

113TH CONGRESS
1ST SESSION

H. R. 3159

To provide for the appointment of a public interest advocate in matters involving a significant legal interpretation or construction of the Foreign Intelligence Surveillance Act of 1978, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 2013

Mr. SCHIFF (for himself and Mr. CARNEY) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Select Committee on Intelligence (Permanent Select), for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide for the appointment of a public interest advocate in matters involving a significant legal interpretation or construction of the Foreign Intelligence Surveillance Act of 1978, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ensuring Adversarial
5 Process in the FISA Court Act”.

1 **SEC. 2. PUBLIC INTEREST ADVOCATES FOR PROCEEDINGS**
2 **UNDER THE FOREIGN INTELLIGENCE SUR-**
3 **VEILLANCE ACT OF 1978.**

4 (a) APPOINTMENT BY PRIVACY AND CIVIL LIB-
5 ERTIES OVERSIGHT BOARD.—

6 (1) IN GENERAL.—Section 1061(d) of the Intel-
7 ligence Reform and Terrorism Prevention Act of
8 2004 (42 U.S.C. 2000ee(d)) is amended by adding
9 at the end the following new paragraph:

10 “(5) APPOINTMENT OF PUBLIC INTEREST AD-
11 VOCATES.—

12 “(A) APPOINTMENT.—The Board shall ap-
13 point attorneys to serve as public interest advo-
14 cates in proceedings before the Foreign Intel-
15 ligence Surveillance Court, a judge of the peti-
16 tion review pool, the Foreign Intelligence Sur-
17 veillance Court of Review, and the Supreme
18 Court under the Foreign Intelligence Surveil-
19 lance Act of 1978 (50 U.S.C. 1801 et seq.).

20 “(B) REQUIREMENTS.—In making ap-
21 pointments under subparagraph (A), the Board
22 shall—

23 “(i) consult with the Attorney Gen-
24 eral;

25 “(ii) appoint attorneys with expertise
26 and experience in cases involving privacy

1 and civil liberties who are not employees of
2 the Federal Government;

3 “(iii) consider candidates with dem-
4 onstrated expertise in and commitment to
5 constitutional and legal protections for pri-
6 vacy and civil liberties;

7 “(iv) consider the availability of can-
8 didates to appear before the Foreign Intel-
9 ligence Surveillance Court, a judge of the
10 petition review pool, the Foreign Intel-
11 ligence Surveillance Court of Review, or
12 the Supreme Court in urgent matters;

13 “(v) consider the ability of candidates
14 to obtain and maintain an appropriate se-
15 curity clearance to participate fully in mat-
16 ters before the Foreign Intelligence Sur-
17 veillance Court, a judge of the petition re-
18 view pool, the Foreign Intelligence Surveil-
19 lance Court of Review, and the Supreme
20 Court under the Foreign Intelligence Sur-
21 veillance Act of 1978 (50 U.S.C. 1801 et
22 seq.); and

23 “(vi) provide notice to the Attorney
24 General and the presiding judge of the

1 Foreign Intelligence Surveillance Court of
2 all appointments under subparagraph (A).

3 “(C) DUTIES.—Attorneys appointed under
4 subparagraph (A) shall carry out the duties of
5 the public interest advocate as described in sub-
6 section (i) of section 103 of the Foreign Intel-
7 ligence Surveillance Act of 1978 (50 U.S.C.
8 1803).

9 “(D) TECHNICAL EXPERTS.—

10 “(i) APPOINTMENT.—The Board shall
11 appoint technical and subject-matter ex-
12 perts, not employed by the Federal Gov-
13 ernment, to be available to assist public in-
14 terest advocates in performing the duties
15 of such advocates under this paragraph.

16 “(ii) QUALIFICATIONS.—In making
17 appointments under clause (i), the Board
18 shall consider individuals with expertise in
19 technical issues likely to arise in cases re-
20 lating to the Foreign Intelligence Surveil-
21 lance Act of 1978 (50 U.S.C. 1801 et
22 seq.), including computer networks, tele-
23 communications, encryption, and cyberse-
24 curity.

1 “(E) COMPENSATION.—The Attorney Gen-
2 eral shall, from funds made available to the De-
3 partment of Justice, compensate each attorney
4 appointed under subparagraph (A) at the daily
5 equivalent of the annual rate of basic pay for
6 level III of the Executive Schedule for each day
7 (including travel time) during which such attor-
8 ney is engaged in the actual performance of du-
9 ties under subsection (i) of section 103 of the
10 Foreign Intelligence Surveillance Act of 1978
11 (50 U.S.C. 1803).

12 “(F) TRAVEL EXPENSES.—The Attorney
13 General shall, from funds made available to the
14 Department of Justice, provide each attorney
15 appointed under subparagraph (A) with travel
16 expenses, including per diem in lieu of subsist-
17 ence, in accordance with applicable provisions
18 under subchapter I of chapter 57 of title 5,
19 United States Code.

20 “(G) SECURITY CLEARANCES.—The Presi-
21 dent shall ensure that attorneys appointed
22 under subparagraph (A) and technical and sub-
23 ject-matter experts appointed under subpara-
24 graph (D)(i) are expeditiously provided appro-
25 priate security clearances to carry out the du-

1 ties of the attorneys to the extent possible
2 under the appropriate procedures and require-
3 ments and provided that such attorneys meet
4 the criteria for receiving such security clear-
5 ances.

