III federal courts, and the equivalent of state courts. Palmore v. United States, 411 U.S. 389 (1973).
Monterey Prize Court	Sat during the Mexican-American War	Judges are uncertain, but the Supreme Court noted that they were easily interfered with by the military commanders.	An Article II court	Found to be a nullity because it was unconstitutionally exercising the judicial power of admiralty. Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1851).

[i] This discussion omits, generally, some peculiar courts of military occupation erected under Article II. The omitted courts include the military government of Germany after World War Two, the provost courts in the South during Reconstruction, and the occupation courts established in the former Spanish possessions immediately after the Spanish-American War. *See* David J. Bederman, *Article II Courts*, 44 Mercer L. Rev. 825 (1993).