



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE JOHN D. BATES
Director

WASHINGTON, D.C. 20544

August 5, 2014

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

Dear Mr. Chairman:

I am writing to express, on behalf of the Judiciary, several important concerns about the USA FREEDOM Act, S. 2685, which you introduced on July 29, 2014. We appreciate your continuing outreach to our branch and willingness to work with us to address these concerns.

We recognize that this bill is part of an important national dialogue relating to national security and personal privacy. In keeping with the approach of my January 13, 2014, letter to the House and Senate Judiciary and Intelligence Committees (which expressed the views of the Judiciary on various proposed changes to the Foreign Intelligence Surveillance Act (FISA)), this letter is not meant to express preferences on fundamental policy choices. Rather, we are focused on potential resource and operational impacts on the Judiciary. That said, we believe that the effective operation of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review¹ enhances the public interests in both national security and personal privacy. Conversely, the significant negative effects that we anticipate from certain provisions in S. 2685 could inadvertently undermine the twin goals of protecting privacy and national security.

A bill with the same title, H.R. 3361, passed the House of Representatives on May 22, 2014, and for matters affecting the courts, S. 2685 appears to follow the same framework as the House bill. However, there are three key elements of S. 2685 (two of which differ from the House bill) – related to a special advocate, appellate review, and public information about FISA

¹ We refer to these courts individually, below, by their common respective acronyms FISC and FISCR, and collectively we refer to them as “the FISA courts.”

court opinions – with which we have important concerns. Before discussing those concerns, I note that we also have identified various technical ambiguities and anomalies in the new special advocate provisions in S. 2685, some of which exacerbate the problems we describe above, and others that would potentially impede administration of the provisions as intended by the drafters of the legislation. Our Office of Legislative Affairs is prepared to discuss these technical issues with your staff separately.

Special Advocate

Considerable discussion in Congress has addressed the ex parte nature of most FISA court proceedings. In truth, ex parte proceedings in the federal courts (most notably, search warrant proceedings) are common. The current structure of the FISC, as designed by statute and implemented in practice, allows experienced federal judges, aided by senior legal advisers, to apply their training and knowledge to carefully scrutinize the government's applications and ensure that constitutional and statutory requirements are met. The current process also enables the FISC to communicate efficiently with the government to seek, receive, and act on additional information or legal argument. Furthermore, the government's status as the sole party in ex parte proceedings puts additional burdens of candor on government advocates. Recent official disclosures of previously classified FISA court opinions as well as the release of more detailed statistics by the FISC have, we hope, now demonstrated that the FISA courts are hardly a "rubber stamp," and that the courts exert robust efforts, consistent with their roles under FISA, to ensure that the government abides by its legal obligations.

The House bill² would augment the resources available to the FISA courts with a standing pool of amici curiae, appointed in advance with security clearances, who would be available to the courts whenever they determine amici participation is necessary and feasible. That bill thereby clarifies and facilitates the FISA courts' inherent authority to receive and consider the views of amici in their proceedings. By eliminating some of the security-related and other practical obstacles to obtaining such assistance, the House bill would increase the percentage of cases in which the FISA courts could designate amici to participate.³ We believe that the approach used in the House bill would indeed be helpful to the FISA courts in the relatively small number of cases where such participation may be warranted.⁴

By contrast, the role of the advocate contemplated by Section 401 of S. 2685 would not be the role of an amicus curiae who assists the court in resolving the particular novel or significant legal issue that triggered the advocate's designation in the first place. Instead, the

² The House bill language is in turn based on a similar approach taken in S. 1631, the FISA Reform Act, which was approved by the Senate Intelligence Committee on October 31, 2013.

³ The House bill would provide the FISA courts with substantial discretion in determining when it would be helpful and appropriate to appoint an amicus and in determining the nature and scope of the assistance to be provided in a particular matter. The House bill would require the appointment of an amicus 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." The bill would also allow the court to appoint an amicus "in any other instance as such court deems appropriate." An amicus appointed to participate in a particular matter would be required "to carry out the duties assigned by the appointing court" and the bill would permit the court to determine what materials should be made available for the amicus to review as "relevant to the duties assigned by the court."

⁴ Our staff have provided bill language to the relevant committees that would further clarify and perhaps slightly expand the scope of the amicus authority.

advocate's statutory mandate would be to advance legal interpretations that enhance privacy and civil liberties.⁵ In carrying out that function, the advocate would be able to demand broad access to court records and have the ability to enlist expert assistance.⁶ For several reasons, we are concerned that inserting into FISA court proceedings an advocate with a statutory mandate to make specific arguments would raise substantial legal questions and impede the courts' work without furthering the interests of privacy or civil liberties.

