THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

May 20, 2014

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Hon. Nancy Pelosi
House Minority Leader
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Hon. Robert Goodlatte
Chairman, House Judiciary Committee
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Hon. John Conyers
Ranking Member, House Judiciary Committee
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Hon. Mike Rogers
Chairman, House Permanent Select Committee on Intelligence
2112 Rayburn House Office Building
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Hon. C. A. Dutch Ruppersberger
Ranking Member, House Permanent Select Committee on Intelligence
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Dear Mr. Speaker, Minority Leader Pelosi, Chairman Goodlatte, Ranking Member Conyers, Chairman Rogers, and Ranking Member Ruppersberger,

We, the members of The Liberty and Security Committee of The Constitution Project, write to share our views on the Manager's Amendment to H.R. 3361, the USA FREEDOM Act, which we understand is scheduled to be considered by the full House of Representatives in the coming days. As we explain, we believe that (1) although other substantive reforms should take precedence, ensuring meaningful adversarial participation before the Foreign Intelligence Surveillance Court (FISC) must be a necessary element of *any* surveillance reform legislation; (2) the language of H.R. 3361 in its current form does not do nearly enough to achieve this goal; (3) the House should amend H.R. 3361 to (a) require that a security-cleared "special advocate"[1] be allowed to participate in *all* proceedings before the

1. Different proposals use different terminology to refer to the same concept. We use the umbrella term "special advocate" to refer to any security-cleared lawyer, however constituted and deployed, who provides briefing and argument adversarial to the Executive Branch in appropriate cases before the FISC.

FISC involving surveillance authorities that do not require determinations about an individual target, and (b) otherwise ameliorate constitutional questions about the special advocate's ability to *appeal* adversarial FISC decisions; and (4) such an amendment would effectively cure the constitutional and practical objections that have been voiced elsewhere.

As the Supreme Court explained 36 years ago, "The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous."[2] Although a lack of vigor has long been accepted as a necessary cost of ancillary criminal proceedings such as warrant applications and wiretap orders (on which FISA was initially modeled), such acquiescence reflects a pair of assumptions: that (1) these *ex parte* judicial decisions will be subject to meaningful adversarial scrutiny down the road; and (2) in any event, they tend to turn on narrow questions of fact, as opposed to broader interpretations of statutory and/or constitutional provisions with implications far beyond an individual case.[3]

Neither of those assumptions holds when it comes to FISC's authorities to authorize surveillance on a *non-individual* (and suspicion-less) basis, especially under section 215 of the USA PATRIOT Act and section 702 of FISA (as added by the FISA Amendments Act of 2008). A vanishingly small percentage of the information collected under these authorities will ever make its way into a criminal proceeding, and the underlying question before the FISC is much more likely to turn on the resolution of competing statutory or constitutional interpretations—as opposed to individualized factual determinations. As significantly, the stakes in such cases are far higher, since a production order under section 215 or a directive under section 702 could encompass millions—if not billions—of individual data points or communications, as opposed to the far narrower scope of an individual wiretap, physical search, or trap-and-trace order under FISA. These distinctions help to explain why Congress, when it created both of these broader authorities, specifically authorized the *recipients* of such FISC orders to

2. Franks v. Delaware, 438 U.S. 154, 169 (1978).

3. *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 n.663 (2008).

object via adversarial proceedings before the FISC—and to appeal adverse FISC decisions to the FISA Court of Review (FISCR) and U.S. Supreme Court, if necessary.[4]

Those provisions, however, have proven woefully inadequate. As the ever-growing body of publicly disclosed FISC opinions illustrates, (1) recipients of these orders have almost never availed themselves of their right to challenge such FISC rulings; (2) those few that have are doing so on their own behalf, and are not in a position meaningfully to represent the interests of their customers; and (3) the FISC's statutory and constitutional interpretations, almost always reached in *ex parte*, non-adversarial contexts, have left more than a little to be desired.[5] As a result, there is now widespread and bipartisan support for a more formalized process to ensure meaningful adversarial participation before the FISC; the debate is merely over *how* Congress should so provide.

