NOTE*

THE POWER TO APPOINT FISA JUDGES: EVALUATING LEGISLATIVE PROPOSALS TO REFORM 50 U.S.C. § 1803 AND IMPROVE THE SURVEILLANCE COURT

> "So in fact one Chief Justice of the United States selects the seven men who will sit on this court and he can, in fact, influence the foreign intelligence operation of this Nation through his lifetime, whether the Chief Justice be an Abe Fortas or a Warren Burger. He can appoint people who have his predisposition and we in this Nation will be encumbered with that predisposition through the Chief Justice's lifetime. I think it is wrong."
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> — Rep. Allen E. Ertel of Pennsylvania, October 1978
> Upon adoption of the Foreign Intelligence Surveillance Act[1]

I. Introduction

On June 5, 2013, a British newspaper, *The Guardian*, published an article detailing the National Security Agency's (NSA) efforts to collect millions of telephone records from Verizon, an American telecommunications company.[2] The following day, a second story revealed the existence of "Prism"—a program that facilitates the bulk collection of an individual's internet user records by obtaining direct access to service providers such as Microsoft, Google, and Facebook.[3] In the months that followed, a series of intelligence-related news reports made public several different aspects of the global surveillance regime, including the NSA's use of sophisticated data analysis programs,[4] the extensive intelligence sharing between England's

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[1] *See* 124 Cong. Rec. H36416 (daily ed. Oct. 12, 1978) (statement of Rep. Ertel).

[2] *See* Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, The Guardian (June 5, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order, *archived at* http://perma.cc/64TA-R38J.

[3] *See* Glenn Greenwald & Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, The Guardian (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data, *archived at* http://perma.cc/6Q3L-33CH; Barton Gellman & Laura Poitras, *U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program*, The Washington Post (June 6, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html, *archived at* http://perma.cc/8L2Q-NYLP.

[4] Using a program entitled "Boundless Informant," the NSA is able to conduct sophisticated analysis of where information originates. *See, e.g.*, Glenn Greenwald & Ewen MacAskill, *Boundless Informant: The NSA's secret tool to track global surveillance data*, The Guardian (June 11, 2013), http://www.theguardian.com/world/2013/jun/08/nsa-boundless-informant-global-datamining, *archived at* http://perma.cc/4B86-D3LB. Separately, the NSA al-

Government Communication Headquarters, the Israeli SIGINT National Unit, and the NSA,[5] the efforts by the United States to surveil European and Asian allies,[6] as well as foreign leaders,[7] and the Central Intelligence Agency's collection of global financial records.[8]

The public's—and in turn, the government's—reaction to these reports was a mixture of shock, debate, explanation, and justification.[9] What drove the public's indignation was not the mere existence of these programs.[10] Rather, it was that federal judges serving on the Foreign Intelligence Surveillance Court (FISC, or the Court) had seemingly approved many of the most controversial programs, including, for example, the bulk collection of telephone records[11] and Internet metadata.[12] In light of the FISC's role in facili-

legedly uses "X-KEYSCORE" to search through vast databases of users' online information. *See, e.g.*, Glenn Greenwald, *XKeyscore: NSA tool collects 'nearly everything a user does on the internet'*, The Guardian (July 31, 2013, 8:56 AM), http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data, *archived at* http://perma.cc/TX39-48G6.

[5] *See, e.g.*, Nick Hopkins & Julian Borger, *Exclusive: NSA pays £100m in secret funding for GCHQ*, The Guardian (Aug. 1, 2013), http://www.theguardian.com/uk-news/2013/aug/01/nsa-paid-gchq-spying-edward-snowden, *archived at* http://perma.cc/ZA3D-QJJP; Glenn Greenwald, et al, *NSA shares raw intelligence including Americans' data with Israel*, The Guardian (Sept. 11, 2013), http://www.theguardian.com/world/2013/sep/11/nsa-americans-personal-data-israel-documents, *archived at* http://perma.cc/K72M-EBF4.

[6] *See, e.g.*, Ewen MacAskill & Julian Borger, *New NSA leaks show how US is bugging its European allies*, The Guardian (June 30, 2013), http://www.theguardian.com/world/2013/jun/30/nsa-leaks-us-bugging-european-allies, *archived at* http://perma.cc/5HAY-NLB8; Jason Burke, *NSA spied on Indian embassy and UN mission, Edward Snowden files reveal*, The Guardian (Sept. 25, 2013), http://www.theguardian.com/world/2013/sep/25/nsa-surveillance-indian-embassy-un-mission, *archived at* http://perma.cc/3RWB-D3BB.

[7] *See, e.g.*, Kevin Rawlinson, *NSA surveillance: Merkel's phone may have been monitored 'for over 10 years'*, The Guardian (Oct. 26, 2013), http://www.theguardian.com/world/2013/oct/26/nsa-surveillance-brazil-germany-un-resolution, *archived at* http://perma.cc/F57L-GR9T.

[8] *See, e.g.*, Charlie Savage & Mark Mazzetti, *C.I.A. Collects Global Data on Transfers of Money*, N.Y. Times (Nov. 14, 2013), http://www.nytimes.com/2013/11/15/us/cia-collecting-data-on-international-money-transfers-officials-say.html, *archived at* http://perma.cc/3HXK-4RCU.

[9] *See, e.g.*, Tom Gjelten & Melissa Block, *Snowden's Document Leaks Shocked the NSA, And More May Be On The Way*, NPR (Dec. 17, 2013), http://www.npr.org/templates/story/story.php?storyId=252006951, *archived at* http://perma.cc/55BM-7ANN; Louise Dufresne, *Debate over Snowden, NSA dominates Face the Nation*, CBS News (Dec. 30, 2013), http://www.cbsnews.com/news/debate-over-snowden-nsa-dominates-face-the-nation/, *archived at* http://perma.cc/55FV-DBQE.

[10] *See, e.g.*, Jeffrey Rosen, *A Newly Released Secret Opinion Shows Surveillance Courts Are Even Worse Than You Knew*, The New Republic (Sept. 25, 2013), http://www.newrepublic.com/article/114853/fisa-court-decision-upholding-surveillance-joke, *archived at* http://perma.cc/6P5L-T4M6.

[11] *See* Secondary Order, *In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc. on behalf of MCI Communication Services, Inc. D/B/A Verizon Business Services*, FISA Ct. (Apr. 25, 2013), *available at* http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order, *archived at* http://perma.cc/Y5BQ-NBL3.

[12] *See* Opinion and Order, FISA Ct. (2004) (case name and date redacted), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf, *archived at* http://perma.cc/QZ38-6QJQ. At a basic level, metadata describes, or provides information about, other data. Metadata is produced anytime an individual uses technology. *See generally A Guardian guide to your metadata*, The Guardian (June 12, 2013), http://www.theguardian.com/technol

tating these intelligence operations, it is no surprise that the calls for reforming the Court came swiftly and in abundance. Between June 2013 and February 2014, members of Congress introduced no fewer than twenty proposals to modify how the Court functioned.[13] Concurrently, President Obama advocated for his own set of reforms, noting that while he has full confidence in the propriety of our nation's surveillance programs, "the American people need to have confidence in them as well."[14] For their part, privacy and civil liberty advocacy organizations issued reports and pursued impact litigation strategies.[15] And, not to be outdone, a wide range of news organizations and journalists threw their support behind reform.[16]

One aspect of the FISC that received significant attention is the process by which judges are designated to the Court. Under current law, the Chief Justice of the Supreme Court "shall publicly designate eleven district court judges" drawn from "at least seven" judicial districts, of whom at least "three shall reside within twenty miles of the District of Columbia."[17] Together, these eleven judges constitute the Foreign Intelligence Surveillance Act (FISA) Court.[18] Additionally, the Chief Justice "shall publicly designate three judges . . . who together shall comprise a court of review . . . ."[19]

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ogy/interactive/2013/jun/12/what-is-metadata-nsa-surveillance#meta=0000000, *archived at* http://perma.cc/8GY7-8U6G.

