THE CONSTITUTIONALITY OF A PUBLIC ADVOCATE FOR PRIVACY

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OVERVIEW[1]

The creation of a Public Advocate for Privacy is prominently featured in many of the reform proposals regarding the current electronic surveillance program conducted by the United States government.[2] Such proposals are not unexpected, given the various legal impediments (including standing and the state secrets privilege) that have limited litigation of FISA privacy and civil liberties issues that have been brought by private parties.

At present, however, there is no consensus as to the function or structure of the Public Advocate. In one iteration, the Public Advocate merely provides input as an amicus when invited to do so by the Foreign Intelligence Surveillance Court ("the FISC"). This approach has been approved by the House of Representatives. On the other end of the spectrum, the Public Advocate actively litigates (all the way through appeal) individual information requests as well as issues regarding the broad contours of the surveillance program. A bill taking this approach is pending in the Senate. Some have suggested that the Advocate should be housed in the Judiciary (much like the Federal Public Defender). Others have suggested that it should be housed in the Executive Branch.

There is very little (if any) constitutional controversy regarding the more modest (amicus) approach. The discussion regarding the constitutionality of the Public Advocate has been focused on its more robust incarnation. This paper addresses those concerns, and in particular discusses certain questions that have been raised in an analysis performed by the Congressional Research Service ("CRS").[3]

We conclude that the constitutional issues that have been raised can be surmounted.

Article III and Standing. The principal constitutional challenge that may be lodged against the Public Advocate concerns Article III standing to litigate privacy disputes. In this connection we look at standing to litigate specific individual surveillance activities as well as standing to contest broad general orders that set policy for the surveillance programs. We conclude that the "third party" standing doctrine and the "government interest" doctrine, taken together, provide a firm basis for supporting the conclusion that the Public Advocate would have standing to litigate the full array of issues that arise before the FISC. We suggest how legislation might be crafted to avoid doubt on these issues.

Article II and the Appointments Clause. The CRS Report has raised the question whether the Public Advocate should be considered to be a "principal officer" that would require Senate

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[1] This White Paper was commissioned by AOL Inc.

[2] The term used to refer to such an attorney varies in different proposals; this paper will refer to the position as a "Public Advocate" or simply as "the Advocate."

[3] This paper focuses on those constitutional issues related to the creation of a FISA Public Advocate discussed in INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES (Oct. 25, 2013) (hereinafter "CRS Report"), *available at* http://www.fas.org/sgp/crs/intel/R43260.pdf. The CRS subsequently published another report focused on constitutional issues related to the potentially mandatory involvement of an amicus curiae in FISC proceedings under certain legislative proposals. *See* REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES (Jan. 16, 2014) (hereinafter "Second CRS Report"), *available at* http://www.fas.org/sgp/crs/intel/R43362.pdf. The concerns raised are largely variants of the issues raised in the robust "full litigation" iteration of the Advocate and are therefore not separately addressed in this paper.

confirmation. It is our conclusion that the Public Advocate should properly be viewed as an inferior officer and therefore would not require Senate confirmation.

Separation of Powers Concerns. Finally, we have looked at the question of whether the Public Advocate should be housed in the Judicial or the Executive branches of the federal government. Different constitutional concerns arise from these alternatives. Housing the Public Advocate in the Judiciary raises separation of powers concerns. Housing it in the Executive Branch raises intra-branch litigation concerns. While we believe that there is a reasonable basis to house the Public Advocate in either branch, the precedent of the Federal Public Defender service militates in favor of housing the Public Advocate in the Judiciary.

This paper does not opine on the best outcome as a matter of policy. It is our view, however, that the policy debate regarding the Public Advocate can proceed unencumbered by the shadow of any alleged constitutional infirmity.

I. BACKGROUND: CURRENT PROPOSALS

In order to provide a background for the discussion of the constitutionality of the Public Advocate, we provide a very brief overview of various proposals as of the date of this paper, with an understanding that they continue to evolve.

A. THE ADMINISTRATION'S PROPOSALS

After the disclosures of various classified intelligence programs in the summer of 2013, and the resulting public debate about the constitutionality and propriety of these programs, President Obama directed the establishment of the Review Group on Intelligence and Communications Technologies. The Review Group was tasked with assessing "whether . . . the United States employs its technical collection capabilities in a manner that optimally protects our national security and advances our foreign policy while appropriately accounting for other policy interests." *See* Press Release, Presidential Memorandum – Reviewing Our Global Signals Intelligence Collection and Communications Technologies (Aug. 12, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/12/presidential-memorandum-reviewing-our-global-signals-intelligence-collec. The Review Group released a report on December 12, 2013 that included a recommendation to "create the position of Public Interest Advocate to represent privacy and civil liberties interests before the [FISC]," among many other recommendations. The President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World 36 (Dec. 12, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

While the report does not give a specific recommendation on the exact form the Public Interest Advocate should take, the group recommended that the Public Advocate have the authority to intervene in cases that pose "difficult questions of statutory or constitutional interpretation." *Id.* at 203. The group recommended that the Public Interest Advocate receive docketing information in order to intervene on its own initiative. The report also discussed several possibilities for housing the Advocate, including having a full-time member of a new Executive Branch body, the Civil Liberties and Privacy Policy Board (CLPPB), be the Advocate, or having the CLPPB outsource the responsibilities to a law firm or public interest group. *Id*. at 203-04.

