

THE CONSTITUTION PROJECT  
  
*Safeguarding Liberty, Justice & the Rule of Law*

August 27, 2014

Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

The undersigned members of The Constitution Project's bipartisan Liberty and Security Committee write to respond to recent suggestions by Judge John D. Bates in a letter to you that the special advocate and appellate review provisions of S. 2685 raise constitutional concerns.<sup>1</sup> Judge Bates's August 5 letter does not actually contend that S. 2685 would be unconstitutional. Nor does he offer any constitutional argument. He nonetheless adverts to constitutional concerns, and cites two Congressional Research Service (CRS) reports on FISA Reform.<sup>2</sup> In our view, the constitutional concerns Judge Bates raises are not in fact implicated by S. 2685, and the CRS reports he cites do not support Judge Bates's doubts, as they were directed to very different special advocate proposals.

As one of the CRS reports carefully explained, the authors were not suggesting that the potential constitutional hurdles they were raising were insurmountable, or even *applicable*, to all special advocate reform proposals.<sup>3</sup> We expressed this same point in our report, "The Case for a FISA 'Special Advocate,'" stating that while constitutional concerns with expansive special advocate proposals merited serious consideration, "through careful legislative drafting, the special advocate idea can be implemented in a manner that ... ameliorates these concerns."<sup>4</sup> We recommended that the creation of a special advocate be viewed as a necessary component of surveillance reform.<sup>5</sup> We also made specific and carefully circumscribed recommendations for

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<sup>1</sup> See, e.g., Letter from the Honorable John D. Bates, Director of the Administrative Office of the United States Courts, to the Honorable Patrick J. Leahy, U.S. Senator (Aug. 5, 2014), available at <http://www.lawfareblog.com/wp-content/uploads/2014/08/08-05-2014-Leahy.pdf>; see also, postings of Orin Kerr to Lawfare, [www.lawfareblog.com](http://www.lawfareblog.com), (July 30, 2014, 16:26 EST; Aug. 5, 2014, 3:20 EST; Aug. 5, 2014, 14:23 EST).

<sup>2</sup> Bates, *supra* note 1.

<sup>3</sup> Andrew Nolan, Richard M. Thompson II & Vivian S. Chu, Cong. Research Serv., R43260, "Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate 50 (Mar. 21, 2014) ("[T]his is not to say that any hurdle imposed by the Constitution that is implicated by a public advocate proposal is insurmountable or even applicable with respect to every FISA advocate measure...Ultimately, the proverbial 'devil is in the details'...").

<sup>4</sup> The Constitution Project's Liberty and Security Committee, The Case for a FISA "Special Advocate" 13 (May 29, 2014), available at [http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf) ("TCP Special Advocate Report").

<sup>5</sup> *Id.* at 2.

maximizing the effectiveness of the special advocate while minimizing any potential constitutional concerns.

S. 2685 does not reflect all of our policy recommendations. But in our view, the constitutional issues discussed in the CRS Reports and elsewhere are not applicable to the special advocate and appellate review provisions of S. 2685, as we explain below.

### **The Special Advocate Provisions Do Not Raise Appointments Clause Concerns**

One constitutional concern cited by Judge Bates involves whether the appointment of special advocates would comply with the Appointments Clause in Article II of the Constitution. The Appointments Clause governs how certain “officers” of the federal government are appointed. But it is inapplicable to S. 2685 because the bill does not authorize the appointment of any officers of the federal government. Instead, the bill provides for the designation of private attorneys to participate as *amicus curiae* on a case-by-case basis – a practice routinely undertaken by federal courts.<sup>6</sup> Judge Bates cites a March 21, 2014 CRS report, but that report expressly provides that special advocate proposals that allow for attorneys to be appointed from the private sector on a case-by-case basis “would likely not run afoul of the Appointments Clause because of the temporary nature of such a position.”<sup>7</sup> S. 2685 does not create an office of the public advocate within the federal government nor does it even provide for special advocates as federal employees. As such, S. 2685 does not raise concerns under the Appointments Clause.

### **The Special Advocate Provisions Do Not Raise Article III Concerns**

Judge Bates also questions whether the involvement of a special advocate in the FISC process complies with the case or controversy requirement in Article III, which limits courts to hearing concrete disputes between parties with sufficiently adverse interests.<sup>8</sup> To the extent that this is an Article III issue, however, it arose in 1978 with the creation of the FISC itself. In its more than quarter century of existence, no court has suggested that the FISC is incompatible with Article III. Introducing a special advocate as *amicus curiae* creates no new Article III concerns.<sup>9</sup> Indeed,

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<sup>6</sup> Posting of Marty Lederman and Steve Vladeck to Just Security, <http://justsecurity.org/2873/fisa-special-advocate-constitution> (Nov. 4, 2013, 13:34 EST) (citing *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459 at \*3 (OLC) (Apr. 16, 2007)). As Professors Vladeck and Lederman also explain, even if the special advocate were employed by the executive branch, the advocate would not necessarily exercise sufficient authority to qualify as an officer for purposes of the Appointments Clause. Moreover, Congress could, should it decide to create a special advocate position within the federal government, provide for appointment in a manner that satisfies the Appointments Clause (“The CRS Report appears to assume that the special advocate would not be appointed in a manner allowed under the Appointments Clause. That assumption may well be mistaken, depending on the bill in question.”). Nevertheless, these issues do not arise under S. 2685 because, as discussed above, the special advocate would remain a private attorney fully independent of the federal government, who would be appointed to serve as *amicus curiae* on a case-by-case basis.