Section 401 of the Manager's Amendment to H.R. 3361 modestly pursues such adversarial participation by creating a pool of private lawyers to appear as *amici curiae* when appointed by the FISC. Such an appointment is mandatory in any case "that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a written finding that such appointment is not appropriate." In all other cases, *amicus* appointments are left to the discretion of the FISC.[6] Once the FISC has rendered a decision in a case in which an *amicus* has appeared, that ends the matter; the bill provides no mechanism for the *amicus* to pursue any form of rehearing or appellate review.

We fear that, in such a form, H.R. 3361 will *not* meaningfully ensure adversarial participation before the FISC. Although the bill requires appointment of an *amicus* in certain cases, it provides an unreviewable means for FISC judges to sidestep that requirement simply by asserting that such an appointment is unnecessary. And insofar as FISC *already* possesses the authority to appoint *amici* in appropriate cases, but has seldom exercised it, it seems likely—if not certain—that H.R. 3361 will merely

4. *See* 50 U.S.C. §§ 1861(f), 1881a(h).

5. *See, e.g.*, Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215*, VOLOKH CONSPIRACY, Sept. 17, 2013, 7:39 p.m., http://www.volokh.com/2013/09/17/thoughts-august-2013-fisc-opinion-section-215/.

6. *See* Amendment in the Nature of a Substitute to H.R. 3361, § 401 (2014), *available at* http://judiciary.house.gov/_cache/files/ec687f8f-3b69-43b2-b5f6-bcf234457e7d/fisa-anos-003-xml.pdf.

perpetuate the status quo. If all a FISC judge must do to avoid *amicus* participation is issue an unreviewable, and presumably classified, "written finding" that such an appointment is unnecessary, we believe H.R. 3361 will produce a negligible increase in adversarial presentation before the FISC.

Instead, we believe *any* effort by Congress to provide for more meaningful adversarial participation before the FISC should incorporate the following three principles:

1) **The special advocate must have an unconditional right to participate in at least some cases**. At a minimum, the special advocate should be entitled to participate in any case in which the FISC is asked to approve *non-individual* surveillance authorizations, including, inter alia, production orders under section 215 and directives under section 702. And this right should not be subject to findings by a FISC judge that such participation is unnecessary. After all, it is in *these* contexts in which Congress has already identified the need for adversarial presentation—and where it is likely to make the greatest difference.[7]

2) **The special advocate should be empowered to represent U.S. persons who are subject to the surveillance orders at issue**. In order to crystallize the role and responsibilities of the special advocate—and to bolster their standing to appeal adverse decisions, as explained below—the special advocate should not just be an *amicus*, or someone only generally charged to "protect individual privacy and civil liberties," but should rather be specifically invested with the authority to litigate *on behalf of* those U.S. persons who could be subject to the surveillance authorization at issue.

3) **Cases in which the special advocate participates should be "certified" to the FISCR to ensure meaningful appellate review**. Although we believe, as explained below, that empowering the special advocate to represent U.S. persons who are subject to the underlying surveillance order mitigates any standing concerns, we also believe that Congress may—and should—provide for mandatory certification of FISC decisions to the FISA Court of Review ("FISCR") in any case in which the special advocate participates, and that no "standing to appeal" is necessary for the FISCR to accept such certifications and pass upon the merits of the challenged FISC ruling.[8]

These principles are not just our view of the best way forward for ensuring meaningful adversarial participation before the FISC, but they also go a long way toward ameliorating the various constitutional and prudential objections that "special advocate" proposals have precipitated. With

7. We would support even broader mandatory participation by the special advocate—including, for example, in any individualized case in which the FISC is asked to resolve a novel or significant question of law. But we believe that, at an absolute minimum, the special advocate must be allowed to participate in any FISC case involving an authorization relating to anything *beyond* surveillance of an individual target.