After the release of the Review Group's report, President Obama officially endorsed the creation of a Public Advocate in a January 17, 2014 speech, albeit with a slightly different vision for the Advocate. In his speech, President Obama called on Congress to pass legislation that would create a panel of non-governmental "advocates" who would "provide an independent voice in significant [FISC] cases" in order "[t]o ensure that the court hears a broader range of privacy perspectives." *See* Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.[4] On March 25, 2014, legislation to implement the President's proposal was introduced in the House. FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. (2014).[5]

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[4] A video of the President's speech can also be viewed at http://www.youtube.com/watch?v=p4MKm2uFqVQ.

[5] This bill creates a panel of one or more amicus curiae, which "may" be appointed to assist in any FISA proceedings. H.R. 4291 § 5. Notably, the legislation does not create any appellate rights for the amicus curiae. As noted above, there is very little, if any, constitutional controversy regarding the amicus proposal. *See* Second CRS Report at 11-13.

B. LEGISLATIVE PROPOSALS

In addition to the Review Group's report and President Obama's speech, there has been an array of reform bills introduced in Congress. The bills vary widely in their details, but they can be divided into essentially two different concepts of the Public Advocate.

The first concept of the Advocate is that of an advisory role, similar to that of a traditional *amicus* in litigation. In this concept, the Advocate would be an attorney, or panel of attorneys, who is kept apprised of key legal issues arising in matters before the FISC. The Advocate would have the authority to submit briefs to the FISC regarding novel legal or technological issues. The Advocate, however, would not actually litigate specific surveillance requests or general orders at the FISC or through the appellate process. On May 22, 2014, the House of Representatives approved a bill that takes the amicus model approach. *See* USA Freedom Act, H.R. 3361, 113th Cong. (2013).

The second concept of the Advocate is cast in a more adversarial role. Under this approach, the Advocate would have the authority to litigate a case fully. The bill presently pending in the Senate allows the Advocate to directly monitor the FISC's docket and intervene in cases with the FISC's permission, *see* FISA Court Reform Act of 2013, S. 1467, 113th Cong. Under this proposal, the Advocate would be tasked with "vigorously advocating . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention," and would have authority to appeal FISC decisions. *Id.*

II. ARTICLE III STANDING CONSIDERATIONS

Standing challenges can be anticipated to the more robust version of the Public Advocate, if only because they have occupied a prominent position in the litigation of FISA issues in the cases brought by private parties. As noted below, the response to these challenges may vary depending on whether the Public Advocate is litigating individual surveillance requests on behalf of specific intelligence targets or whether it is litigating broad general orders that set the policy for the FISA process.[6] We believe that standing objections can be surmounted in either context.

A. THE APPLICABILITY OF ARTICLE III TO FISA PROCEEDINGS

There is a threshold question of whether the constraints of Article III apply to FISA proceedings. One might argue that FISA proceedings need not comply with Article III because such proceedings are non-adjudicatory, non-adversarial, and merely incidental to the federal Judiciary power. *See Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988).

As noted in the CRS Report, however, there are problems with the "incidental" argument under *Morrison* and *Mistretta*, and both the United States Department of Justice and at least one federal court have recognized that FISA proceedings satisfy Article III's case-or-controversy requirement. *See* CRS Report at 18-19. We agree with the CRS that FISA proceedings are

[6] The FISC has issued several "Primary Orders" that define the scope of the government's surveillance program. *See, e.g.*, Primary Order 13-80 (Apr. 25, 2013) (setting parameters of telephony metadata collection), *available at* http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf.

sufficiently adversarial so as to invoke Article III. Indeed, the addition of the Public Advocate is intended to assure the adversarial nature of the process.

B. CURRENT VIEWS REGARDING THE STANDING OF THE PUBLIC ADVOCATE TO LITIGATE BEFORE THE FISC

1. The CRS Analysis

The CRS Report argues that a more robust version of the Public Advocate could not meet traditional Article III standing requirements. First, the CRS argues that the Public Advocate himself would not have standing because he would not have personally suffered a concrete and particularized injury. Critics of the constitutionality of the Public Advocate may contend, as the CRS does, that, by seeking to vindicate privacy interests, the Public Advocate is merely litigating a "generalized grievance" insufficient to grant standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (holding that the "injury-in-fact" requirement of standing could not be "satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive Branch observe the procedures required by law").

Second, the CRS dismisses the viability of third party standing by making two principal arguments: 1) the interest of the public at large is too abstract and widely shared to support third party standing; and 2) the Public Advocate is not a true agent of the public's interest because (a) the public has not authorized the Public Advocate to act as its agent, and/or (b) the required elements of an agency relationship, such as the power to control the litigation and the power to remove, are not present in the Public Advocate-general public relationship.

The CRS concludes that the only viable path to standing for the Public Advocate is as an officer of a government agency and, therefore, an agent of the government. However, the CRS contends that this approach would run into difficulties to the degree that the Public Advocate was an actual litigant given the doctrine governing intra-government litigation. As noted below, *see* Part IV.B *infra*, we believe that this concern can be overcome.