<sup>7</sup> Nolan, *supra* note 3, at 13.

<sup>8</sup> *Id.*

<sup>9</sup> Lederman, *supra* note 6 (“The heart of the CRS Report curiously focuses on an issue that is not really related to the question of whether a special advocate would be constitutional—namely, whether the FISC process *itself* complies with Article III...”). As Professors Vladeck and Lederman explain, prior to FISA’s enactment in 1978, Congress heard testimony about whether the proposed process would violate Article III because of the lack of a case or controversy between adverse parties. An Office of Legal Counsel attorney testified that the FISC process being contemplated complied with Article III, likening the process of approving surveillance applications to the traditional practice of adjudicating search warrant applications. Subsequent court decisions agreed with this analysis. The Article III debate has become more complicated since the passing of the FISA Amendments Act of 2008, which authorized the FISC to

enlisting a special advocate to represent privacy and civil liberties interests in the FISC process, as proposed in S. 2685, actually ameliorates such concerns, by increasing the adverseness before the court.<sup>10</sup> As we explained in our Special Advocate Report:

[T]he CRS Report is correct to flag the serious constitutional questions concerning the “adverseness” of proceedings before the FISC ... But those concerns have nothing whatsoever to do with a special advocate (and have, in any event, historically been rejected by the federal courts). If anything, such adversarial participation, like that contemplated by Congress in sections 215 and 702, should only ameliorate adverseness concerns, not exacerbate them.<sup>11</sup>

### **The Appellate Certification Provisions Do Not Raise Article III Concerns**

Finally, Judge Bates’s concern about the certification authority in S. 2685 is also unwarranted. In order to improve accountability of FISC and FISA Court of Review decisions, S. 2685 authorizes these courts to certify questions of law to the court above, just as federal district courts and courts of appeal may already do under existing law.<sup>12</sup> Where the FISC has authority to consider the government’s surveillance application, the court’s certification of questions of law related to that application does not raise insurmountable Article III concerns. “[T]he existence of such a case-or-controversy presumably *follows* the certificate to the appellate court.”<sup>13</sup> As Professor Stephen Vladeck, author of our report, has explained, “certificates don’t of themselves raise Article III issues so long as the court that issued the certificate did so in the context of an ongoing case-or-controversy.”<sup>14</sup> Even after the FISC has issued an order granting a government application, the case or controversy continues to exist at least “for so long as the government is *acting* under the relevant application.”<sup>15</sup> And, even where the government is no longer conducting surveillance under the order, such orders may still be reviewable under the “capable of repetition but evading review” doctrine. Moreover, the FISC or FISA Court of Review could avoid this Article III question altogether by issuing a temporary order, rather than a final order, while certain questions of law are certified for review.

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engage in functions with arguably less resemblance to the traditional warrant process. They suggest that the provisions allowing the recipients of Section 215 orders or 702 directives to challenge the government’s request before the FISC may provide the requisite adverseness needed for satisfying Article III. But these Article III questions are about the role of the FISC itself, and not about the involvement of a special advocate.

<sup>10</sup> TCP Special Advocate Report, *supra* note 4, at 11-12.

<sup>11</sup> *Id.*

<sup>12</sup> TCP Special Advocate Report, *supra* note 4, at 12 (“There are, however, other means of ensuring appellate review. Thus, for example, separate statutes already authorize the ‘certification’ of issues for interlocutory appeal from federal district courts to circuit courts. *See* 28 U.S.C. Section 1292(b). Although both courts must so certify, such certification can occur sua sponte. *See, e.g., Salt Lake Tribune Pub. Co. v. AT&T Corp.*, 320 F.3d 1081, 1087 (10th Cir. 2003). To similar—if not stronger—effect, 28 U.S.C. Section 1254(2) authorizes the Supreme Court to accept certified questions from the courts of appeals ‘at any time,’ after which the Court may ‘decide the entire matter in controversy,’ even on its own motion. S. Ct. R. 19.2.”).

<sup>13</sup> Posting of Steve Vladeck to Lawfare, <http://www.lawfareblog.com/2014/07/article-iii-appellate-review-and-the-leahy-bill-a-response-to-orin-kerr> (July 31, 2014, 10:54 EST). (“*I*ff the government’s application suffices to create an Article III case or controversy, that case or controversy necessarily persists for the duration of the authorities that the FISA Court’s granting of the application provides ... it should follow that the FISA Court has the power to certify relevant questions of law to the FISA Court of Review (and it, in turn, to the Supreme Court”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Honorable Patrick Leahy

August 27, 2014

Page 4

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By all accounts, S. 2685 reflects a hard-won compromise amongst members of the Senate and stakeholders within the executive branch, private industry, and civil liberties organizations. 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 that hard-won compromise. While other arrangements might well raise constitutional concerns, S. 2685 does not.

We hope you will consider these views as S. 2685 moves forward.

Sincerely,

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Honorable Patrick Leahy

August 27, 2014

Page 5

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\* Signed on August 28, 2014