6 “(H) DEFINITIONS.—In this paragraph:

7 “(i) FOREIGN INTELLIGENCE SUR-
8 VEILLANCE COURT.—The term ‘Foreign
9 Intelligence Surveillance Court’ means the
10 court established under section 103(a) of
11 the Foreign Intelligence Surveillance Act of
12 1978 (50 U.S.C. 1803(a)).

13 “(ii) FOREIGN INTELLIGENCE SUR-
14 VEILLANCE COURT OF REVIEW.—The term
15 ‘Foreign Intelligence Surveillance Court of
16 Review’ means the court established under
17 section 103(b) of the Foreign Intelligence
18 Surveillance Act of 1978 (50 U.S.C.
19 1803(b)).

20 “(iii) PETITION REVIEW POOL.—The
21 term ‘petition review pool’ means the peti-
22 tion review pool established under section
23 103(e) of the Foreign Intelligence Surveil-
24 lance Act of 1978 (50 U.S.C. 1803(e)).”.

1 (2) INITIAL APPOINTMENT.—Not later than
2 180 days after the date of the enactment of this Act,
3 the Privacy and Civil Liberties Oversight Board
4 shall appoint at least one attorney to serve as a pub-
5 lic interest advocate under paragraph (5) of section
6 1061(d) of the Intelligence Reform and Terrorism
7 Prevention Act of 2004 (42 U.S.C. 2000ee(d)), as
8 added by subsection (a) of this section.

9 (b) APPOINTMENT BY FOREIGN INTELLIGENCE SUR-
10 VEILLANCE COURT.—Section 103 of the Foreign Intel-
11 ligence Surveillance Court of 1978 (50 U.S.C. 1803) is
12 amended by adding at the end the following new sub-
13 section:

14 “(i)(1) In any matter before a covered court involving
15 a significant interpretation or construction of a provision
16 of this Act, including any novel legal, factual, or techno-
17 logical issue or an issue relating to the Fourth Amend-
18 ment to the Constitution of the United States, the court
19 shall appoint one or more public interest advocates ap-
20 pointed under paragraph (5) of section 1061(d) of the In-
21 telligence Reform and Terrorism Prevention Act of 2004
22 (42 U.S.C. 2000ee(d)) to represent the privacy and civil
23 liberties interests of the people of the United States in
24 the matter before the court.

1 “(2) A court that appoints a public interest advocate
2 for a matter before the court under paragraph (1) shall—

3 “(A) provide notice to the Attorney General and
4 the Privacy and Civil Liberties Oversight Board of
5 the appointment; and

6 “(B) provide the Privacy and Civil Liberties
7 Oversight Board with a summary of the issues in
8 such matter that warranted such appointment.

9 “(3) A public interest advocate appointed under para-
10 graph (1)—

11 “(A) shall participate fully in the matter before
12 the court for which such public interest advocate
13 was appointed with the same rights and privileges as
14 the Federal Government;

15 “(B) shall represent the interests of the people
16 of the United States in preserving privacy and civil
17 liberties in such matter, including with respect to
18 the impact of such matter on the rights of the peo-
19 ple of the United States under the Fourth Amend-
20 ment to the Constitution of the United States;

21 “(C) shall have access to all relevant evidence
22 in such matter and may petition the court to order
23 the Federal Government to produce documents, ma-
24 terials, or other evidence necessary to perform the
25 duties of the public interest advocate;

1 “(D) may file timely motions and briefs, in ac-
2 cordance with the procedures of the court, and shall
3 be given the opportunity by the court to respond to
4 motions or filings made by the Federal Government
5 in accordance with such procedures; and

6 “(E) may request a rehearing or en banc con-
7 sideration of a decision of the court.

8 “(4)(A) In matters before the court established under
9 subsection (a) in which a public interest advocate has been
10 appointed and the court believes the case involves a ques-
11 tion of law in which there is substantial ground for dif-
12 ference of opinion, the court may by certification at any
13 time, including following the rendering of a final judg-
14 ment, request review by the court established under sub-
15 section (b).

16 “(B) In matters before the court established under
17 subsection (b) in which a public interest advocate has been
18 appointed and the court believes the case involves a ques-
19 tion of law in which there is substantial ground for dif-
20 ference of opinion, the court may by certification at any
21 time, including following the rendering of a final judg-
22 ment, request review by the Supreme Court.

23 “(C) In any matter in which a court makes a certifi-
24 cation for review of any ruling or question of law as pro-
25 vided in subparagraph (A) and (B), the United States and

1 the public interest advocate shall be given opportunity to
2 provide written briefs or arguments related to the decision
3 by the court established under subsection (b) or the Su-
4 preme Court to review a ruling.

5 “(5) A covered court may, sua sponte and upon a
6 finding that the court would benefit from additional views,
7 permit and facilitate participation by amicus curiae, in-
8 cluding participation in oral argument if appropriate, in
9 proceedings before such court. Such court may issue ap-
10 propriate orders to facilitate the participation of amicus
11 curiae.

12 “(6) The Attorney General shall ensure that each
13 public interest advocate appointed under paragraph (1)
14 for a matter before a covered court has access to office
15 space and materials necessary to fully participate in such
16 matter, including, as necessary, access to appropriately se-
17 cured computers, communication devices, and facilities.

18 “(7) In this subsection, the term ‘covered court’
19 means the court established under subsection (a), the
20 court established under subsection (b), a judge of the peti-
21 tion review pool established under subsection (e), or the
22 Supreme Court.”.