[13] For a full list of current proposals, conduct a legislative word search using the terms "FISA" or "Foreign Intelligence Surveillance Act" at www.congress.gov. As of February 6, 2014, in addition to the four proposals discussed in this paper, there were at least 17 additional proposals pending that sought to reform the FISC, including: S. 1631, H.R. 3159, H.R. 3228, S. 1467, H.R. 2586, H.R. 2440, S. 1215, H.R. 3880, H.R. 2818, H.R. 2849, H.R. 3103, H.R. 2736, H.R. 3361, S. 1599, S. 1551, H.R. 2475, and H.R. 3756.

[14] *See* Transcript of August 9, 2013, Remarks by President Barack Obama, in a Press Conference, *available at* http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference, *archived at* http://perma.cc/SUK5-8236.

[15] *See, e.g.*, Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records, In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, FISC Ct. (2013), *available at* https://www.aclu.org/sites/default/files/assets/fisc_2_motion_final.pdf, *archived at* http://perma.cc/3KTC-C9BB; Alliance for Justice, Justice in the Surveillance State (2013), *available at* http://www.allianceforjustice.org/press/fisc-report-8_2013.pdf, *archived at* http://perma.cc/KKW3-K3S8.

[16] *See, e.g.*, Editorial, *More Independence for the FISA Court*, N.Y. Times (July 28, 2013), http://www.nytimes.com/2013/07/29/opinion/more-independence-for-the-fisa-court.html, *archived at* http://perma.cc/333G-S3TQ; Editorial, *Reforming the FISA Court*, The Washington Post (July 23, 2013), http://articles.washingtonpost.com/2013-07-23/opinions/40859606_1_fisc-fisa-court-appointed-judges, *archived at* http://perma.cc/7NLQ-K6B7; Editorial, *Privacy and the FISA Court*, L.A. Times (July 10, 2013), http://articles.latimes.com/2013/jul/10/opinion/la-ed-fisa-court-20130710, *archived at* http://perma.cc/M743-EDFW.

[17] *See* Foreign Intelligence Surveillance Act § 103, 50 U.S.C. § 1803 (2010) [hereinafter *FISA*].

[18] *Id.*

[19] *See* FISA, *supra* note 17, § 1803(b). The discussion in this note focuses primarily on the FISC, rather than the Foreign Intelligence Surveillance Court of Review (FISCR) because the FISC is where the vast majority of decisions are being rendered. Importantly, however, the critiques apply with equal force to both courts. From its inception through 2006, the FISCR's jurisdiction was limited to reviewing the denial of electronic surveillance applications. *See*

Beyond the geographic requirements set forth in the statute, the Chief Justice's authority is unconditional and unconstrained. Critics of § 1803's "scary secret"[20] and "awesome"[21] delegation of power argue that it produces three harmful outcomes: (1) a corrosive concentration of power, (2) a powerful pro-government bias, and (3) a homogeneous court.[22] In response to these concerns, four legislative proposals are currently pending that aim to reform the § 1803 appointments process.[23] In the upper chamber, Senator Richard Blumenthal (D-Conn.) has introduced the FISA Judge Selection Reform Act of 2013.[24] In the House, three competing proposals are pending: Rep. Steve Cohen's (D-Tenn.) FISA Court Accountability Act;[25] Rep. Adam Schiff's (D-Cal.) Presidential Appointment of FISA Court Judges Act;[26] and Rep. Steve Israel's (D-N.Y.) FISA COURT Act.[27]

In this Note, I argue that § 1803, in its current form, undermines the legitimacy of the Court, if not in practice, then certainly in the public's per-

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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 at 181 (Jan. 23, 2014), https://s3.amazonaws.com/s3.documentcloud.org/documents/1008957/final-report.pdf, *archived at* http://perma.cc/53LP-V2U7. Given that the FISC annually approved nearly all surveillance applications, the FISCR's role was limited. Moreover, even after Congress made it easier to appeal to the FISCR in 2006, the review court has been rarely utilized and since 2001 appears to have decided only two cases. *See id.* at 181, n.630.

[20] *See* Joan Walsh, *John Roberts' scary secret powers*, SALON (July 9, 2013), http://www.salon.com/2013/07/09/john_roberts_scary_secret_powers/, *archived at* http://perma.cc/BN8D-KRV.

[21] *See* Ezra Klein, *Chief Justice Roberts Is Awesome Power Behind FISA*, BLOOMBERG (July 2, 2013), http://www.bloomberg.com/news/2013-07-02/chief-justice-roberts-is-awesome-power-behind-fisa-court.html, *archived at* http://perma.cc/FG8-3FES.

[22] Versions of these critiques are widely available. *See, e.g.*, Editorial Boards, *supra* note 16; ACLU and Alliance for Justice Reports, *supra* note 15; The President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World 201, 207–208 (Dec. 12, 2013), http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (recommending that Congress should change the process by which judges are appointed to the FISC because of (1) the risks associated with vesting the Chief Justice with sole authority, and (2) legitimacy concerns); Nicole Flatow, *Retired Federal Judge: Your Faith in Secret Surveillance Court is Dramatically Misplaced*, ThinkProgress.org (June 14, 2013, 6:00 PM), http://thinkprogress.org/justice/2013/06/14/2163441/retired-federal-judge-your-faith-in-secret-surveillance-court-is-dramatically-misplaced/, *archived at* http://perma.cc/B3YV-L65U (transcribing comments by former-Judge Nancy Gertner); and Amanda Frost, *Academic highlight: Pfander questions the power of the Chief Justice to appoint 'inferior Officers'*, SCOTUSBLOG (Jul. 31, 2013, 1:44 PM), http://www.scotusblog.com/2013/07/academic-highlight-pfander-questions-the-power-of-the-chief-justice-to-appoint-inferior-officers/, *archived at* http://perma.cc/5Z9S-KDM9 (describing legal and prudential concerns to vesting the power of appointment in the office of the Chief Justice).

[23] On Dec. 12, 2013, the President's Review Group proposed a fifth alternative: dividing the power of appointment between the members of the Supreme Court. This Note does not address this proposal in depth because, at the time of this writing, there is no corresponding legislative proposal, and because the proposal is not adequately developed in the Review Group's Report. *See* LIBERTY AND SECURITY IN A CHANGING WORLD, *supra* note 22, at 208.

[24] S. 1460, 113th Congress (2013).

[25] H.R. 2586, 113th Congress (2013).

[26] H.R. 2761, 113th Congress (2013).

[27] H.R. 3195, 113th Congress (2013).

ception. The three aforementioned criticisms, I contend, are credible, a claim supported both by the critiques' persistence—as we will see, the same concerns were voiced in the lead up to the enactment of FISA—and in the critiques' ability to explain the FISC's worrisome empirical record. Finally, I argue that these three major criticisms can serve as a useful lens for examining the legislative proposals for reform. And, following that path, I conclude that one proposal in particular, if adopted, would produce a more balanced and legitimate court.

This Note will proceed as follows. In Part II, I detail the rather lengthy legislative history of the Foreign Intelligence Surveillance Act, with a focus on the debate concerning § 1803. Part III of this Note explores the three major criticisms aimed at § 1803. In this section, I will show that these three concerns originated in the legislative lead up to FISA, but have persisted to the present as a result of both their intuitive force and their ability to explain aspects of the FISC's empirical record. In Part IV, I evaluate the four proposals pending in Congress through the lens of these three major criticisms and conclude that Sen. Blumenthal's proposal is particularly meritorious. This last section also includes a brief thought experiment to explore how Sen. Blumenthal's proposal, if adopted, would reshape the composition of the court over the next decade.

II. Legislative History

A. *FISA: A Brief History from Enactment through the Patriot Act*

The first half of the 1970s, much like today, was a period during which the intelligence community underwent significant scrutiny. The Watergate scandal, which culminated in President Richard Nixon's resignation in 1974,[28] coupled with revelations documented in the Church Committee Reports concerning expansive domestic intelligence operations,[29] contributed to a growing consensus that greater oversight of surveillance activity was warranted.[30] Thus, despite earlier resistance, on March 23, 1976, President Gerald Ford submitted to Congress a draft proposal for the Foreign Intelligence

[28] *See* Video: President Nixon Resigns, ABC News, *available at* http://abcnews.go.com/Archives/video/aug-1974-president-nixon-resigns-10549613 (last visited Dec. 2, 2013 at 10:59 AM), *archived at* http://perma.cc/DV6U-YB6Y.