Reduction of Assistance to the Courts by the Government

In light of the special advocate's mandate to argue for privacy and civil liberties, we assume the advocate – unlike an amicus acting at the direction and under the control of the court – would generally be in an adversarial posture vis-a-vis the government. As we have previously explained, the FISC and its staff frequently engage in ex parte interactions with the government for the purpose of raising questions and concerns regarding particular matters and to obtain additional information. Such interactions are an important tool for the FISC in obtaining complete and accurate information from the Executive Branch in a timely fashion. In light of the ethical and procedural requirements that apply in adversarial proceedings, such ex parte interactions would no longer be possible in cases in which a special advocate participates.

Introducing an adversarial special advocate into FISC proceedings is unlikely to compensate for the loss of this critical tool for obtaining information from the government. As we have previously acknowledged, genuinely adversarial processes, such as criminal or civil trials, provide an excellent means of testing a party's factual contentions. But introducing a special advocate into the FISA process would not produce that result. Indeed, the special advocate contemplated by Section 401 would not actually represent a proposed target of surveillance or any other particular client, and factual development would not be a core purpose of the advocate's participation. Nor could the advocate assume such a role, as operational security concerns would preclude the advocate from being able to conduct an independent factual investigation, for example, by interviewing the target or the target's associates. Simply put, it is doubtful that the special advocate contemplated by S. 2685 could meaningfully assist the court in developing the factual record. Yet that is where interaction between the FISC and the Executive Branch is most important.

In fact, the participation of the special advocate could actually hinder the FISC's ability to obtain complete and accurate information. Introducing an adversarial special advocate in FISA proceedings creates the risk that representatives of the Executive Branch – who, as noted, have a heightened duty of candor in ex parte FISA court proceedings – would be reluctant to disclose to the courts particularly sensitive factual information, or information detrimental to a case, because doing so would also disclose the information to an independent adversary. This reluctance could diminish the court's ability to obtain all relevant information, thus degrading the quality of its

⁵ In addition to providing, as the default rule, for participation by a special advocate in any case involving a “novel or significant interpretation of the law” (proposed 50 U.S.C. § 103(i)(2)(A)), section 401 of the bill separately permits the court to designate an amicus curiae or expert “in any other instance” (proposed 50 U.S.C. § 103 (i)(2)(B)) as the court deems appropriate. An amicus or expert designated under that provision presumably could provide assistance on any issue or from any perspective deemed useful by the court. We are concerned, however, that the “in any other instance” language can be read as precluding the designation of such an amicus or expert in any matter that would involve special advocate participation pursuant to § 103(i)(2)(A).

⁶ The advocate would also have the ability to request payment from the judiciary. We note that while S. 2685 appears to retain the FISA courts' discretion to obtain the assistance of amici and technical experts, other than the advocate, it does not expressly provide for the compensation of such other persons or organizations for providing that assistance.

decisions. Alternatively, it could prompt the government not to pursue potentially valuable intelligence-gathering activities under FISA.

An amicus curiae appointed pursuant to H.R. 3361 to assist in a particular matter would not present the same difficulties. H.R. 3361 gives the FISA courts substantial discretion not only to determine when to appoint an amicus in the first place, but also to decide the nature and scope of the assistance to be provided by the amicus and to determine which materials will be relevant to the amicus's assistance. This framework would thus give the courts substantial flexibility in obtaining additional perspectives and assistance without creating an institutional adversary whose participation could impede the courts' ability to make decisions based on complete, accurate, and timely information.

Reductions in Efficiency and Timeliness of National Security Proceedings

Inserting a special advocate into FISA court proceedings would also result in other practical problems with minimal commensurate benefit. By its terms, Section 401 would seem to apply to a potentially large number of cases. The requirement to designate a special advocate would be triggered in the first instance in any matter involving a "novel or significant interpretation of the law." That term is defined expansively to include, among other things, matters involving the "application . . . of settled law to novel . . . circumstances." Because nearly every application involves distinct (i.e., "novel") facts and circumstances, Section 401 could be read as applying in a broad swath of cases.

To be sure, the bill would give the courts discretion, consistent with the timing requirements imposed by Congress on FISA court action or as otherwise appropriate, to decline to designate a special advocate even when one would, as a default matter, be required. Nevertheless, merely determining in every case whether or not the language of Section 401 requires the designation of a special advocate, and, if so, whether such designation would be appropriate under the circumstances, and then reducing many of those determinations to writing, is itself likely to add significantly to the FISA courts' overall workload and could impair the courts' ability to complete their work in a timely fashion.⁷

In light of the national security requirements that are typically involved in FISA matters, FISC proceedings often must be conducted quickly.⁸ Indeed, FISA requires the courts to conduct their proceedings "as expeditiously as possible," and in several contexts imposes short and specific time limits for particular court actions. We are concerned that the operational realities of FISA court practice make it unrealistic to expect meaningful participation by a special advocate in a substantial number of matters in which one would, as an initial matter, be required according to the language of S. 2685. In order for an advocate to have a meaningful opportunity to review the application in a matter and prepare and submit views to the FISC, and for the FISC to consider the advocate's submission together with the application, the government would have to

⁷ By contrast, H.R. 3361 does not broadly define the term "novel or significant interpretation of the law," but instead leaves it to the court to determine "in [its] opinion" when such an issue is presented. The House bill would thus not create the same broad, threshold procedural burdens as Section 401 of S. 2685.