2. The Lederman & Vladeck Analysis

Professors Lederman and Vladeck argue that the issue of standing to participate in FISA proceedings is a "red herring" because properly drafted legislation would create a Public Advocate that is merely an additional lawyer weighing in on a particular case, rather than an additional party needing to satisfy traditional standing requirements. In other words, assuming that FISA proceedings satisfy Article III's case-or-controversy requirement, as we do here, the addition of a lawyer, rather than a party, to the proceedings raises no new Article III concerns.

Professors Lederman and Vladeck, however, believe that the issue of appellate standing for the Public Advocate presents a different question. They provide the useful insight that properly drafted legislation that specifies the representative nature of the Public Advocate, similar to a guardian ad litem, could circumvent the appellate standing constitutional issue. As noted below, we agree with their conclusion on this point.

C. A RESPONSE TO THE CRS ANALYSIS

On balance, we believe that if the legislation is appropriately structured, both government agent standing and third party standing could provide a reasonably solid basis to counter an

Article III challenge to the Public Advocate. There are two primary responses to standing concerns, depending on the nature of the proceeding.

First, where the privacy interests at issue concern the public as a whole (as distinct from those of specific individuals), the statute would state that the Public Advocate is representing the government's interest that the privacy of its citizens not be unlawfully trespassed and would specifically authorize the Public Advocate to sue in order to protect that interest. In such circumstances, the Public Advocate would have standing as an employee, or agent, of the government. We note that this broad governmental interest should be sufficient to provide standing whether the matter that is being litigated is a specific surveillance request or a general order setting the terms of the surveillance program. In either case, the interest of the government that its privacy laws be appropriately enforced would provide standing for the Public Advocate.

Second, where specific information requests are presented to the FISC that affect particular individuals, the Public Advocate could be authorized by statute to serve as the third party representative of those individuals. We note, however, that such "third party standing" might only be applicable to cases where the Public Advocate is litigating specific surveillance requests as opposed to broad general orders.

1. Government Agent Standing to Represent the Interests of the Public as a Whole

a) Government interest as a cure to standing objections

Just as a private individual must demonstrate injury-in-fact in order to have standing to sue, the government must show "it has such an interest in the relief sought as entitles it to move in the matter." *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888). Case law, however, recognizes the government's standing to sue in order to protect its general interest in ensuring that its laws are appropriately enforced.

Government interest standing has been upheld in the context of cases where the government sued to protect the civil rights of its citizens. *See, e.g., United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 335-36 (E.D. La. 1965) ("We resolve any doubt [as to the government's ability to sue] in favor of the Government's standing to sue in a case of this kind. In its sovereign capacity the Nation has a proper interest in preserving the integrity of its judicial system, in preventing klan interference with court orders, and in making meaningful both nationally created and nationally guaranteed civil rights."). This result flows from the general principle that the federal government has broad authority to sue to "promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare." *In re Debs*, 158 U.S. 564, 584 (1895) (upholding the government's standing to seek judicial relief to enjoin the Pullman strike of 1894 in part because the federal government's power to regulate interstate commerce impliedly authorized it to bring suit to relieve any burdens on such interstate commerce).

b) The utility of express statutory language defining the government interest and authorizing government suits

In the past hundred years, the case law has focused on whether the government has standing to sue in the absence of statutory authorization. If no relevant statute explicitly authorizes the government to sue, the government's action will fail for lack of standing absent the presence of certain recognized government interests that provide the basis for concluding that there is an implied authority to sue. *United States v. Mattson*, 600 F.2d 1295, 1300 (9th Cir. 1979); *see also United States v. Solomon*, 563 F.2d 1121, 1127-28 (4th Cir. 1977). The bases for an

implicit grant of authority to sue include: the government's right to sue to enforce its property interests, the government's interest in effecting certain legislative schemes that provided no enforcement provision, the government's interest in protecting the public from fraudulent patents, the government's interest in preserving national security, and the government's interest in relieving burdens on interstate commerce. *Mattson*, 600 F.2d 1295 at 1298-99 (collecting cases).

Thus, while there may be limits to government standing in the absence of express statutory authority, the presence of clear statutory authority appears to address most standing concerns. *Cf.* Erwin Chemerinsky, Federal Jurisdiction 118 (6th ed. 2011) (observing that the federal government's right to litigate in a *parens patriae* capacity is rarely tested because it usually sues under a specific statutory authority). Indeed, Chief Justice Roberts has recognized the general principle that Congress may write legislation in order to "elevate[] injuries that were not previously legally cognizable to the status of legally enforceable rights," "'the invasion of which creates standing.'" John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1228-29 (1993) (quoting *Lujan*, 504 U.S. at 578). So long as the government's legal interest is properly defined, then, Congress has the power to legislatively create an interest and authorize an agent of the government to sue on its behalf in case that interest is harmed.

The efficacy of express statutory authority to sue and a clear statement of the government interest has been tested in litigation. In direct response to the successful challenges to the attorney general's standing to sue to protect the constitutional rights of institutionalized mentally disabled individuals in *Mattson* and *Solomon*, Congress passed the Civil Rights of Institutionalized Persons Act ("CRIPA") and explicitly authorized the attorney general to sue in such circumstances. *See* 42 U.S.C. § 1997a ("Whenever the Attorney General has reasonable cause to believe that any State . . . or agent thereof . . . is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions . . . , the Attorney General . . . may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate."). CRIPA has subsequently been challenged on grounds other than standing, but the attorney general's standing to bring suit under the statute has not been questioned. For example, in ruling on one such challenge, a court uncontroversially described CRIPA as "a standing statute" that "permits the Attorney General to institute an action for equitable relief when he has reasonable cause to believe that inmates are being subject to egregious and flagrant conditions that violate their constitutional rights." *United States v. Erie Cnty.*, 724 F. Supp. 2d 357, 366 (W.D.N.Y. 2010).

