SACK, Circuit Judge, concurring:

I fully concur in Judge Lynch's opinion for the Court. I nonetheless take the liberty of offering several additional observations about the import of today's decision.

Because our decision is based on our reading of a federal statute, not the Constitution, Congress can in effect overrule it. The enactment of a statute amending or supplanting the portion of section 215 that, until now, has been interpreted to authorize the NSA's bulk collection program would likely do the job, subject, of course, to

g just that.

[1] And the plaintiffs have suggested that their grievance could be addressed by a statutory amendment

[1] *See* Jonathan Weisman & Jennifer Steinhauer, *Patriot Act Faces Curbs Supported by Both Parties*, N.Y. Times, May 1, 2015, at A1; *see also, e.g.*, Ellen Nakashima, *With Deadline Near, Lawmakers Introduce Bill to End NSA Program*, Wash. Post, [illegible] *Imperilled as it Competes with Alternative Effort in the Senate*, The Guardian, Apr. 28, 2015, http://www.theguardian.com/us-news/2015/apr/28/house-nsa-reform-bill-senate-usa-freedom-act; H.R. 1466, 114th Cong. (2015).

replacing the bulk collection program with an arrangement under which the telephone companies will retain the metadata in question, subject to valid government subpoenas. *See* Argument Tr. at 7-8 (Sept. 2, 2014) (statement by counsel for the appellant); Jonathan Weisman & Jennifer

such legislation, its future application to particular acts or practices of the federal government and others, or its propriety under the Constitution. The courts are charged with the responsibility of making those judgments. They are, as an institution, tasked with the duty, in the context of cases or controversies properly brought before them, to seek to reconcile the never completely reconcilable tension between the individual's interest in privacy and right to civil liberties and the government's duty to protect American lives and property.[2]

The role of Congress under Article I of the

The FISC, like the quotidian federal district courts and courts of appeals, is established under Article III of the Constitution.[3] But because of its specialized role dealing with matters touching on national security concerns, it conducts its proceedings differently. Two of the fundamental characteristics of ordinary Article III courts that are often considered central to their mission are transparency ("openness") and a properly functioning adversary system. Neither transparency nor a true adversary system characterizes the operation of the FISC.

Thus, most Article III courts, including this Court, operate under a strong presumption that their papers and proceedings are open to the public. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980).

> The value of openness lies in the fact that people . . . can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co. v. Superior Court of Cal., 464 U.S.

institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.*, 448 U.S. at 572.[4]

The FISC, by contrast, operates largely behind closed doors. While it may do so at the cost

civil cases touching on state secrets); *United States v. Stewart*, 590 F.3d 93, 125-32 (2d Cir. 2009) (describing at length the methods employed when a criminal defendant in federal district court seeks FISA documents); *Doe v. CIA*, 576 F.3d 95 (2d Cir. 2009) (civil) (describing this Court's manner of conducting an appeal involving state secrets). In such cases, courts typically operate publicly only to the extent they think practicable after evaluating the basis of the government's purported need for secrecy and the effects of such secrecy on the other parties before them.

The absence of a robust adversary system in the FISC may be another matter. It requires little beyond the common experience of bench and bar to establish the general importance to courts and the parties before them of hearing from all sides of a dispute. The Supreme Court has recognized that:

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those are

Considering the issue of advocacy in the context of deliberations involving alleged state secrets, and, more broadly, the "leak"[6] by Edward Snowden that led to this litigation,[7] calls to mind the disclosures by Daniel Ellsberg that

Cir.) (*en banc*) (per curiam), *rev'd*, 403 U.S. 713 (1971) (per curiam). The issues in that case, like the concerns that led to the deliberations of the Church Committee, and then to FISA's enactment and the creation of the FISC, arose, as Judge Lynch puts it, during "the early 1970s, in a climate not altogether unlike today's." *Ante* at 5. His observation is reminiscent of Judge Gurfein's somber contemporary dictum about the same era: "These are troubled times." *Pentagon Papers*, 328 F. Supp. at 331.