⁸ As we have previously explained, most of the FISC's work is currently conducted within the context of a seven-day duty week. Each week, one judge of the court is on duty at the FISC's secure facility in Washington, DC, and handles the matters that are presented for decision by the court during that time. Under the FISC's rules, the government must generally file a proposed application at least seven days before it seeks a decision on the matter. Emergency matters are handled on an even shorter time frame. These practices reflect the operational urgency of many of the matters that come before the FISC.

submit a proposed application substantially earlier than the seven-day period required by the FISC's current rules. Given the need for expedited consideration of applications when necessary to respond effectively to diverse and rapidly evolving threats, such additional time is simply not available in many FISC matters, including some that raise novel or significant legal questions. In such time-sensitive matters, it would not be feasible for an advocate to provide meaningful input to the court on questions of privacy, civil liberties, or any other issue, much less to do so after receiving and reviewing all non-privileged⁹ materials relevant to the advocate's duties and, in some cases, enlisting and obtaining the assistance of additional technical or subject matter experts.¹⁰

In our view, the greater flexibility and control that the FISA courts would have under the amicus provision in H.R. 3361 make it a better fit for FISA court proceedings than the special advocate provision of S. 2685. As discussed above, the House bill would give the FISA courts substantial flexibility not only in deciding when to appoint an amicus in the first place, but also in tailoring the nature and scope of the assistance provided to the circumstances of a particular matter.

Potential Impact of Identified Constitutional Concerns

The foregoing practical concerns cannot be entirely divorced from potentially serious legal issues (which have been raised by others) with the scheme proposed in S. 2685. For example, the Congressional Research Service has concluded that the insertion of such an independent advocate into FISA court proceedings would raise substantial constitutional questions, including issues under the case or controversy requirement of Article III, the separation of powers doctrine, and the Appointments Clause of Article II.¹¹ Because these legal issues may be litigated before and ultimately decided by judges in our branch, we will avoid opining about their proper outcomes. We nonetheless would strongly urge both Houses of Congress to consider these questions – fully, carefully, and publicly – before formal legislative action is taken on S. 2685. The interests of the American people would not be well served by the enactment of legislation that presents fundamental constitutional difficulties and the attendant administrative uncertainty during the time it would take to resolve them.

⁹ Notably, S. 2685 contains a provision that would enable the Executive Branch to withhold from the special advocate materials that are “privileged from disclosure.” No such provision is made for internal court documents, such as the court legal staff’s memoranda to judges. Insofar as S. 2685 would give to the special advocate broad access to relevant materials including internal court documents or communications, the bill potentially raises serious concerns of separation of powers and judicial independence.

¹⁰ The bill’s provisions providing the special advocate with broad access to information and allowing the advocate to enlist the assistance of technical or subject matter experts are likely to result in logistical difficulties and delay. An advocate would first likely need time to familiarize himself with a matter before determining whether to request additional materials or expert assistance. Determining what materials to request and identifying an expert (with appropriate security clearances) would also take time. Furthermore, requests for materials or expert assistance are likely to lead in at least some cases to disagreements between the advocate and the Executive Branch over access to sensitive national security information. Resolving these ancillary disputes is likely to require still more time and court resources.

¹¹ See Andrew Nolan, Richard M. Thompson II & Vivian S. Chu, Cong. Research Serv., R43260, “Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate 9-48 (Mar. 21, 2014); Andrew Nolan and Richard M. Thompson II, Cong. Research Serv., R43362, “Reform of the Foreign Intelligence Surveillance Courts: Procedural & Operational Challenges 13-16 (Jan. 16, 2014). In contrast, facilitating the use of an amicus whose participation and role in a particular case would be at the discretion of the court has not been seen to raise substantial constitutional concerns. See *id.* at 11-12.

Appellate Certification

We understand the efforts of some in Congress to facilitate more frequent appellate review of FISA court decisions. As laudable as those efforts may be, we are concerned that the particular remedy proposed in S. 2685 – Section 401’s certification provision – may be untenable. To begin with, it is unclear from the text of the bill precisely how this provision is intended to operate. For example, it is unclear whether a “special advocate” designated by the FISC to provide briefings before the Supreme Court is bound by the “duties” provision that applies to special advocates participating in proceedings before the FISC. There is also an ambiguity about whether the FISC, when considering a certification from the FISC, would have the discretion not to designate a special advocate upon a finding in a particular case that doing so would not be appropriate.