Thus, to further support the Public Advocate's standing as a government agent, it would be useful for legislative drafters to articulate a clear government interest in the statute and to explicitly authorize the Public Advocate to vindicate that interest by appearing in FISA proceedings and appealing FISC decisions when appropriate. It is for this reason that we recommend that the legislation expressly state: (1) that it is an important interest of the United States that the privacy of its citizens be protected, and (2) that the Public Advocate may appear before the FISC and appeal FISC rulings in order to protect such interest. Adverse FISC rulings could impair and harm this concrete governmental interest, confirming the Public Advocate's argument for standing to litigate these issues.

2. Third Party Standing: The Public Advocate can be Structured to Constitute a Valid Agent of Individuals Adversely Affected by Information Requests

The Public Advocate should be able to invoke the doctrine of "third party standing" to overcome Article III challenges for at least certain cases that it would litigate. Under this doctrine, a third party may be authorized to represent the interests of non-governmental actors by clear statutory authority. Such authorization is particularly sound when the third party representative is a government official. *Cf. Erie Cnty.*, 724 F. Supp. 2d at 366. In reaching this conclusion, we have considered (a) the contours of effective representation under the Supreme Court's decision in *Hollingsworth v. Perry*, and (b) the limits of third party/representative standing when applied to the litigation of general orders setting forth policy guidelines regarding the surveillance program as distinct from individual surveillance requests.

a) Effective representation under Hollingsworth v. Perry

In *Hollingsworth v. Perry*, the Supreme Court noted several factors that it would consider when determining whether legislation created an agency relationship that would support third party standing. 133 S. Ct. 2652, 2663 (2013). Although *Hollingsworth* on its face applies only to private parties seeking third party standing in the absence of statutory authorization, its analysis of the agency relationship is helpful when structuring legislation authorizing the Public Advocate to sue on behalf of third parties.

The first critical element of an agency relationship is the right of the principal to control the agent. *Id.* at 2666. Legislation that makes the Public Advocate subject to removal would introduce this element of control. *Id.* at 2666-67. On this pivotal issue, the norms of traditional agency law will need to confront the realities of the contemporary security state. It is true that control would not be exercised by the specific individuals who are subject to surveillance, given that, by definition, they would not know they were subject to surveillance at the time that the Public Advocate was acting on their behalf. But to conclude that an individual who is under surveillance must be denied any legal representation whatsoever because she is barred from knowing of the existence of the proceeding against her would appear to transgress fundamental due process principles.

Such a result would amount to an invidious constitutional "Catch-22." That an individual must be deprived of *some rights* (the right to know that there is a pending investigation) does not require her to be denied *all rights* to an adversarial process. *Cf. United States v. Will*, 449 U.S. 200, 213-14 (1980) (holding that, where jurisdiction otherwise would not be proper, the "Rule of Necessity" prevents the "denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated").

A far more satisfying framework would accept the view that principles of agency are satisfied where the people, through their elected representatives, endorse legislation that delegates the right to represent individual privacy interests to a government officer. Making the performance of that officer subject to review and the officer herself subject to removal would provide an effective surrogate for direct control of this "agent" by the affected individuals themselves. As long as the legislation clearly provided for this delegation of control and granted the public's consent to it, the Public Advocate would be under the effective control of the affected individuals, albeit through a representative structure.

There is ample precedent for this approach. For example, Federal Rule of Civil Procedure 17(a) notes that, while typically "[a]n action must be prosecuted in the name of the real party in interest," there are exceptions for actions brought by, *inter alia*, "an administrator[,] . . . a

guardian[, . . . or] a party authorized by statute." Federal Rule of Civil Procedure 17(c) provides that a "fiduciary," a "next friend," or a "guardian ad litem" may "sue or defend on behalf of . . . an incompetent person." A reasonable argument can be made that the secret procedures of the FISC render otherwise-capable individuals "incompetent," in that they are unable to represent their own interests fully. Accordingly, it is appropriate for the Public Advocate to litigate on behalf of the interests of those individuals.

The additional elements identified as significant under *Hollingsworth* are more easily dispensed with. The second essential element of an agency relationship identified by the Court is the fiduciary obligation of the agent to the principal. 133 S. Ct. at 2667. Legislation that requires the Public Advocate to take an oath of office or that creates a fiduciary duty to the individuals represented could satisfy this aspect of the agency relationship. *Id.*

Finally, the Supreme Court noted the third critical element of the agency relationship, which is the duty of the principal to indemnify the agent for any expenses or losses. *Id.* Without some connection between fees paid or funding provided to the Public Advocate and its authority to take action on behalf of the third party, "authority cannot be based on agency." *Id.* To satisfy this element, legislation should provide that the Public Advocate is funded for the purpose of providing legal services on behalf of individuals whose privacy interests are at stake.

b) The applicability of "third party standing" to the litigation of general orders

To the degree that the Public Advocate litigates general orders that define a surveillance program as a whole, rather than surveillance requests targeting specific individuals, further objections may be raised as to whether the Advocate is acting as a representative of a concrete individual interest. The objections could come in at least two flavors.