[29] *See generally* S. Rep. No. 94-755 (1976) [hereinafter *Church Committee Reports*].

[30] *See, e.g.*, William C. Banks, *The Death of FISA*, 91 Minn. L. Rev. 1208, 1227 (2007) ("Watergate, the Church Committee and other investigative reports emboldened Congress to control executive overreaching in its use of surveillance."); Timothy S. Hardy, *Intelligence Reform in the Mid-1970s*, CIA (unclassified in 1994), https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol20no2/html/v20i2a01p_0001.htm, *archived at* http://perma.cc/D7KY-GKJY ("As the recommendations of the Rockefeller and Church reports . . . demonstrate, public discussion is possible and has begun on the limits—at least domestically—to be placed on foreign intelligence activities.").

Surveillance Act of 1976.[31] The legislation's central effect was to "provide a procedure for seeking a judicial order approving the use . . . of electronic surveillance to obtain foreign intelligence information and [to] establish standards that must be satisfied before any such order could be entered."[32] If enacted, the bill was to "ensure that the government will be able to collect necessary foreign intelligence" while affording "major assurance to the public that electronic surveillance for foreign intelligence purposes can and will occur only when reasonably justified in circumstances demonstrating an overriding national interest."[33]

The Administration's proposal was introduced in Congress as S. 3197 and H.R. 12750, respectively.[34] While both the Senate Select Committee on Intelligence and the Senate Judiciary Committee approved S. 3197, the 94th Congress concluded prior to consideration of the bill by the full Senate.[35] The following year, the Administration's proposal was re-introduced as S. 1566 and H.R. 7308, respectively.[36] After approval by the Senate Judiciary and Intelligence Committees, the Senate passed S. 1566, as amended, on April 20, 1978 by a vote of 95 to 1.[37] In the House, both the recently created Permanent Select Committee on Intelligence and the Judiciary Committee approved H.R. 7308 before adoption in the full House on September 7, 1978 with a vote of 246 to 128.[38] As is typical, the House version of FISA differed from the Senate's in key ways. Thus on September 6, the House and Senate formed a conference committee. A conference report was approved on October 5, and subsequently adopted by the Senate and the House on October 9 and 12, respectively.[39] Two weeks later, on October 25, 1978, President James E. Carter signed FISA into law.[40]

In the thirty-five years since enactment, FISA has been amended more than a dozen times.[41] One significant set of changes was included in the

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[31] H.R. Doc. No. 94-422 (1976), President Gerald R. Ford (Mar. 23, 1976) [hereinafter *Communication to Congress*].

[32] *Id.* at 1.

[33] *Id.*

[34] *See Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong. 2-6 (1976) [hereinafter *1976 House Judiciary Subcommittee Hearing*].

[35] *See* S. Rep. No. 95-701, at 6 ("S. 3197 was reported favorably by both Senate committees . . . but the session ended before the full Senate could act on the legislation."); S. Rep. No. 94-1161, at 1 (1976); S. Rep. No. 94-1035, at 1 (1976).

[36] The Senate bill, S. 1566, was introduced on Nov. 1, 1977, while the House bill, H.R. 7308, was introduced on June 8, 1978. *See* S. Rep. No. 95-604, at 1 (1977); H.R. Rep. No. 95-1283 Pt. 1, at 1 (1978).

[37] 124 Cong. Rec. S5994 (daily ed. Apr. 20, 1978).

[38] 124 Cong. Rec. H9237-73 (daily ed. Sept. 7, 1978).

[39] *See* H.R. Rep. No. 95-1720 (1978) (Conf. Rep.).

[40] *See* President Jimmy Carter, Statement on Signing S. 1566 Into Law (Oct. 25, 1978), http://www.cnss.org/data/files/Surveillance/FISA/Carter_FISA_Signing_Statement.pdf, *archived at* http://perma.cc/48KR-PCT8.

[41] *See, e.g.*, Counterintelligence and Security Enhancements Act of 1994, Pub. L. 103-359, § 801, 108 Stat. 3423, 3435-43 (1994); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. 105-272, § 601, 112 Stat. 2396, 2404-13 (1998); Intelligence Authorization for Fiscal

Patriot Act, adopted in 2001. These changes are significant for several reasons.[42] One important change relates to the types of surveillance applications the FISC considers. Prior to the Patriot Act, the FISC had a limited role. The Court primarily determined whether an application by the Executive Branch to conduct electronic surveillance was adequately supported by a showing of "probable cause" that the target of surveillance is a foreign power or an agent thereof.[43] Although this limited role had started to expand by 1999,[44] the scope of the Court's power increased dramatically after the adoption of the Patriot Act.[45] In particular, § 215 of the Patriot Act now allowed FISA orders to compel the production of business records and other tangible objects, so long as these records "are sought for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities."[46] As a result, the FISC's role was no longer limited to considering the legality of electronic surveillance of individuals, but also extended to issuing orders that could "permit an entire database to be the subject of a FISA order."[47] A second important change resulting from the Patriot Act relates directly to the § 1803 appointments process. Section § 208 of the Patriot Act modified the size of the Court, and imposed the geographic limitation on the Chief Justice's power of appointment.[48]

B. Debating the Power of Appointment: The Evolution of § 1803

In President Ford's original proposal, § 2523 of FISA vested the Chief Justice with authority to designate seven district court judges, each of whom would have jurisdiction to hear the government's applications for electronic surveillance.[49] As introduced, the initial House and Senate versions of FISA mirrored this language.[50] Likewise, the 1977 re-introduced versions—S.

Year 2001, Pub. L. 106-567, § 601, 114 Stat. 2832, 2850-56 (2000). For an overview of legislative modifications to FISA, *see* Federation of American Scientists, https://www.fas.org/irp/agency/doj/fisa/ (last visited Mar. 6, 2014), *archived at* http://perma.cc/GS9H-XHNV.

[42] *See* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 George Washington L. Rev. 1306, 1330 (2004) ("The attacks of September 11 led to the greatest changes by far in FISA law and practice since its creation in 1978.").

[43] *See* FISA, *supra* note 18, § 1805(a)(2)(A).

[44] *See* Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272 § 602, 112 Stat. 2396, 2410–12 (1998) (amending 50 U.S.C. 1861 to permit applications for an order to produce production by "a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility" to release records in its possession).

[45] *See* Swire, *supra* note 42, at 1331 ("Section 215 contained two statutory changes that drastically expanded this power.").

[46] *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272; Swire, *supra* note 42, at 1346.

[47] *See* Swire, *supra* note 42, at 1332.

[48] *See* USA Patriot Act, *supra* note 46, at § 208.

[49] *See Communication to Congress*, *supra* note 30, at § 2523.

[50] *See 1976 House Judiciary Subcommittee Hearing*, *supra* note 34, at 4; *Foreign Intelligence Surveillance Act of 1976: Hearing on S. 743, S. 1888, and S. 3197 Before the Subcomm. On Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 94th Cong. 121-34 (1976) [hereinafter *1976 Senate Judiciary Subcommittee Hearing*].

1566 and H.R. 7308—contained identical provisions.[51] Here, however, the story becomes more complicated. In the Senate, § 2523 was well received. As a result, the Senate-passed version of S. 1566 included an appointments provision that closely resembled President Ford's version of § 2523, notwithstanding the arguments raised by a few significant critics.[52] In contrast, in the House, § 2523 underwent significant revisions on several occasions, and the version ultimately adopted differed dramatically from what President Ford proposed in 1976.[53] The debate around and evolution of § 2523 is detailed in the discussion that follows. As one will likely note, the criticisms voiced between 1976 and 1978 mirror the three major concerns that we hear today: the concentration of power, the pro-government bias, and the homogeneity critiques. And, as I argue in Part III, the persistence of these critiques supports their credibility, and suggests that we would be well served to take these concerns seriously.