More fundamentally, the certification provision appears to raise serious legal questions that may not be resolvable through clarifying changes to the proposed statutory language. Insofar as it may contemplate appellate review, including Supreme Court review, of issues in the absence of a case or controversy, it is potentially inconsistent with the requirements of Article III of the Constitution. In addition, the portion of this provision that purports to permit the FISC to designate a special advocate to appear before the Supreme Court could also be constitutionally suspect. It is unusual, to say the least, for an inferior court to determine the process or participants in Supreme Court proceedings. As previously indicated, we identify these concerns not meaning to opine as to their validity, but rather to identify where there could be confusion and administrative burden while they are being resolved or if the provisions are invalidated.

Summaries of Court Opinions

We believe that the proposal to create public “summaries” of classified and unpublished FISA court opinions is ill-advised, runs the risk of misleading the public about the courts’ work, and could reduce the incentives for the government to release information about court decisions in the more reliable format of redacted opinions. We recommend deleting this provision, leaving in place the provision that significant FISA court decisions would continue to be released, whenever feasible, in redacted form.¹²

Our January 13, 2014, letter to the Senate Judiciary and Intelligence Committees explained why it can be challenging to release FISA court opinions in a form that is both informative to the public and adequately protective of sensitive national security information.¹³ Notwithstanding these challenges, recent experience shows that the preparation and release of *redacted* opinions can, in some cases, contribute to public understanding of the FISA courts’ work. Our concern is only with the provision that would require the preparation and publication

¹² S. 2685 has carried over this provision from H.R. 3361. It would call for the public release of declassified FISA court opinions in redacted form, or in lieu of such redacted opinions, summaries prepared by the Executive Branch. Specifically, section 602 of S. 2685 would seem to create a presumption that the FISA courts’ significant decisions be released to the public in redacted form by the Attorney General. In those cases where the Attorney General determines that even a redacted release would harm national security, the Attorney General may opt instead to make an unclassified summary of the opinion available to the public.

¹³ For example, the subject of an opinion might be “how to apply FISA’s four-part definition of ‘electronic surveillance,’ *see* 50 U.S.C. § 1801(f), to a proposed surveillance method for a new communications technology.” January 13, 2014, Letter at 14. It may be necessary to withhold from the public details about how the surveillance is effected “so that valid intelligence targets are not given a lesson in how to evade it.” *Id.* On the other hand, however, releasing the opinion with that information redacted might not enhance public understanding in any meaningful way.

of unclassified summaries for those opinions that the government has determined not to release – even in redacted form – because doing so would harm national security.

To be sure, summaries of federal court opinions are sometimes prepared for the convenience of readers. But in those situations, the full opinion is also public. Summaries often (perhaps even typically) contain ambiguities or imprecision. But such summaries are unlikely to confuse or mislead readers when the opinion itself can be consulted and is understood to be authoritative. In contrast, a summary that is made public *instead of* a court’s opinion, and is intended to convey some information about the opinion while concealing the rest, is much more likely to result in misunderstanding of the opinion’s reasoning and result. This risk of misunderstanding is heightened when the only party to the proceeding – in this context, the government – is tasked with preparing the summary.

These difficulties become more pronounced in the context of S. 2685, under which summaries would be required for the very subset of opinions in which national security information is inextricably intertwined with the opinion’s entire line of reasoning – otherwise, redaction and partial release would be feasible. For the same reasons that a redacted release could not be accomplished for those opinions, attempts to “summarize” them without disclosing the operative facts are likely to fall short in one of two ways. Either the summary may be so conclusory as to be minimally informative (“The Court held that a novel surveillance technique fell within the definition of ‘electronic surveillance’ under 50 U.S.C. § 1801(f), such that the application to use that technique was within its jurisdiction.”). Or, in a well-meaning attempt to say more without disclosing classified information, the summary may describe the opinion’s reasoning abstractly and incompletely, divorced from the relevant facts. Such a summary is more likely to distort, rather than illuminate, the opinion for which it is substituted.

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In sum, we believe there are important concerns with provisions of S. 2685. We would recommend using a true amicus approach (such as in H.R. 3361) rather than the special advocate approach. With respect to the appellate certification, we recommend adjustments to insure clarity, constitutionality and practicality. And we recommend reliance on redacted opinions rather than “summaries” with respect to the public release of FISA court opinions.

We hope these comments are helpful to the Senate in its deliberations. If we may be of further assistance to you in this or any other matter, please do not hesitate to contact us through our Office of Legislative Affairs at 202-502-1700.

Sincerely,



John D. Bates
Director

cc: Honorable Eric H. Holder, Jr.

Identical letter sent to: Honorable Charles E. Grassley
Honorable Dianne Feinstein
Honorable Saxby Chambliss