The first objection would simply be that the privacy interest of the "principals" (the non-government private citizenry) would be too widely shared and diffuse to provide the basis for standing. Such an objection, however, would appear to be unfounded. *See FEC v. Akins*, 524 U.S. 11, 24-25 (1998) (holding that plaintiffs' injury was sufficiently concrete, even though widely shared, because Congress had by statute defined the FEC's failure to make certain information public as a concrete harm).

A more serious objection, however, might be lodged based on the potentially divergent interests of members of the public that could potentially be subject to a surveillance program governed by a general order. Some general orders might be of such broad applicability that all members of the public would be similarly situated. It is not certain, however, that this would always be the case, and one could envision circumstances in which there is not always a uniform "class interest."

To be sure, our legal system has long recognized the ability of an attorney to represent a broad class of individuals regarding the interests of the class as a whole. The most salient example of this concept is the practice of class action litigation under Federal Rule of Civil Procedure 23.

Thus, where the government seeks an order at the FISC that would "apply generally" to a group of individuals, the Public Advocate could represent those individuals in a manner similar to that contemplated by Rule 23. Moreover, given the lack of an opt-out requirement under at least some forms of class action litigation, the inability for the putative clients of the Public Advocate to opt out of such representation may not be fatal. *See, e.g.*, Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. Rev. 480, 485 (1998) (noting that in class actions seeking injunctive relief, "[c]ourts deny opt out rights . . . because such rights may destroy the benefits of unitary adjudication").

That said, class certification can be a complex process, where the potentially divergent interests of class members can be subject to protracted evaluation. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (holding that a class of employees could not be properly certified due to lack of commonality, seven years after the class action suit was initially filed). Accordingly, it may be that where the interests of the "public as a whole" are at issue—i.e., where general orders are being litigated—the "class representation" model might well have its limits. While it may be possible to create subclasses of the public with more common legal interests, there may still be conflicts within each subclass as to the type of relief desired. In such circumstances, the statutorily defined "government interest" in the protection of the privacy rights of the citizenry may well be the surer basis for overcoming standing objections.[7]

III. ARTICLE II APPOINTMENTS CLAUSE CONSIDERATIONS

A. LEGAL OVERVIEW

Under the Appointments Clause of Article II, Section 2 of the Constitution, Executive Branch appointees are divided into two separate categories, each of which has a different appointment requirement. Certain "Officers of the United States" may only be appointed by the President with the advice and consent of the Senate. Officers subject to this specific appointment process are sometimes known as "principal officers." *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 132 (1976). However, the Appointments Clause provides that "Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, there are two threshold issues in considering whether Article II might pose any limitations on the manner in which the Public Advocate may be appointed. The first is whether the Public Advocate is an officer. If so, the second question is whether she is a principal or an inferior officer.

B. THE PUBLIC ADVOCATE WOULD PROBABLY BE AN "OFFICER"

The CRS concludes that the Public Advocate would be an officer because she would exercise "significant authority pursuant to the laws of the United States." We agree.

This conclusion is consistent with case law defining officers. Not all employees of the United States are officers. *See, e.g., United States v. Germaine*, 99 U.S. 508, 509 (1878) (noting that "nine-tenths of the persons rendering service to the government undoubtedly are" not officers). Rather, only those "exercising significant authority pursuant to the laws of the United States" are considered officers. *Buckley*, 424 U.S. at 126.

In *Buckley*, commissioners of the Federal Election Committee were deemed officers because they had "primary responsibility for conducting civil litigation in the courts of the United States

[7] The non-consensual representation of the individuals in interest might be said to raise concerns based on the norms of legal ethics. While a discussion of this topic is beyond the scope of this paper, we note that the concepts of guardians ad litem and class representation provide models that would appear to meet such objections.

for vindicating public rights." *Buckley*, 424 U.S. at 140. The Public Advocate, at least in its more robust iterations, would plainly meet that test.[8]

C. THE PUBLIC ADVOCATE WOULD LIKELY NOT BE A "PRINCIPAL OFFICER"

1. The Legal Framework

The CRS concludes that a Public Advocate "would likely be considered a principal officer," based on the assumption that a Public Advocate would be independent from other Executive Branch officers. We disagree, and believe that the office of the Public Advocate readily could be structured in a way that makes the position an inferior officer.

The seminal case drawing the line between principal and inferior officers was previously *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, the Supreme Court addressed the constitutionality of an independent counsel position that was not appointed by the President with the advice and consent of the Senate. Accordingly, the Court was required to determine whether the independent counsel was a principal officer, whose appointment was subject to the advice and consent requirements of the Appointments Clause, or an inferior officer. Noting that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear," 487 U.S. at 671, the Court looked to several factors: whether the officer is "subject to removal by a higher Executive Branch official"; whether the officer is "empowered . . . to perform only certain, limited duties"; whether the officer's "office is limited in jurisdiction"; and whether the officer's appointment is "limited in tenure." *Id.* at 671-72.

Because the independent counsel's authority and autonomy were limited in all of these dimensions, the Court concluded that the independent counsel was an inferior officer who need not be appointed by the President with the advice and consent of the Senate. *Id.* at 672. Because the Court felt the independent counsel "clearly f[ell] on the 'inferior officer' side," it did "not attempt . . . to decide exactly where the line falls between the two types of officers." *Id.* at 671.