1. Senate Consideration of S. 3197 and S. 1566

The Senate considered several iterations of FISA legislation between 1976 and 1978. The Senate, having worked closely with President Ford to draft his FISA proposal, proved a sympathetic audience. Yet, the debate preceding the adoption of S. 3197 and S. 1566 nonetheless introduces several important criticisms. One prominent critic was Sen. John V. Tunney (D-Cal.), who served on both the Intelligence and Judiciary Committees and who twice opposed S. 3197 in committee proceedings.[54] Summarizing his opposition, Sen. Tunney emphasized the legitimacy risk posed by § 2523's delegation of power:

> An age-old maxim of the law teaches, "not only must justice be done, justice must appear to be done." It reminds us of the importance of making obvious to everyone that the legal system operates fairly. Section 2523, however, allows the appearances of judge-shopping and court-packing.[55]

Sen. Tunney elaborated by noting that, "one person would be given the authority to designate which judges may decide the cases in an entire area of law. The seven judges are to be handpicked by the Chief Justice."[56] The

[51] *See* S. Rep. No. 95-604, at 75–76 (1977) (reprinting S. 1566 and noting Senate Judiciary Committee amendments to S. 1566); *1976 House Judiciary Subcommittee Hearing*, *supra* note 34, at 4; *Foreign Intelligence Electronic Surveillance: Hearing on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632: Hearing Before Subcomm. on Legislation of the H. Permanent Select Comm. on Intelligence*, 95th Cong., at 238 (1978) [hereinafter *1978 House Intelligence Subcommittee Hearing*].

[52] *See supra* notes 44–51 and accompanying text.

[53] *See infra* notes 54–84 and accompanying text.

[54] *See* S. Rep. No. 94-1161, *supra* note 35, at 7.

[55] *Id.* at 123–44.

[56] *Id.* at 137.

concern raised by Sen. Tunney is that the Chief Justice may abuse his or her power of appointment and fill the court with judges who possess a particular agenda. As an alternative, Sen. Tunney proposed that each circuit court should designate a particular district court judge to hear surveillance applications within its geographic area.[57] One should recognize this concern as an early version of the concentration of power critique.

A similar, if expanded, version of this argument arose in subsequent Senate proceedings. In a 1978 Senate Intelligence Committee hearing, Dr. Christopher Pyle warned that § 2523 would overburden the office of the Chief Justice, an individual who has neither the time nor the expertise (i.e. a working knowledge of district court judges) to adequately perform the designation process.[58] More significantly, Dr. Pyle continued, vesting the power of appointment in the Chief Justice represents "a possible affront to the integrity of the lower courts" and "may even suggest an unworthy scheme to assure that only pro-government jurists will be chosen in the first round."[59] For emphasis, Dr. Pyle added that seven "handpicked judges . . . load[ ] the dice very heavily in favor of the search and against the individual right."[60] Dr. Pyle's testimony, then, raised two distinct critiques. First, Dr. Pyle both reinforced the concentration of power critique by noting that the perception—if not necessarily the reality—of § 2523 erodes the legitimacy of the Court, and he expanded this critique by raising concerns that relate to the Chief Justice's workload and lack of expertise. Second, Dr. Pyle warned that § 2523 risks producing a court with a pro-government bias.

These criticisms notwithstanding, the Senate Intelligence and Judiciary Committees, as well as the full Senate, passed S. 1566, which included a version of § 2523 that closely mirrors President Ford's proposal.[61] The only significant departure from President Ford's draft is the creation of a special court based in D.C. on which the seven judges sit, in place of having seven judges receive applications in their home districts.

2. *House Consideration of H.R. 12750 and H.R. 7308*

As introduced, H.R. 12750 and H.R. 7308 both contained an appointment provision for FISA judges that replicated the approach set forth in § 2523 of President Ford's proposal.[62] Unlike their Senate counterparts, how-

[57] *Id.* at 145.

[58] *Foreign Intelligence Surveillance Act of 1978: Hearing on S. 1566 Before the Subcomm. on Intelligence and Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong., 99 (1978) (statement by Dr. Christopher Pyle, Mount Holyoke College).

[59] *Id.*

[60] *Id.* at 98 (internal citations omitted). As an alternative, Dr. Pyle argued in favor of vesting the appointment authority in the eleven chief judges of each circuit, and of increasing the number of judges to twenty-two (which includes an alternate judge for each circuit).

[61] *See* S. REP. NO. 95-701, at 48 (1978).

[62] *See 1976 House Judiciary Subcommittee Hearing*, *supra* note 34, at 4; *1978 House Intelligence Subcommittee Hearing*, *supra* note 52, at 238.

ever, the House proved less receptive to the expansive role proposed for the Chief Justice.

The only House committee to consider H.R. 12750 was the Judiciary Subcommittee on the Courts.[63] At that hearing, Duke University Law Professor William Van Alstyne echoed a version of the concentration of power critique. Describing his concerns regarding § 2523, Professor Alstyne questioned (1) the desirability of burdening the Chief Justice with these additional administrative responsibilities, (2) the failure of § 2523 to uphold both "the appearance and the substance of separation of powers to be maintained, preserving detachment on the part of the Supreme Court," and (3) the negative perception produced by vesting the power of appointment entirely in the Chief Justice.[64] Arguing in favor of an alternative proposal that relied more heavily on the chief judge of each circuit court, Professor Alstyne summarized his position as follows: "I don't think it is seemly that he personally designate the seven judges . . . which may at least communicate to the public a degree of involvement that is simply not appropriate by way of appearance."[65]

Subsequent House proceedings revealed similar skepticism towards § 2523. In a January 1977 hearing before the House Permanent Select Committee on Intelligence, Rep. Morgan F. Murphy (D-Ill.) challenged Attorney General Griffin Bell, a leading defender of the proposed law, on the potential lack of geographic and experiential diversity on the Court.[66] Concluding his remarks, Rep. Murphy noted:

> I would hope that we just wouldn't select judges from this area. I mean, it is a pretty big broad country out there, especially west of the Appalachians. We might suggest that you go to the different areas, and take a judge from amongst the people, so to speak . . . I find that the farther you get from this city, the problems of the world and the country don't have the same seriousness or drama attached to them as they do in this town, and sometimes I think better reasoning and clearer judgment are brought to bear on an issue . . . [T]he core of your statement is to get the people to trust in the Government. We can do this if we reached out to places other than New York or Washington, D.C. for these judges.[67]

Significantly, this discussion of judicial diversity raises a potential problem that is distinct from the concentration of power critique. Here, the problem is neither that the legitimacy of the Court is jeopardized by the perception of bias, nor that the Chief Justice may abuse his authority or become adminis-

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[63] *See 1976 House Judiciary Subcommittee Hearing*, *supra* note 34.

[64] *Id.* at 58, 64.

[65] *Id.* at 64.

[66] *See 1978 House Intelligence Subcommittee Hearing*, *supra* note 51, at 17–18 (colloquy between Rep. Morgan Murphy and Griffith Bell, Att'y Gen. of the United States).

[67] *Id.* at 19–20.

tratively overburdened. Rather, the argument suggests that geographic diversity will produce objectively better outcomes and decisions.

At the same 1977 hearing, two witnesses from the ACLU warned of a related but distinct worry that the FISC may become so strongly pro-government as to be transformed into a mere rubber stamp. As then-ACLU Executive Director John H. F. Shattuck explained, by vesting the power of appointment in several chief judges rather than in a singular Chief Justice, one can avoid "the centralization of power and information that . . . lends itself to the kind of rubber stamp abuse."[68] Striking a similar note, Rep. Robert McClory (R-Ill.) noted with alarm that a weak court may actually be worse than no court at all. As he saw it, a court full of "patsies" may allow the Executive Branch to both outsource self-regulation to the Court and also use the Court as a foil for ex-post blame shifting.[69] Finally, speaking as a witness in a subsequent hearing, Rep. Romano L. Mazzoli (D-Ky.) warned that § 2523, as originally drafted, risked creating "an old boy network . . . who may have had some background in the intelligence community," and, therefore, who presumably would be predisposed to favor the government's request for surveillance.[70]

For a time, the House appeared on the verge of adopting substantive amendments to § 2523 intended to address the three major critiques. For example, in H.R. 7308, as amended and approved by the House Permanent Select Committee on Intelligence, § 2523 had been modified as follows:

> Section 103(a). There is established a Special Court of the United States with jurisdiction throughout the United States to carry out the judicial duties of this title. The Chief Justice of the United States shall publicly designate at least one judge from each of the judicial circuits, nominated by the chief judges of the respective circuits, who shall be members of the Special Court and one of whom the Chief Justice shall publicly designate as the chief Judge. The Special Court shall sit continuously in the District of Columbia.[71]

This two-step process was intended to (1) mitigate the concentration of power concerns by relying more heavily on the chief judges of the circuit courts, (2) foster geographic and ideological diversity through decentralization, and (3) reduce the risk of an exceedingly pro-government court.[72] This

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[68] *Id.* at 117 (statement of John Shattuck, Exec. Dir., ACLU).