8. For examples of existing certification authorities, both of which authorize review via certification without requiring any affirmative action by a "party," see 28 U.S.C. §§ 1254(2) and 1292(b).

regard to constitutional objections, consider, for example, a Congressional Research Service (CRS) report, which raises a series of objections to the creation of a special advocate grounded in Article II and Article III of the U.S. Constitution.[9] The Article II concerns can be redressed simply by not locating the special advocate within the Executive Branch; H.R. 3361, for example, would draw the special advocate from a panel of private lawyers—which could hardly implicate the President's constitutional authority. As for Article III concerns, we do not believe, as Professors Lederman and Vladeck have explained, that there is any Article III problem with having a special advocate, constituted in almost any form, participate before the FISC itself. If anything, such participation *vindicates* Article III.[10]

Instead, the only potential Article III concerns involve the special advocate's ability to appeal an adverse decision—which requires that her "client" have standing, *i.e.*, a direct, personal stake in the outcome of the proceeding.[11] But (1) having the special advocate represent U.S. persons who *are* subject to the surveillance orders at issue likely invests them with standing to appeal on their putative clients' behalves, just like guardians ad litem and class counsel in certain class-action proceedings may appeal when their putative clients "lose"; and (2) in any event, those concerns are not implicated by the mandatory certification procedure described above. Simply put, smart and careful legislative drafting can and should eliminate any constitutional objections.

In addition to the constitutional concerns raised by the CRS report, a series of prudential objections to calls for a special advocate have also been advanced. Perhaps the most cogent and concise articulation of these concerns came in "Comments of the Judiciary on Proposals Regarding the Foreign

9. ANDREW NOLAN ET AL., CONG. RES. SERV., INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES (2014), *available at* http://www.fas.org/sgp/crs/intel/R43260.pdf.

10. *See* Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY, Nov. 4, 2013, 1:34 p.m., http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/. As Lederman and Vladeck explain, in virtually any form, the special advocate's duties would not make her an "Officer of the United States" who is subject to the Appointments Clause, nor would adding an *additional* advocate to the FISC process present any adverseness problems that are not already inherent in the nature of the FISC. *See id.*

11. *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

Intelligence Surveillance Act," prepared by Judge Bates[12]—who has also served on the FISC. In addition to reiterating the appellate standing concerns articulated above, Judge Bates also suggested that a special advocate would be both unnecessary and unwise, stressing the extent to which the "vast majority of FISC matters" involve individualized applications under "classic" FISA. In those cases, Bates writes, there is simply "no need for a quasi-adversarial process." And in cases in which adversarial participation might be more appropriate, Judge Bates flagged the ability of the FISC, even under its current rules, to appoint *amici* to take positions adverse to the government.

For starters, it is worth noting that Judge Bates was responding to a very different series of proposals than those currently under consideration—and that most of his objections, at least with respect to a special advocate, have already been accounted for in both H.R. 3361 and in the principles we have outlined above.[13] After all, we believe that participation by the special advocate must be mandatory only in those FISC cases involving non-individual, suspicion-less surveillance authorizations—*i.e.*, the cases in which there *is* a necessity for "a quasi-adversarial process," as Congress has understood since it created such authorities. We would otherwise leave appointment of a special advocate to the discretion of the individual FISC judge—which is already effectively the case today. As for Judge Bates's concerns about the *wisdom* of special advocate proposals, we believe that, in fact, appropriately circumscribed adversarial litigation over secret government surveillance programs in this small minority of cases not only minimizes the burdens to which Judge Bates alluded, but will only *benefit* the government in the long term, insofar as it will place those programs that are upheld on far firmer—and more legitimate—legal and constitutional footing.

* * *

Reasonable people can—and should—object to a model in which parties have their rights vindicated by lawyers they have never met in secret judicial proceedings about which they will never

12. *See* Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, *available at* http://www.lawfareblog.com/wp-content/uploads/2014/01/1-10-2014-Enclosure-re-FISA.pdf.

13. *See* Steve Vladeck, *Judge Bates and a FISA "Special Advocate,"* LAWFARE, Feb. 4, 2014, 9:24 a.m., *available at* http://www.lawfareblog.com/wp-content/uploads/2014/01/1-10-2014-Enclosure-re-FISA.pdf.

become aware. But in the unique context of foreign intelligence surveillance, we believe that such representation is a least-worst alternative to the status quo, in which *no one* is able meaningfully to assist the FISC in reviewing novel—and, in at least some cases, controversial—statutory and constitutional interpretations advanced by the Executive Branch. As such, we believe that the creation of a FISA special advocate reflecting the principles discussed above is a necessary—but not necessarily sufficient—element of any surveillance reform.

We hope you will consider these views when H.R. 3361 comes to the floor.

Sincerely,

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cc: All members of the House Judiciary Committee and
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