In *Edmond v. United States*, 520 U.S. 651 (1997), the Supreme Court refined the scope of *Morrison*'s inquiry into what makes an officer "principal" or "inferior." Observing that "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause," 520 U.S. at 661, *Edmond* eschewed the several factors *Morrison* considered. Instead, *Edmond* held that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. In other words, *Edmond* focused on the degree of supervision under which an officer operates. If an official reports to another officer who was appointed with the advice and consent of the Senate—a principal officer—then that official is an inferior officer.

Notwithstanding *Edmond*, *Morrison* has not been overturned and remains good law. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (declining to address the continued viability of *Morrison*); *Intercollegiate Broad. Sys., Inc. v. Copyright*

[8] Some observers have suggested that merely defending privacy rights in already-pending litigation—rather than affirmatively initiating litigation—entails such insignificant authority that it may be done by a person who is not an officer. *See, e.g.*, Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY (Nov. 4, 2013, 1:34 PM), http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/. However, under most scenarios in which the Public Advocate would meaningfully represent individuals' or the public's interest, she would likely be an officer.

Royalty Bd., 684 F.3d 1332, 1337 (D.C. Cir. 2012) (observing that "the major differentiating feature [between principal and inferior officers is] the extent to which the officers are 'directed and supervised' by persons" appointed with Senate advice and consent, but noting that the type of authority exercised by the officer may also still bear on the principal/inferior officer distinction) (quoting *Edmond*, 520 U.S. at 663). In deciding whether the Public Advocate is a principal or inferior officer, a court will likely weigh most heavily the degree of supervision over the position, but may still consider the various other factors articulated in *Morrison*.

2. Application of the Legal Standard to the Public Advocate, and Suggestions for Proposed Legislation

It would seem that, whether the test that is applied is that of *Morrison* or *Edmond*, the position of the Public Advocate likely could, like *Morrison*'s independent counsel, be structured in a way that makes her an inferior officer.

Much like *Morrison*'s independent counsel, the Public Advocate's "duties" and "jurisdiction" would be "limited." 487 U.S. at 671-72. The *Morrison* court found the independent counsel's duties were limited because she could only conduct "investigation and, if appropriate, prosecution for certain federal crimes" committed by high-ranking government officials, and had no "authority to formulate policy." *Id*. Likewise, the Public Advocate would not make policy; further, she would only litigate on behalf of absent third parties in cases that the government had *already initiated*. Also like the *Morrison* independent counsel, the Public Advocate's jurisdiction would be limited. The Public Advocate could only intervene in cases pending before the FISC to represent the public's interest where the government seeks access to records. Both of these factors militate in favor of the Public Advocate being considered an inferior officer.

To the degree that a court were to look to *Edmond*, it would analyze whether the Public Advocate were supervised by a principal officer. On this measure, the Public Advocate would again likely be an inferior officer. The Public Advocate would likely have a fair amount of independence, but, as noted above, her performance would almost certainly be subject to review.

Just as important, the Public Advocate would be subject to removal if her performance were deemed inadequate. *Cf. Edmond*, 520 U.S. at 664. In *Morrison*, the independent counsel was considered "inferior" to the Attorney General despite not reporting to him, because the Attorney General could remove her. Along the same lines, the Public Advocate could formally remain independent, but another official (whether in the Executive or Judicial Branch, as we discuss below) could have the authority to remove her, in order to make the Public Advocate an inferior officer.

Relatedly, we note that several legislative proposals provide for removal of the Public Advocate for good cause shown. *See, e.g.*, FISA Court Reform Act of 2013, S. 1467, 113th Cong.; Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013). Such "for cause" removal protection is not inconsistent with the Public Advocate being an inferior officer; the independent counsel deemed an inferior officer in *Morrison* was similarly subject to removal by the Attorney General only "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs . . . [her] duties." *Morrison*, 487 U.S. at 664.

The Federal Public Defender presents a useful analogy. The Public Defender is appointed to four-year terms by the court of appeals, which also approves the budget related to the Public Defender. It is housed in the judicial branch and considered an inferior officer not subject to

Senate confirmation. Moreover, much like the above-mentioned legislative proposals would provide for the Public Advocate, the Public Defender is removable by the court only in the event of "incompetency, misconduct in office, or neglect of duty." *See* 18 U.S.C. § 3006A(g)(2)(A). Such an arrangement would provide a useful legislative model for the Public Advocate. The Federal Public Defender is discussed in greater detail in Part IV.A, *infra*.

IV. HOUSING THE PUBLIC ADVOCATE: JUDICIAL OR EXECUTIVE BRANCH

When drafting legislation for the Public Advocate, Congress will face a choice of whether to house the Public Advocate in the Judicial Branch or the Executive Branch. While both options raise different issues, we recommend housing the Public Advocate in the Judicial Branch in the first instance. That said, we conclude that housing the Public Advocate in either branch would ultimately be permissible.

A. HOUSING THE PUBLIC ADVOCATE IN THE JUDICIAL BRANCH: SEPARATION OF POWERS CONCERNS

1. CRS Analysis

The CRS Report suggests that housing the Public Advocate in the Judicial Branch may violate separation of powers principles on two grounds: it would (a) unduly expand the powers of the Judiciary or (b) undermine its integrity. CRS Report at 26-28. The CRS Report notes that, in the past, the Supreme Court has deemed it acceptable to house a Sentencing Commission within the Judiciary. *Mistretta v. United States*, 488 U.S. 361 (1989). The CRS Report argues that the Public Advocate, however, raises different and potentially more serious constitutional concerns due to the advocacy nature of such a position.