[69] *Id.* at 179 (statement of Rep. Robert McClory).

[70] *See Foreign Intelligence Surveillance Act: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 50 (1978) (statements by Rep. Romano Mazzoli) [hereinafter *1978 House Judiciary Subcommittee Hearing*].

[71] *See* H.R. Rep. No. 95-1283 pt. 1, *supra* note 35, at 5 (stating text of § 103).

[72] *Id.* at 71 (section-by-section analysis of H.R. 7308, as amended by House Permanent Select Committee on Intelligence).

sentiment is well-captured by ACLU Legislative Counsel Jerry J. Berman, who wrote:

> The concern that the Special Court would be a rubber stamp owed primarily to the fact that the Senate bill gave the responsibility for naming the judges to the Chief Justice of the United States and only from judges in Washington, D.C. In response to this concern, the House bill expands the number of judges, including judges from around the county and involves the chief judges of the circuits in the nominating process. . . . [U]nder the House version the chief judges of the district courts have a say in the nominating procedure so you can get more diversity and more judges from across the country and maybe a wider diversity of opinion.[73]

As the bill moved towards a vote on the House floor, however, a sequence of events resulted in one more dramatic revision of § 2523. During floor consideration, the House adopted an amendment introduced by Rep. McClory that removed the warrant requirement for electronic surveillance of non-U.S. persons, thereby sharply curtailing the number of surveillance applications the FISC would be expected to review.[74] The reduced volume of surveillance applications caused some members of Congress to question whether a special court devoted to electronic surveillance was necessary at all. And in turn, Rep. Allen E. Ertel (D-Pa.) offered just such an amendment. Under this amendment, § 2523 would neither create a special court for surveillance nor require the appointment of judges. Instead, § 2523 would simply vest the United States district courts with jurisdiction to receive and review surveillance applications.[75] After a relatively limited debate, the House adopted the Ertel Amendment by a vote of 224 to 103, with 105 abstentions.[76]

For reasons that are not entirely clear, the following day the House held a second vote on the McClory amendment. This time, however, they rejected it—and this is where the House erred. By rejecting the McClory amendment, the House undermined the primary justification supporting the Ertel Amendment: namely, that the FISC was no longer necessary in light of the reduced volume of surveillance applications.[77] Thereafter, the House considered no further amendments. On September 7, 1978 the House voted to pass H.R. 7308 by a vote of 246 to 128.[78] And with that, the House abandoned—on the

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[73] *See 1978 House Judiciary Subcommittee Hearing*, *supra* note 70, at 151–52, 168 (statement of Jerry Berman, Legis. Counsel, ACLU).

[74] *See* 124 Cong. Rec. H9134 (daily ed. Sept. 6, 1978).

[75] *See* 124 Cong. Rec. H9147 (daily ed. Sept. 6, 1978).

[76] *See* 124 Cong. Rec. H9150 (daily ed. Sept. 6, 1978).

[77] *See* 124 Cong. Rec. H9273 (daily ed. Sept. 7, 1978) (adopting Rep. Edward P. Boland's (D-Mass.) motion to substitute H.R. 7308 into S. 1566).

[78] *See* 124 Cong. Rec. H9268 (daily ed. Sept. 7, 1978).

basis of a flawed rationale that the House itself rejected—months of committee debate aimed at creating a balanced and legitimate court.

3. *The House–Senate FISA Conference Committee*

On September 26, 1978, the House and Senate agreed to form a conference committee to resolve the differences between their competing versions of FISA.[79] The conference lasted just over a week and on October 5 a conference report issued, renumbering § 2523 as § 103. The Senate, having made relatively few concessions in conference, approved the report without objection on October 9.[80] The task in the House proved more difficult. A sizeable number of House members, including Reps. Ertel and McClory, were dismayed to discover that this latest version of S. 1117, reflecting the compromises reached during conference, not only created a special court in D.C—a sharp departure from the Ertel Amendment—but also vested the power of appointment entirely in the Chief Justice of the Supreme Court—which was precisely the arrangement that many feared would result in a gross concentration of power, a pro-government bias, and a homogenous court.[81] As Rep. Ertel protested:

> We now have a court consisting of seven men selected by the Chief Justice of the United States who is appointed for life. He does not get removed as does a circuit court chief judge who has to relinquish his position when he reached the age of 70. So in fact one Chief Justice of the United States selects the seven men who will sit on this court and he can, in fact, influence the foreign intelligence operation of this Nation through his lifetime, whether the Chief Justice be an Abe Fortas or a Warren Burger. He can appoint people who have his predisposition and we in this Nation will be encumbered with that predisposition through the Chief Justice's lifetime. I think it is wrong.[82]

The frustration in the House is understandable, although its members should not have been surprised at the final bill produced in conference. By adopting the Ertel Amendment but then rejecting the McClory Amendment, the House's version of § 2523, which vested jurisdiction in the various dis-

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[79] *See* 124 CONG. REC. H10707 (daily ed. Sept. 26, 1978) (agreeing to conference with Senate); 124 CONG. REC. S16127 (daily ed. Sept. 26, 1978) (agreeing to conference with House).

[80] *See* 124 CONG. REC. S17882-84 (daily ed. Oct. 9, 1978) (adopting conference report).

[81] *See* 124 CONG. REC. H12534-36 (daily ed. Oct. 12, 1978) (remarks in support by Rep. Boland and in opposition by Rep. McClory).

[82] *See* 124 CONG. REC. H12541 (daily ed. Oct. 12, 1978) (quoting Rep. Ertel). The irony of Rep. Ertel's antipathy towards the compromise version of § 2523 should not be lost on the reader. Had it not been for the Ertel Amendment, the House would have possessed a stronger bargaining position as it moved into conference, and would, as a result, likely have had greater success negotiating with the Senate for a better outcome.

trict courts around the country, was "totally inadequate for the substantial number [of applications] which would be necessary under the restored provisions of the bill."[83] Therefore, the House conferees were left with little leverage to demand significant changes to the Senate version of § 2523. The result was as expected: "In the end, the conferees settled on a modified version of the Senate language, altered to guarantee geographic diversity in judge selection and discourage the possibility of judge shopping."[84]

4. *Changes to § 103 in the Patriot Act*

After enactment in 1978, § 103 remained unchanged for twenty-three years. In 2001, the House and Senate passed, and President George W. Bush signed into law, the Patriot Act.[85] Section 208 of the Patriot Act modified § 103 by increasing the number of FISA Court judges from seven to eleven, and by requiring that at least three of the judges reside within twenty miles of Washington, D.C.[86] From 2001 through today, then, the provision for designating judges for appointment to the FISA Court has read as follows:

> The Chief Justice of the United States shall publicly designate eleven district court judges from at least seven of the United States judicial circuits of whom no fewer than three shall reside within twenty miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance . . . .[87]

III. Three Major Criticisms Targeting § 1803

The central claim of this note is that the modern trio of criticism is credible, and therefore should guide our legislative reform efforts. This credibility is evidenced both by the critiques' endurance—as we have seen, today's arguments mirror those of thirty-five years ago—as well as by the their power to explain aspects of the FISC's empirical record. The three major criticisms while related, are analytically distinct. The criticisms are related because they all target the current structure of § 1803, which vests the power of appointment exclusively in the office of the Chief Justice, subject only to limited geographic conditions. They are distinct because each criticism raises a separate, troubling consequence produced by § 1803: (1) a gross concentration of power, (2) a powerful pro-government bias, and (3) a homogenous court that poorly reflects our nation's diverse views on privacy and surveillance. Each criticism is considered in the discussion that follows.

