

Senate Committee on the Judiciary

“Continued Oversight of U.S. Government Surveillance Authorities”

December 11, 2013

Questions for the Record from Ranking Member Charles E. Grassley

Julian Sanchez

1. Concerns have been raised about whether the advocate position that would be established under the USA FREEDOM Act is constitutional. For example, it’s unclear whether the advocate would have constitutional standing to be a party before the FISA Court. And it may not be consistent with the separation of powers to create an office housed in the judicial branch, without any oversight from the executive branch, which appears to possess executive branch powers and responsibilities. Do you share any of these concerns that may be important to those of us who interpret the Constitution strictly? If so, what are they?

ANSWER: I do not believe the creation of a special “advocate” to argue before the FISC in cases involving novel or complex questions of law presents any inherent constitutional difficulties on either standing or separation of powers grounds. The Advocate would serve in an effectively advisory role before the court, exercising no independent executive powers. Though superficially appearing before the court in as an adverse party, the practical role of the Advocate would be no different than that of an amicus or, for that matter, a thoughtful clerk ensuring that the FISC judges had an opportunity to consider a broad range of constitutional and statutory arguments bearing on the issue at hand.

If there are questions of standing stemming from the “cases or controversies” clause, at least with respect to arguments before the FISC or FISCR, they do not arise with the creation of an Advocate, but with the existence of the FISC itself, as a court structured to hear ex parte arguments not ultimately intended to result in—or, indeed, affording in most cases any opportunity for—an eventual adversarial proceeding between the government and the target of surveillance. If we assume the constitutionality of the basic FISA structure itself, the addition of an advocate presents no further constitutional problems. Standing problems *would* arise if the Advocate were intended to have further recourse to the Supreme Court, since she would represent no genuinely adverse party with a direct personal stake in the Court’s ruling, but again, that would raise questions distinct from any implicated by the Advocate’s role within the FISC itself. Given the profound Fourth Amendment implications of cases decided by the FISC, however, it may be desirable to consider mechanisms that might enable more frequent appellate review of FISC rulings by the Supreme Court, especially in light of that Court’s ruling in

Amnesty v. Clapper, which would appear to effectively foreclose review even in cases where NSA programs entail ongoing Fourth Amendment searches affecting large numbers of American citizens whose identities are unlikely to ever be known.