2. A Response to the CRS Analysis

While the Framers did envision some overlap among the branches, the Supreme Court has cautioned "against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 120-22. Specifically regarding the Judicial Branch, the Court held in *Mistretta* that locating an agency within the branch is constitutional so long as it does not (1) expand the powers of the Judiciary beyond its typical bounds or (2) undermine the integrity of the Judiciary. 488 U.S. at 393. In particular, if the Public Advocate were permitted to fully litigate proceedings before the FISC, FISC Court of Review and Supreme Court, the Public Advocate would, by seeking relief in aid of the legal interests of the United States or a private party, arguably be exercising powers beyond the typical bounds of the Judiciary.

The Federal Public Defender, however, provides a strong precedent for housing the Advocate within the Judiciary. Indeed, the Defender provides a useful model for structuring the office of the Advocate. The Federal Public Defender system, established by the Criminal Justice Act of 1964, Pub. L. 88-255, codified at 18 U.S.C. § 3006A, is housed within the Judicial Branch.

The Act authorized each district to create either a "Federal Public Defender Organization" or a "Community Defender Organization." A "Federal Public Defender Organization" is a federal agency operating under the Judicial Branch and overseen by the Administrative Office of the United States Courts. A "Community Defender Organization" is a corporation that receives federal grant money. Both types of organizations receive their funding from the Judicial Branch.

We are not aware of any cases where the constitutionality of the Federal Public Defender has been challenged, but even if it were it would likely pass a *Mistretta* analysis. It should be noted that the representation of a criminal defendant is not a function traditionally performed by either of the Legislative or Executive Branches. Thus, the establishment of the Federal Public Defender does not "encroach" on powers of the other branches. *Buckley*, 424 U.S. at 120-22. Furthermore, Congress's decision to house the Federal Public Defender in the Judiciary reflects an acknowledgment of the role the Judiciary has always played in the protection of the rights of unrepresented parties. *Cf. Mistretta*, 488 U.S. at 390 (noting that Congress's decision to house the Sentencing Commission in the Judiciary "simply acknowledges the role that the Judiciary always has played, and continues to play, in sentencing").

The Federal Public Defender system has been in place for 50 years and, as noted above, we are not aware of any constitutional challenges to this system. The Federal Public Defender has further entrenched a "tradition" within the Judicial Branch of protecting the interests of unrepresented parties and extended this tradition to representing parties that are incapable of securing their own representation. Given this strong tradition, the Public Advocate would not expand the powers of the Judiciary beyond typical or traditional bounds.

B. HOUSING THE PUBLIC ADVOCATE IN THE EXECUTIVE BRANCH: INTRA-BRANCH LITIGATION CONCERNS

Alternatively, the Public Advocate may also be housed in the Executive Branch. While this may instead raise intra-branch litigation concerns, these concerns can be overcome.

1. The CRS Analysis

Generally, a person may not sue himself. This "long-recognized general principle" stems from the Constitution's "case-or-controversy" requirement. *United States v. ICC*, 337 U.S. 426, 430 (1949). Applied to the federal government, this means that the United States generally cannot sue itself.

The CRS Report concludes that if the Public Advocate is an agent of the government, allowing the Public Advocate to be adverse to the Department of Justice in FISC proceedings would run afoul of this general principle. CRS Report at 24-26. The CRS bases its conclusion on the idea that FISC proceedings involving a Public Advocate would essentially be a dispute between two conflicting sovereign interests. The CRS then argues that Article III requires such a dispute to be resolved by the political process instead of litigation.

2. A Response to the CRS Analysis

a) The "real party in interest" response

Despite the general rule that the United States cannot sue itself, the Supreme Court has recognized several exceptions to this rule. In particular, the Supreme Court has found an exception where one of the real parties in interest is a private party, not the government.

In *United States v. ICC*, the Court upheld the constitutionality of an action where the federal government sued the Interstate Commerce Commission ("ICC") in federal court, despite the fact that the ICC was a federal governmental agency. While the case was nominally *United States v. United States, et. al.*, the Court advised lower courts to "look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." 337 U.S. at 430.

The Court examined the underlying interests in the litigation and remarked that the basic question was whether railroads had illegally demanded payment from the government for services that were not rendered. In other words, the Court found that the dispute was not a policy dispute between two governmental bodies, but rather a property dispute between the government and a private party, the railroads. The Court found this type of property dispute was "of a type which [is] traditionally justiciable" and held that the general prohibition on the government suing itself was not applicable. *Id.* at 430-31.

Thus, there would appear to be little basis for "intra-branch" concerns where the Public Advocate has standing on the basis of its representation of individuals who are the targets of surveillance. Looking "beyond the party name," the dispute is between a private citizen and the government, much like the dispute between the railroads and the government in *ICC*. The Public Advocate is simply acting as the lawyer for that private citizen. Moreover, much like the property dispute in *ICC*, a dispute over constitutional privacy rights is "of a type which [is] traditionally justiciable." *ICC*, 337 U.S. at 430-31; *see, e.g.*, *Roe v. Wade,* 410 U.S. 113, 152-53 (1973).