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[83] *See* 124 Cong. Rec. H12534 (daily ed. Oct. 12, 1978).
[84] *See id.* (quoting Rep. Boland on the conference report compromise).
[85] *See* USA Patriot Act, *supra* note 46, at § 208.
[86] *Id.*
[87] *See* 50 U.S.C. § 1803.

A. Concentration of Power: Practical Constraints and Legitimacy Concerns

The concentration of power critique includes both a practical and a theoretical element. The practical concern, voiced previously by Dr. Christopher Pyle, argues that § 1803 risks overburdening the Chief Justice, and that the Chief Justice is not particularly well positioned to identify and select a balanced slate of judges. A modern version of this argument asks with trepidation, "whether we have given the chief justice—any chief justice, not just this one—too much to do?"[88] Answering her own question, one scholar notes that, "[t]he office of Chief Justice of the United States has grown enormously in recent decades in responsibility and complexity— not because of power-grabbing chief justices but because Congress has piled into the office a large number of added responsibilities."[89] Another writes, "[g]iven the distrust of undue concentrations of power in one person and increased interest in including multiple perspectives in decisionmaking, the recently expanded (but now seen as customary) repertoire of powers of the Chief Justice becomes troubling."[90] In my view, this practical concern, however valid, is secondary to the theoretical one: that § 1803's concentration of power creates the perception of partiality and impropriety. This perception, even if never borne out in reality, undermines the FISC's legitimacy. As one recent article notes, "the specter of a politicized appointment process will linger as long as the Chief makes the appointments himself."[91] This point echoes Professor William Van Alstyne's remarks, discussed in Part II, that such an expansive role for the Chief Justice is simply unseemly.

B. Pro-Government Bias: Reviewing Empirical Data on FISC Decisions[92]

Contemporary arguments regarding the FISC's pro-government bias find their foundation in the empirical record of the Court's thirty-five year

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[88] *See* Linda Greenhouse, *Too Much Work?*, N.Y. Times (Aug. 7, 2013), http://opinionator.blogs.nytimes.com/2013/08/07/too-much-work/?_r=0, *archived at* http://perma.cc/93HW-GLRU.

[89] *Id.*

[90] Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev. 1575, 1584 (2006).

[91] James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 Nw U. L. Rev. 1125, 1135 (2013) (questioning whether the Constitution permits Congress to vest the power of appointment in the office of the Chief Justice, rather than in the Supreme Court).

[92] At the outset it is worth noting that, despite this section's focus on the FISC's alleged pro-government bias, the bias could, instead, operate in favor of individual rights or liberty concerns. This idea is reflected in the opening quote by Rep. Ertel, in which he contrasts the jurisprudence of Abe Fortas and Warren Burger, and implicitly argues that under either individual, the bias issue is relevant and problematic. This section focuses on the pro-government bias for two reasons: (1) the historical concern has always been that the FISC would be excessively pro-government (as suggested by Prof. Van Alstyne's statements); and

history. From 2008–2012, the government filed 8,388 applications for electronic surveillance.[93] Of these, the FISC approved 8,369 applications, which equates to a 99.77% approval rate.[94] Separately, from 1979–1983, the government filed 1,984 applications with the FISC, of which 1,973—or 99.45%—were approved.[95] The growth in applications to the Court, while gradual and persistent over several decades, increased markedly after the adoption of the Patriot Act in 2001. In 2003 and 2004, the government made 1,727 and 1,758 applications respectively. In contrast, the number of applications for 1999 and 2000 were 886 and 1005 respectively. In one sense, this sharp increase in the volume of surveillance applications strengthens the position of FISC critics: if criticisms of § 1803 are meritorious, then they only become more consequential as the scope and scale of the government's surveillance activities grows. A counterargument to this data points out that, rather than revealing a pro-government court, these high rates of approval may merely reveal an Executive Branch that is finely attuned to the limits of surveillance.[96] This point is persuasive, but falls short of fully undermining the allegations of bias. Even if it is presumed that the Executive Branch effectively self-regulates the quality of its surveillance applications, it seems unlikely that our Presidents, operating in a post-9/11 environment that saw a sharp increase in surveillance requests and the initiation of novel surveillance programs pursuant to the Patriot Act, so seldom encroached on legal boundaries to justify such infrequent court intervention.

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(2) in light of the FISC's empirical record, it is very difficult to argue that the FISC has shown any bias in favor of individuals rights or liberty.

[93] Pursuant to FISA §§ 1807 and 1862, the Department of Justice must annually report to Congress on the number of surveillance applications made to the Court, as well as the outcome of those applications. This data is publicly available. *See, e.g.*, PETER J. KADZIK, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE, REPORT PURSUANT TO § 107 AND § 502 OF FISA (2013), https://www.fas.org/irp/agency/doj/fisa/2012rept.pdf, *archived at* http://perma.cc/AE4S-R6QL; Ronald Weich, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE, REPORT PURSUANT TO § 107 AND § 502 OF FISA (2012), https://www.fas.org/irp/agency/doj/fisa/2011rept.pdf, *archived at* http://perma.cc/K985-3EUC. Reports from 1979 through 2012 are available at Federation of American Scientist FISA website, available at https://www.fas.org/irp/agency/doj/fisa/#rept, *archived at* http://perma.cc/DB4Q-CD55.

[94] *Id.*

[95] *Id.* As an interesting aside, in 1980 the Court even authorized an activity that wasn't requested. *See* Report to Congress, Dept. of Justice (Apr. 22, 1980), available at https://www.fas.org/irp/agency/doj/fisa/1980rept.html, *archived at* http://perma.cc/JMX5-W39W.

[96] A second counterargument to this narrative is that even if the FISC ultimately grants the surveillance request, it frequently requires the Executive Branch to make substantial modifications to the application. Under this argument, the FISC exerts a moderating influence even if it isn't denying a high percentage of applications. *See e.g.*, Letter to Sen. Chuck Grassley from Presiding Judge Reggie B. Walton (Oct. 11, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/ranking-member-grassley-letter-131011.pdf, *archived at* http://perma.cc/RPL2-96MF. This may well be true. There is no reason to believe, however, that modifying how FISA judges are appointed to the Court would affect this moderating role.

C. Homogeneity: Geographic, Political, and Experiential

What I have termed the homogeneity critique is essentially an argument for greater diversity on the FISA Court. Although our earlier discussion focused on geographic diversity, which is, to a certain extent, addressed even in the current language of § 1803, the modern iteration of this critique also encapsulates political and experiential diversity. The lack of diversity is evident when one considers both the current and historical membership of the court. Chief Justice John Roberts has appointed each of the eleven members on the current court.[97] Of these eleven members, nine were nominated to their judgeship by Republican presidents.[98] Moreover, at least half of these judges were themselves former federal prosecutors, while several others held high-ranking positions in the Executive Branch prior to joining the court.[99] Since FISA's adoption in 1978, only two other Chief Justices have made appointments to the court: Warren E. Burger and William Rehnquist. Like Roberts, the two men were appointed to the Supreme Court by a Republican president and previously held senior positions in the Executive Branch. Perhaps unsurprisingly, then, the historical makeup of the Court reflects the ideologies of the three Chief Justices who controlled the power of appointment. Of the fifty-five judges that have served on the FISC, just seventeen, or 31%, were appointed by Democratic presidents.[100] Viewed in these terms, the court has grown less diverse over the last ten years. While one law professor has noted that "critics have suggested that the Chief *might* use the appointment power to influence policy," others have gone further to argue that, for example, "Chief Justice Rehnquist adopted a partisan approach to

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[97] *See The Foreign Intelligence Surveillance Court: 2014 Membership*, Fed'n of Am. Scientists, http://www.fas.org/irp/agency/doj/fisa/court2014.html (last visited Feb. 9 at 11:39 AM), *archived at* http://perma.cc/9KG4-QM84. The current roster of FISA judges consists of: The Hon. Reggie B. Walton (D.D.C); The Hon. Rosemary M. Collyer (D.D.C.); The Hon. Raymond Dearie (E.D.N.Y.); The Hon. Claire V. Eagan (N.D. Ok.); The Hon. Martin L.C. Feldman (E.D. La.); The Hon. Thomas F. Hogan (D.D.C.); The Hon. Mary A. McLaughlin (E.D. Pa.); The Hon. Michael W. Mosman (D. Or.); The Hon. Dennis F. Saylor (D. Mass.); The Hon. Susan W. Wright (E.D. Ark.); and The Hon. James B. Zagel (N.D. Ill.). On May 18, 2014, Judge Walton's term expires and he will be replaced by the Hon. James E. Boasberg (D.D.C.). *Id.*

[98] *Id.*

[99] *See* John Shiffman & Kristina Cooke, *The judges who preside over America's secret court*, Reuters (June 21, 2013), http://www.reuters.com/article/2013/06/21/us-usa-security-fisa-judges-idUSBRE95K06H20130621, *archived at* http://perma.cc/FQB6-45FC.