The disclosures, the national security issues, and the challenges facing the Pentagon Papers district court and the FISC are different. There is, however, at least one aspect of the Pentagon Papers cases that may be instructive here.

The FISC's hearings are, as noted, held *ex parte*. The targets of their proceedings are ordinarily not represented by counsel. (Indeed it seems likely that targets are usually unaware of the existence of the proceedings or their subject.) In the Pentagon Papers case, the court held a hearing, part in public and part *in camera*, to determine the facts of the case and the whether further publication of the papers would endanger legitimate national security interests. are

had access to the material that the government was attempting to keep from further public view; barring their presence in the otherwise closed hearing room would not have advanced the legitimate security interests of the United States. Their attendance at the hearing apparently turned out to be pivotal.

During the public portion of the hearing, there was little indication that Judge Gurfein was sympathetic to the *Times'* position that further publication of the Papers, which were marked classified, was constitutionally protected or otherwise permissible. *See* David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* 107-52 (1996). As the public portion of the hearing closed, "the government had reason to be confident that it would prevail, and the *Times* lawyers could take very little comfort from what had so far occurred." *Id.* at 152.

It was only upon the *Times'* cross-examination of the first witness in the subsequent closed-door hearing, in which the *Times'* counsel focused relentlessly on what, specifically, in the Papers would present a threat to the United States if disclosed and why, that Judge Gurfein's apparent leaning began to shift towards the position of the *Times. Id.*; *see also* James C. Goodale, *Fighting for the Press: The Inside Story of the Pentagon Papers and Other Battles* 105-07 (2013) (describing the

participation of counsel for the *Times* at the closed-door hearing). The Judge's own questioning of the witnesses[9]

as it was by the participation of legal representatives of all parties, was right.[10]

It may be worth considering that the participation of an adversary to the government at some point in the FISC's proceedings could similarly provide a significant benefit to that court. The FISC otherwise may be subject to the understandable suspicion that, hearing only from the government, it is likely to be strongly inclined to rule for the government. And at least in some cases it may be that its decision-making would be improved by the presence of counsel opposing the government's assertions before the court. Members of each branch of government have encouraged some such development.[11]

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[10] *See* Rudenstine, *supra*, at 326-29. Some years later, Erwin Griswold, who, as the United States Solicitor General, argued the case in the Supreme Court, conceded as much. He wrote, "I have never seen any trace of a threat to the national security from the publication [of the Papers]. Indeed, I have never seen it even suggested that there was such an actual threat." Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25. He further observed: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." *Id.*

[11] They include President Obama, Transcript of President Obama's Jan. 17 Speech on NSA Reforms, Wash. Post, Jan. 17, 2014, http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcbd84_story.html, judges who previously served on the FISC, *see* Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. Times, July 10, 2013, at A16; Judge James G. Carr, *A Better Secret Court*, N.Y. Times, July 23, 2013, at A21, and some

Having said all that, I reiterate that we do not assert any institutional capability to provide, recommend, or in the absence of a case or controversy, pass on the propriety of FISC's deliberations. As Judge Lynch's opinion makes clear, it is Congress that must decide in the first instance under what circumstance the government can obtain data touching upon conflicting national security and personal privacy interests.

Recognition of the dangers to the fundamental rights of citizens that inevitably arise when the nation attempts effectively to treat grave external threats to lives and property was not dependent on the creation of telephone metadata or the preparation of secret reports on the origin of the Vietnam War. It is as old as the Republic.

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and

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But see Letter from Hon. John D. Bates, Director, Admin. Office of the U.S. Courts, to Hon. Dianne Feinstein, Chairman, Select Comm. on Intelligence, U.S. Senate (Jan. 13, 2014) (arguing that "[t]he participation of a privacy advocate is unnecessary—and could prove counterproductive—in the vast majority of FISA matters, which involve the application of a probable cause or other factual standard to case-specific facts and typically implicate the privacy interests of few persons other than the specified targets").

> political rights. To be more safe, they at length become willing to run the risk of being less free.

The Federalist No. 8 (Alexander Hamilton). We judges have an often critical part to play in resolving these issues, but only by addressing them in individual cases, according to the law and Constitution, and as best we can.