

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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Experts Call Concerns About Privacy Advocate at Surveillance Court 'Unfounded'

WASHINGTON, D.C. -- A group of national security law experts say the constitutional concerns raised by a federal judge about the proposal in a Senate surveillance reform bill to create a special privacy advocate before the secret Foreign Intelligence Surveillance Court are unfounded and should not derail the compromise legislation.

In a [letter](#) delivered earlier today to Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.), 16 members of The Constitution Project's Liberty and Security Committee addressed [concerns raised](#) by Judge John Bates. The group said the special advocate and appellate review provisions in the bill do not present the constitutional difficulties that Bates alleges they do.

Bates, a federal district-court judge who is the director of the Administrative Office of U.S. Courts and who once served on the secret national-security court, said he was speaking "on behalf of the Judiciary," but the chief judge of the Ninth Circuit Court of Appeals [disputed](#) that claim.

Sen. Leahy is the leading sponsor of a [compromise version](#) of the USA Freedom Act (S. 2685) that he negotiated with the Obama administration and [key stakeholders](#) in the private sector, including TCP. The legislation is aimed at curbing bulk collection of telephone records by the National Security Agency and providing greater transparency of policies underlying government surveillance programs, in part by allowing the surveillance court to appoint a special advocate to represent privacy concerns whenever it considers cases presenting "a novel or significant interpretation of the law."

In particular, the group of national security experts said that "the constitutional concerns Judge Bates raises are not in fact implicated by S. 2685, and the [Congressional Research Service] reports he cites do not support Judge Bates's doubts."

Judge Bates questioned, for example, whether the inclusion of a special advocate in certain cases before the surveillance court violates the clause in Article III of the Constitution that limits courts to hearing concrete disputes between parties with sufficiently adverse interests. But the TCP experts said that to the extent such a concern exists, it arose in 1978 with the creation of the surveillance court itself, and noted that "no court has suggested that the FISC is incompatible with Article III" since its inception. Instead, the group points out that enlisting a special advocate to

represent privacy and civil liberties interests before the FISC might actually increase the adversarial nature of its proceedings.

Judge Bates also claimed the legislation might be unconstitutional because of the process through which it provides for appellate review of lower-court decisions. But the group calls his concern "unwarranted," noting the bill simply authorizes the FISC to "certify questions of law to the court above, just as federal district courts and courts of appeal may already do under existing law."

The letter to Leahy noted that TCP had [released a report](#) earlier in the year that recommended the creation of a special advocate as a necessary component of any surveillance reform. While observing that the Senate legislation does not reflect all the policy recommendations contained in that report, the group said, "There is no basis in Judge Bates's letter, or the CRS reports he cites, to doubt the bill's constitutionality, and such concerns should not derail [the] hard-won compromise."

Some of the TCP committee members signing the letter to Leahy include: **David Cole**, Professor in Law and Public Policy at Georgetown University Law Center; **David Birenbaum**, former Ambassador to the United Nations for Management and Reform; **John W. Dean**, Counsel to President Richard Nixon; **Mickey Edwards**, former Member of Congress (R-Okla.) and Chairman of the House Republican Policy Committee; **Mary O. McCarthy**, former official at the Central Intelligence Agency and the National Security Council; **Rear Admiral James E. McPherson**, former Judge Advocate General of the U.S. Navy; **Deborah N. Pearlstein**, Associate Professor of Law at Cardozo School of Law; **Paul Pillar**, former intelligence officer at the Central Intelligence Agency and National Intelligence Council; **Peter Raven-Hansen**, Professor of Law and Co-director of the National Security and U.S. Foreign Relations Law Program at The George Washington University Law School; and **Don Wallace**, Chairman, International Law Institute.

A copy of the letter with a full listing of signers is available at <http://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.