[100] *See* Fed'n of Am. Scientists, *supra* note 97.

his judicial appointments."[101] Even this cursory examination of the Court's homogeneity serves to highlight what makes many critics uncomfortable.[102]

IV. Evaluating Pending Reform Proposals

As of the summer of 2014, four proposals are pending in Congress that seek to reform § 1803's appointment process: (1) the FISA Judge Selection Reform Act; (2) the FISA COURT Act; (3) the FISA Court Accountability Act; and (4) the Presidential Appointment and Senate Confirmation of FISA Court Judges Act.[103] The design of each proposal is detailed and evaluated below, with an eye towards whether, if at all, the reforms would address our three major criticisms: concentration of power, pro-government bias, and homogeneity.

A. *Shifting § 1803 from the Chief Justice to the Chief Judges: S. 1460 - The FISA Judge Selection Reform Act*

On August 1, 2013, Sen. Richard Blumenthal, a Democrat from Connecticut, introduced S. 1460, entitled the FISA Judge Selection Reform Act. The objective of S. 1460 is to "create a process that is less cumbersome and political" than the traditional judicial appointment process, but that "nonetheless produces an ideologically diverse Foreign Intelligence Surveillance Court."[104] Moreover, S. 1460 is intended to "promote geographically and ideologically balanced FISA courts that are better suited to reflect the full diversity of perspectives on questions of liberty and national security."[105] The proposal has four components. First, the bill expands the number of FISC judges from eleven to thirteen.[106] These two newly created positions will be filled by a district court judge drawn from the D.C. Circuit and the Federal Circuit, respectively, no later than 180 days after enactment.[107] Second, the bill would create a two-step process for appointing FISC judges. Under this process, when a vacancy occurred, the Chief Judge of the circuit

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[101] *See* Pfander, *supra* note 91, at 1135. Others have argued that Chief Justice Roberts' appointments have been motivated by expertise and experience, rather than political, concerns. Under this view, the type of judge best positioned to serve on the FISC is one who is both young (because this additional role may be strenuous) and experienced (because the FISC is too consequential to risk inexperience). For Chief Justice Roberts, the judges who were most likely to fulfill these prerequisites were judges nominated to the bench by President George W. Bush.

[102] *See, e.g.*, Walsh, *supra* note 20; Klein, *supra* note 21.

[103] *See supra* notes 24-27.

[104] *See* FISA Court Reform: Draft Proposal, Sen. Richard Blumenthal (July 10, 2013) (on file with author).

[105] Blumenthal Unveils Major Legislation To Reform FISA Courts (August 1, 2013), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-unveils-major-legislation-to-reform-fisa-courts, *archived at* http://perma.cc/94AD-P5KK.

[106] *See* S. 1460, *supra* note 24, § 3(a)(1)(B)(i).

[107] *Id.* at § 3(a)(3)(B)(i)–(ii).

court would nominate a district judge from within his or her judicial circuit for designation to the FISC by the Chief Justice.[108] If the Chief Justice failed to designate the proposed judge, then the Chief Judge would nominate two other district court judges, one of whom the Chief Justice must designate to the FISC.[109] The proposal permits incumbent judges to complete their current terms.[110] Third, the Chief Justice would designate a district court or a circuit court judge to serve on the Foreign Intelligence Surveillance Court of Review (FISCR) only with the approval of five associate justices.[111] Finally, S. 1460 mandates a study on the process by which FISC and FISCR judges are selected.[112]

Of the four pending proposals, S. 1460 is best positioned to resolve the three major criticisms. By vesting the power of appointment in the thirteen chief judges, S. 1460 addresses both the practical and theoretical concentration of power concerns. On the practical level, chief judges are saddled with fewer administrative duties than the Chief Justice and, because they have "experience directly reviewing the decisions of district court judges in their circuits," they have "greater knowledge of the ideology and competency of potential FISC judges."[113] On the theoretical level, the power sharing structure envisioned by S. 1460—where the chief judges and the Chief Justice work collectively to designate judges to the court—promotes the legitimacy of the court by removing "the specter of a politicized appointment process" that some have found worrisome.[114] This argument finds some support in what scholars have termed the "rational theory of judicial decision-making."[115] This approach argues that, other things equal, Supreme Court justices—because they are no longer constrained by career advancement prospects—may tend to be more driven by ideology than other judges.[116] Finally, S. 1460 would increase both the court's geographic diversity through the statutory requirement that each circuit be represented, and its ideological diversity because the thirteen chief judges will tend to be ideologically heterogeneous. The weakest aspect of S. 1460 is its impact on reducing the FISC's pro-government bias. To be fair, however, a complimentary bill introduced by Sen. Blumenthal hopes to address this issue through the introduction of an adversarial process.[117]

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[108] *Id.* at § 3(a)(1)(C)(i).

[109] *Id.* at § 3(a)(1)(C)(ii).

[110] *Id.* at § 3(a)(3)(A).

[111] *Id.* at § 3(b)(2). A reader may wonder why this paper has waited until now to introduce the FISCR. The reality is that the FISCR is so infrequently used that its influence is limited. However, the provisions relating to the FISCR are cited here for the sake of completeness.

[112] *Id.* at § 4(a).

[113] *See* FISA Court Reform: Draft Proposal, *supra* note 104.

[114] *See* Pfander, *supra* note 91.

[115] *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013).

[116] *See id.*

[117] S. 1467, 113th Cong. (2013).

B. Creating a Role for the Legislature: H.R. 2586 - The FISA Accountability Act and H.R. 3195 – The FISA COURT Act

On June 28, 2013, Rep. Steve Cohen, a Democrat from Tennessee, along with eleven co-sponsors, introduced H.R. 2586, entitled the FISA Court Accountability Act.[118] As Rep. Cohen stated, "[t]his immensely powerful court can act as an important check on Executive Branch overreach, but it is unlikely to be an effective check if the vast majority of its members share similar views on personal privacy."[119] Several months later, on September 26, 2013, Rep. Steve Israel, a Democrat from New York, introduced H.R. 3195, entitled the FISA COURT Act.[120] Rep. Israel's proposal seeks, "to implement checks and balances so that no single branch of government or political party has too much power."[121]

Despite certain differences, at their core, each of these proposals seeks to divvy the power of appointment between the different branches of the federal government. In H.R. 2586, the power of appointment would be divided as follows: the Chief Justice would appoint three judges, while the Speaker and the Minority Leader of the House as well as the Majority and Minority Leaders of the Senate would each appoint two.[122] In effect, the power to designate judges to the FISCR would be vested in the Chief Justice, the Speaker, and the Majority Leader of the Senate.[123] In instances where the Speaker and the Majority Leader are of the same party, the power would shift to the Senate Minority Leader.[124] Similarly, under H.R. 3195, the eleven judges would be appointed as follows: the President would designate two, a majority of the Supreme Court shall designate one, and the Speaker and Minority Leader of the House, as well as the Majority and Minority Leaders of the Senate will each designate two.[125] Separately, appointments to the FISCR would require approval by a majority of the Supreme Court.[126]

At first glance, the reforms embodied in H.R. 2586 and H.R. 3195 appear to significantly improve the existing system. Both proposals, for example, effectively address the concentration of power critique and thereby strengthen the legitimacy of the court. Moreover, each proposal will achieve political diversity by splitting the power of appointment across party lines. Despite these advances, however, both proposals suffer from two significant

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[118] *See* H.R. 2586, *supra* note 24.

