



June 2, 2015

Majority Leader Mitch McConnell
United States Senate

Chairman Charles Grassley
Senate Judiciary Committee

Ranking Member Patrick Leahy
Senate Judiciary Committee

Minority Leader Harry Reid
United States Senate

Chairman Richard Burr
Senate Select Committee on Intelligence

Vice Chairman Dianne Feinstein
Senate Select Committee on Intelligence

Dear Senate Leadership:

The undersigned members of The Constitution Project’s bipartisan Liberty and Security Committee write to oppose any further weakening of the special advocate provisions in the USA FREEDOM Act as passed by the House and currently under consideration in the Senate. Specifically, we urge opposition to Amendment 1451 to H.R. 2048. This amendment would significantly weaken the already modest amicus provisions in H.R. 2048. The amendment would make three changes in particular that would weaken the advocate provisions to the point that they could not be considered an improvement over the status quo.

First, USA FREEDOM requires the FISA Court to appoint an independent advocate to serve as amicus curiae in any case that “presents a novel or significant interpretation of the law.” While the court retains discretion to decline to appoint an advocate when it determines that doing so would not be appropriate, there is some measure of accountability built in – if the Court decides not to appoint an amicus, it must issue a written finding explaining why. This requirement incentivizes the court to hear from outside perspectives before issuing significant decisions. Amendment 1451 would eliminate this accountability mechanism entirely.

Second, USA FREEDOM mandates amici to provide the court with legal arguments that advance the protection of individual privacy and civil liberties as appropriate. Even with this mandate, the current bill already fails to ensure that a privacy advocate will be appointed in all appropriate cases by instead allowing the court to appoint an amicus that would provide information relating to intelligence collection or technology, or legal arguments or information regarding any other area relevant to the issue presented to the court. But Amendment 1451 would further weaken the advocate provisions by removing the mandate to advocate for privacy and civil liberties entirely. Instead, the duties of the amicus curiae would be limited to the duties assigned to it by the court.

Third, Amendment 1451 would significantly hamper amici’s ability to advocate effectively by failing to ensure that he/she would have access to needed information, including relevant legal

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precedent. The advocate would have access only to applications, certifications, petitions, and motions, and only at the unfettered discretion of the court. By contrast, USA FREEDOM ensures that the advocate would have access to all relevant legal precedent and other materials deemed relevant by the court.

In our report, “The Case for a FISA ‘Special Advocate,’” we recommended that the creation of a special advocate be viewed as a necessary component of surveillance reform.¹ We also made specific recommendations for maximizing the effectiveness of the special advocate.² The amicus provisions in H.R. 2048 already lack 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. Amendment 1451 undoes that progress. We urge the Senate to reject such changes, which not only weaken the bill but also threaten to derail altogether the hard-won bipartisan compromise amongst stakeholders in Congress, the executive branch, private industry, and civil liberties advocates.

Sincerely,

David Cole (co-chair), Hon. George J. Mitchell Professor in Law and Public Policy at Georgetown University Law Center

Stephen Abraham, Lieutenant Colonel USAR (Ret.); Law Offices of Stephen E. Abraham

Azizah al-Hibri, Professor Emerita of Law, University of Richmond

John W. Dean, Counsel to President Richard Nixon

Mickey Edwards, Director, Rodel Fellowships in Public Leadership, and Vice President, Aspen Institute; Member of Congress (R-OK), 1977-1992, and Chairman of the House Republican Policy Committee

Eugene R. Fidell, Of Counsel, Feldesman Tucker Leifer Fidell LLP; Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law, Yale Law School

Louis Fisher, Specialist in Constitutional Law, 2006-2010, and Senior Specialist in Separation of Powers, 1970-2006, Law Library, Library of Congress

Philip M. Girdi, Contributing Editor for *The American Conservative Magazine*, antiwar.com, and *Campaign for Liberty*; Fellow, American Conservative Defense Alliance; former operations officer specializing in counter-terrorism, Central Intelligence Agency, 1975-1992; United States Army Intelligence

Mary O. McCarthy, Consultant, Freedom of Information and Privacy Act; Associate Deputy Inspector General, Investigations, Central Intelligence Agency, 2005-2006; Visiting Fellow, Center for Strategic

¹ The Constitution Project’s Liberty and Security Committee, The Case for a FISA “Special Advocate” 2 (May 29, 2014), available at http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf (“TCP Special Advocate Report”).

² *Id.* at 14-17.

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and International Studies, 2002-2004; Senior Policy Planner, Directorate of Science and Technology, Central Intelligence Agency, 2001-2002; Senior Director, Special Assistant to the President, National Security Council, 1998-2001; Director for Intelligence Programs, National Security Council, 1996-1998; National Intelligence Officer for Warning (Deputy 1991-1994), 1994-1996

Deborah N. Pearlstein, Associate Professor of Law, Cardozo School of Law; Associate Research Scholar, Woodrow Wilson School for Public and International Affairs at Princeton University, 2007-2011; Founding Director, Law and Security Program at Human Rights First, 2003-2007; Clerk to Justice John Paul Stevens, U.S. Supreme Court, 1999-2000; Senior Editor and Speechwriter for President Clinton, 1993-1995

Paul Pillar, Nonresident Senior Fellow, Center for Security Studies, Georgetown University; Intelligence Officer (positions included Deputy Chief of DCI Counterterrorist Center, National Intelligence Officer for the Near East and South Asia, and Executive Assistant to the Director of Central Intelligence); Central Intelligence Agency and National Intelligence Council, 1977-2005

Jack N. Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Glen Earl Weston Research Professor of Law; Co-director, National Security and U.S. Foreign Relations Law Program, The George Washington University Law School

Neal Sonnett, Member, American Bar Association Board of Governors; Past Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida, 1967-1972

Colby Vokey, Lieutenant Colonel USMC (Ret.); Attorney, Law Firm of Colby Vokey PC; Lead Counsel for Guantanamo detainee Omar Khadr before Guantanamo Military Commissions, 2005-2007

Don Wallace, Chairman, International Law Institute; Professor Emeritus and Adjunct Professor, Georgetown University Law Center

Affiliations are listed for purposes of identification only.