

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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TCP Calls for Strong Public Representative at Terror Court

Sloan: "Public deserves a full, independent voice before the FISC whenever it considers surveillance programs that jeopardize fundamental rights to privacy"

WASHINGTON, D.C. -- A bipartisan group of national security and foreign intelligence experts, including a former judge who served on the Foreign Intelligence Surveillance Court, is urging the creation of a special advocate to protect the public's rights before the secretive terrorism review panel when the Senate takes up surveillance reform legislation.

A [report released](#) by The Constitution Project's Liberty and Security Committee earlier today calls on Congress to create "meaningful adversarial participation" before the Foreign Intelligence Surveillance Court, or FISC, including a security-cleared special advocate with a specific mandate to represent the public's privacy and civil liberties interests whenever the government seeks broad surveillance authority.

"I strongly disagree with those who suggest the FISC is a rubber stamp for government surveillance requests," said Judge James Robertson, a signer of the report who served on the FISC. "But the addition of an adversary would improve the FISC's ability to ensure the government properly complies with constitutional and legal limits while performing its necessary national security activities."

"The FISC should be obligated to hear from a special advocate for civil liberties whenever it weighs any government request for broad surveillance authority against the public's constitutional guarantee of freedom from unreasonable searches and seizure," said Virginia Sloan, president of the bipartisan legal watchdog group.

Surveillance reform legislation passed last week by the House, called the USA Freedom Act, creates a pool of private lawyers to appear as "friends of the court" when appointed by the FISC, but provides an unreviewable means for FISC judges to sidestep that requirement simply by asserting that such an appointment is unnecessary.

Sloan said this approach fails to provide the public much protection beyond procedures currently in place. "The public deserves a full, independent voice before the court whenever it considers surveillance programs that might jeopardize fundamental rights to privacy," she said.

The new report suggests any effort by Congress to provide for more meaningful adversarial participation before the FISC should give the special advocate an unconditional right to participate in any case in which the FISC is asked to approve non-individual surveillance authorizations, including any production orders under section 215 of the USA Patriot Act or directives under section 702 of the FISA Amendments Act.

The special advocate should also be empowered to represent all U.S. persons who are subject to the broad surveillance orders, and should have the authority to litigate on their behalf.

Currently, many of the government requests to the FISC simply seek approval to collect limited information on specific suspected terrorists. Under the new proposal, such requests would not be subject to intervention by the advocate without prior authorization from a FISC judge.

In addition, the report says there needs to be a meaningful appellate process to review FISC decisions that adversely affect constitutional rights.

The report notes the "constitutional and prudential objections" to the creation of a special advocate that have been raised by the Congressional Research Service and former FISC Judge John D. Bates, among others, but it says the proposed structure avoids them.

"We believe that, through careful legislative drafting, the special advocate idea can be implemented in a manner that not only ameliorates these concerns, but that also ensures that it has the maximum desired effect at the minimum cost to the government and the FISC," the committee members wrote.

Among those endorsing the new report, along with Judge Robertson, are the committee's co-chairs, Georgetown University law professor David Cole, and David Keene, former chair of the American Conservative Union. Also backing the report are: John Dean, former counsel to President Richard Nixon; Mickey Edwards, a former GOP member of Congress; Mary McCarthy, who served as a special national security assistant to Presidents George W. Bush and Bill Clinton; Alberto Mora, a former general counsel for the U.S. Navy; Col. Lawrence Wilkerson, a former chief-of-staff for Secretary of State Colin Powell; and two former CIA counterintelligence officers, Philip Giraldi and Paul R. Pillar.

The USA Freedom Act, which began as a broad package of surveillance reforms originally introduced by Senator Patrick Leahy (D-Vt.) and Representative James Sensenbrenner (R-Wisc.) to curtail bulk collection of phone data by the National Security Agency, was scaled back in the House to meet the concerns of intelligence and law enforcement officials.

Leahy said he was "disappointed" that the House-passed bill does not contain some the reforms contained in the original legislation and vowed to "continue to push" for these important measures when the Senate Judiciary Committee considers the legislation next month.

Sloan said her organization would back Leahy's efforts to promote additional improvements in the legislation as it works its way through the legislative process, including strengthening the public's representation before the FISC.

The importance of having a special advocate representing the public's interests before the FISC became apparent a year ago when documents disclosed by former federal contractor Edward Snowden revealed that National Security Agency programs approved by the court had allowed the spy agency to collect information on millions of Americans. Prior to these revelations, most Americans did not know about the FISC.

A copy of the report with a full list of signers is available at <http://www.constitutionproject.org>.

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About The Constitution Project

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.