[119] *See* Press Release, Rep. Steve Cohen, At Surveillance Oversight Hearing, Cohen Sheds Light on Extreme Partisan Tilt of Secret FISA Court (July 17, 2013), http://cohen.house.gov/press-release/surveillance-oversight-hearing-cohen-sheds-light-extreme-partisan-tilt-secret-fisa, *archived at* http://perma.cc/DQ7M-BRZN.

[120] *See* H.R. 3195, *supra* note 26.

[121] *See* Press Release, Rep. Steve Cohen, *supra* note 119.

[122] *See* H.R. 2586, *supra* note 24, § 2(1)(A).

[123] *Id.*

[124] *Id.*

[125] *See* H.R. 3195, *supra* note 26, § 2(1).

[126] *Id.*

drawbacks. First, as drafted, the proposals undermine the court's geographic diversity by removing the requirement, currently codified at § 1803(a), that FISC judges represent at least seven judicial circuits. Second, by vesting the power of appointment primarily in elected officials, the proposals risk creating or enlarging the political dimension of national security policy, a proposition many may find unpalatable.

C. Applying Art. II, § 2 to the FISC: H.R. 2761 - Presidential Appointment of FISA Court Judges Act

On July 19, 2013, Rep. Adam Schiff, a Democrat from California, introduced H.R. 2761: The Presidential Appointment of FISA Court Judges Act.[127] In Rep. Schiff's own words, the proposal seeks to "ensure that the Foreign Intelligence Surveillance Court remains a truly independent check on the executive branch."[128] If adopted, the proposal would, purportedly, "result in a more diverse set of judges on the Court, and strengthen the checks and balances that Congress intended to create when the FISC was established."[129] Functionally, H.R. 2761 seeks to replicate the Art. II § 2 appointments process for FISC judges—nomination by the President followed by Senate confirmation.[130]

When viewed through the lens of our three major critiques, H.R. 2761—despite having some positive aspects—exacerbates rather than resolves some of the central concerns. On the one hand, the proposal resolves the theoretical concentration of power critique by subjecting the President's nominees to Senate scrutiny, which helps to preserve the court's legitimacy. Moreover, because the Executive Branch already has a functioning nominations process, and possesses significant familiarity with federal district court judges, the practical concentration of power considerations are also resolved favorably. Still, serious questions remain. For one, there exist legitimate questions as to whether the Art. II, § 2 appointments process is currently functioning properly.[131] These concerns become particularly acute during times of divided government and heightened partisanship.[132] This should give one pause before seeking to replicate the Art. II, § 2 structure in the FISC context. A related issue is how H.R. 2761 would function if a vacancy

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[127] *See* H.R. 2761, *supra* note 25.

[128] *See* Press Release, Rep. Adam Schiff, Rep. Schiff to Introduce Legislation Requiring Foreign Intelligence Surveillance Court Judges to be Nominated by the President and Confirmed by the Senate (July 17, 2013), http://schiff.house.gov/press-releases/rep-schiff-to-introduce-legislation-requiring-foreign-intelligence-surveillance-court-judges-to-be-nominated-by-the-president-and-confirmed-by-the-senate/, *archived at* http://perma.cc/V49L-UQNY.

[129] *Id.*

[130] *See* H.R. 2761, *supra* note 26, § 2(a)(1)(A)-(B).

[131] *See* Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 Ohio St. L.J. 287, 290–98 (2012) (describing the current challenges of the confirmation process and exploring some of its potential causes).

[132] *See id.* at 296 ("Studies show that delays and obstruction are greatest during times of divided government, helping to prove the importance of partisanship in the process.").

occurred during recess; would the President have the power to make recess appointments of FISC judges?[133] More problematically, vesting the power of appointment in the Executive Branch makes no progress on minimizing the FISC's pro-government bias. In fact, it appears to make it worse since the President will possess the primary authority to appoint the very judges entrusted to constrain the Executive's prerogative. Even if one feels that federal judges are sufficiently independent to overcome this conflict of interest in practice, the perception of bias raises legitimacy concerns. Finally, H.R. 2761 is unlikely to produce significant geographic diversity, in part because the proposal removes the existing provisions that ensure at least a minimally diverse geographic representation.

V. A Brief Thought Experiment: Applying Sen. Blumenthal's Proposal Today

A brief thought experiment further demonstrates the strength of Sen. Blumenthal's proposal. While not a precise analogy, let us consider the current makeup of the thirteen chief judges as a proxy for the sorts of district court judges they might nominate to serve on the FISC.[134] For starters, the existing group is politically diverse. Of the thirteen chief judges, seven were nominated to their judgeship by Democratic presidents, while Republican presidents appointed six. Within this group, there are ideologies that range from Judges Alex Kozinski (an independent-minded libertarian conservative) and Edward Carnes (a moderate conservative), to Judges Diane Wood and Robert Katzmann (both moderate progressives).[135] While this group, too, features a significant number of former prosecutors—seven, including several state prosecutors—their collective experience also includes years spent as professors, political scientists, solicitors general, bankruptcy judges, and private practitioners.[136] Admittedly, the continued predominance of prosecutorial backgrounds suggests that reforms to § 1803, even effective ones, may be insufficient to fully overcome the perception or the reality of FISC's pro-government bias.[137] Finally, the statutory requirement that each

[133] *See* U.S. Const. art. II, § 2, cl. 3 (Recess Appointments Clause); *see also* Noel Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (U.S. 2013).

[134] *See* Fed'n of Am. Scientists, *supra* note 97.

[135] It should be noted that classifying judges by ideology will always be an exercise that is too general and too crude to be of much value—and my attempt is no exception. This task is particularly difficult with respect to these four judges, who each have a nuanced jurisprudence. The point of the exercise is simply to illustrate that the collection of Chief Judges—unlike the singular Chief Justice—will often include an array of diverse ideologies.

[136] Biographical data is available for all federal judges at the Federal Judicial Center website, http://www.fjc.gov/history/home.nsf/page/judges.html, *available at* http://perma.cc/WT5E-CSH7. For a current list of FISA judges, see *supra* note 97.

[137] For a broader perspective on this argument, see Editorial, *The Homogenous Federal Bench*, N.Y. Times, Feb. 6, 2014, *available at* http://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?_r=0, *archived at* http://perma.cc/W6QD-YUGN

chief judge nominates a judge from within his or her judicial circuit will necessarily produce a geographically balanced collection of judges.

VI. Conclusion

There exist important parallels between the first half of the 1970s and today. At both times, the intelligence community faced exacting scrutiny as a result of disclosures and revelations that stunned the American public. In the 1970s, the legislative outcome produced FISA, and with it, a specialty court intended to serve as a viable check on the President's surveillance activities. Today, however, it is apparent that the Court neither fulfills that role in practice, nor in the public's perception. As of this writing, it remains uncertain which legislative reforms will result from the current wave of criticism, although the alignment of our three branches of government in favor of reform suggests change will occur once more. This paper argues that § 1803 is an appropriate target for reform. In its current form, § 1803 unnecessarily concentrates power in the office of the Chief Justice, thereby at once undermining the Court's legitimacy and overburdening our highest judicial officer. Moreover, a review of the Court's empirical record at least raises the specter of a pro-government bias, a flaw exacerbated by § 1803. Finally, the Court's ideological, experiential, and, to a lesser extent, geographic homogeneity risk producing jurisprudence that inadequately reflects our society's varied interests. Fortunately, our representatives in Congress have identified and offered proposals intended to resolve these challenges. This paper offers an argument for why Sen. Blumenthal's bill represents an effective solution. Whether this argument is convincing I leave to you. In the meantime, as citizens, it is our obligation to push Congress not just to propose, but also to enact, positive reforms.

("Equally important is diversity of professional experience, which gets less attention. Regrettably, under the Obama administration, federal judges continue to be drawn overwhelmingly from the ranks of prosecutors and corporate lawyers. This deprives the courts of crucial perspectives and reduces public trust in the justice system.").

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