Nor would such "real party in interest" analysis run afoul of recent case law regarding standing to bring surveillance related suits. The Supreme Court has held that when the standing of private parties is at issue, an "objectively reasonable likelihood" of being the target of intelligence activity is insufficient to garner standing. *Clapper v. Amnesty Int'l*, 113 S. Ct. 1138, 1150 (2013). The CRS Report therefore suggests that, to the degree that the analysis focuses on "real parties in interest," such "real parties in interest" may not be suffering from "cognizable injuries." CRS Report at 26. Such objections, however, would likely fail at least where the Public Advocate is litigating as the representative of actual targets of surveillance, since the injury to their privacy interest would be quite specific and concrete. Thus, far from being a "speculative chain of possibilities," the injury to the "real parties in interest," i.e., the targets of the government's surveillance activities, would be concrete.

Finally, the CRS report argues that later Supreme Court cases have interpreted the *ICC* case narrowly by focusing on how the government was acting as a "statutory beneficiary" or "market participant" by purchasing railroad services. These later cases, however, did not directly address intra-branch litigation concerns. CRS Report at 25-26. For example, the *Newport News Shipbuilding* case relied on by the CRS focused on determining whether an agency met the definition of "[a]ny person adversely affected or aggrieved" under a provision of the labor code. *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127-28 (1995). Notably, the *Newport News Shipbuilding* case concerns statutory interpretation, not intra-branch concerns, and the Court even suggested that Congress could rewrite the statute to "make clear" that an agency qualifies as a "person adversely affected or aggrieved." *See id.* at 130 ("Of course the text of a particular statute could make clear that the phrase is being used in a peculiar sense."). Contrary to the CRS Report's reliance on dicta in *Newport News Shipbuilding*, the *ICC* case remains good law.

b) The response based on the independence of the Public Advocate

The Supreme Court has also found an exception where one of the governmental parties is sufficiently independent from the other governmental party. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court held that a dispute between a Special Prosecutor and the President was justiciable, despite the apparent intra-branch conflicts. The Court rejected the idea that the "mere assertion of a claim of an 'intra-branch dispute'" is enough "to defeat federal jurisdiction" under Article III. *Nixon*, 418 U.S. at 693. Instead, the Court looked beyond the caption and held that the case was justiciable because the Special Prosecutor was sufficiently

independent from the Executive Branch and because the issues in dispute (production of evidence and assertion of privilege) were "'of a type which are traditionally justiciable.'" *Id.* at 697 (quoting *ICC*).

To satisfy the *Nixon* rule, the Public Advocate would have to be "independent" from the Executive. As noted above, a completely independent officer in the Executive Branch would likely require Senate approval, *see* Part III.C.1, *supra*, and could lack standing, *see* Section II.C.2. We believe that it is possible to establish sufficient independence for the Public Advocate to avoid intra-branch concerns without running afoul of such Article II and Article III considerations.

In particular, the Special Prosecutor in *Nixon* provides a model for how to structure the Public Advocate in the Executive Branch to simultaneously satisfy standing concerns, avoid the requirement of Senate confirmation, and avoid intra-branch litigation concerns. The Special Prosecutor in *Nixon* was created in the Office of Watergate Special Prosecution Force, within the Department of Justice, pursuant to regulations promulgated by the Attorney General under authority vested in him by statute. The Special Prosecutor was given only limited jurisdiction,[9] but was afforded "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice." 38 Fed. Reg. 30739 (November 7, 1973). Furthermore, the regulation explained that "the Attorney General will not countermand or interfere with the Special Prosecutor's actions" and that "the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given." *Id.* (as amended by 38 Fed. Reg. 32805 (November 26, 1973)). Specifically, the regulation stated that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part" and without consulting several enumerated members of Congress. *Id*. Despite this unique structure, the Supreme Court held that "it would be inconsistent with the applicable law . . . to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision." *Nixon*, 418 U.S. at 697.

Thus, similar to the Special Prosecutor, the Public Advocate could be created within the Department of Justice as a subordinate officer to the Attorney General. Furthermore, the Public Advocate's jurisdiction could be limited to representing the interests of the United States in its citizens' privacy before the FISC, FISC Court of Review and Supreme Court. Finally, the Public Advocate could be subject to removal, but only for "extraordinary improprieties."

c) The limits to "real party in interest" analysis as a reason to house the Public Advocate in the Judiciary

As noted above, there may be cases in which the interest that the Public Advocate is representing are those of the United States and not of specific targets of surveillance. In such cases, the defense to the intra-branch challenge might rely on the *Nixon* (independence) rather than the *ICC* (real party in interest) doctrine.

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[9] Namely, the Special Prosecutor was given authority for "investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election, . . . allegations involving the President, the White House Staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30738-9 (November 7, 1973).

It is our view that a response based on *Nixon* would likely prevail. Nonetheless, to avoid any uncertainty on this point it may well be preferable to house the Public Advocate in the Judicial Branch, especially given the precedent of the Federal Public Defender.

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[10] Covington & Burling would like to thank Professor Stephen Vladeck and Professor Vicki Jackson for their early review of an outline of this white paper. Their input is greatly appreciated. That said, the views expressed in this paper are those of Covington & Burling and do not necessarily reflect the views of Professors Vladeck and Jackson.