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THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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National Security Experts Oppose Efforts to Weaken Special Advocate at FISA Court

WASHINGTON, D.C. -- National security experts from across the ideological spectrum are urging senators to oppose efforts to weaken the special advocate provisions in surveillance reform legislation, known as the USA Freedom Act, currently under consideration by the Senate.

In a [letter organized](#) by The Constitution Project and sent to members of the Senate earlier today, the experts argue that an amendment proposed by Senator Mitch McConnell (R-Ky.) "would significantly weaken the already modest amicus provisions ... to the point that they could not be considered an improvement over the status quo."

As approved by the House, the legislation (H.R. 2048) would require the secretive Foreign Intelligence Surveillance Court to appoint an advocate from a panel of security-cleared lawyers to advise the court in cases involving novel or significant interpretations of law, including offering input on privacy and civil liberties concerns when asked to do so. If the court elected not to appoint a special advocate in certain cases, under the House-approved bill, it would be required to explain its reasons in writing.

The McConnell amendment removes the mandate for the appointed lawyer to advocate for privacy and civil liberties, restricts the information to which the advocate would have access, and removes the need for the court to explain its decision not to appoint one.

"This amendment is clearly intended to gut the already limited authority of a special advocate, thereby keeping the American people in the dark about the operation and decisions of the FISA court, which in the past has allowed the NSA to amass the phone records of millions of Americans. As Judge Sack recently noted in the Second Circuit decision finding the NSA phone records program illegal, having an advocate at the FISA court would improve the decision-making of the court and give the public greater confidence in its rulings," said Rita Siemion, senior counsel at The Constitution Project, a bipartisan legal watchdog group.

TCP [released a report](#) in May 2014 urging the appointment of a special advocate with an unconditional right to participate any case in which the FISC is asked to approve certain broad surveillance authorizations, and setting forth requirements for making the advocate effective.

The House-passed bill "already lack[s] many elements that would help ensure that the advocate would be a strong and effective voice for privacy and civil liberties. Nevertheless, the current provisions are at least a significant step forward over the status quo," the letter said.

Among the signers of the letter are: former Congressman Mickey Edwards (R-Okla.); former Nixon White House Counsel John Dean; Phil Giraldi, Mary McCarthy and Paul Pillar, three former high-ranking CIA officials; Professor David Cole, George Mitchell Professor in Law and Public Policy at Georgetown University Law Center; Professor Peter Raven-Hansen, co-director of the National Security and U.S. Foreign Relations Law at the George Washington University Law School; and Professor Don Wallace, chairman of the International Law Institute. All are members of The Constitution Project [Liberty and Security Committee](#).

The House passed the USA Freedom Act on a vote of 338 to 88. Chief sponsors of the legislation [have indicated](#) the House will not support a watered-down version of the bill.

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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 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 through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.

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