



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

May 4, 2015

Honorable Devin Nunes  
Chairman  
Permanent Select Committee on Intelligence  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I write regarding H.R. 2048, the “USA Freedom Act,” which was recently ordered reported by the Judiciary Committee, to provide perspectives on the legislation, particularly an assessment that the pending version of the bill could impede the effective operation of the Foreign Intelligence Surveillance Courts.<sup>1</sup>

In letters to the Committee on January 13, 2014 and May 13, 2014,<sup>2</sup> we commented on various proposed changes to the Foreign Intelligence Surveillance Act (FISA). Our comments focused on the operational impact of certain proposed changes on the Judicial Branch, particularly the Foreign Intelligence Surveillance Court (“FISC”) and the Foreign Intelligence Surveillance Court of Review (collectively “FISA Courts”), but did not express views on core policy choices that the political branches are considering regarding intelligence collection. In keeping with that approach, we offer views on aspects of H.R. 2048 that bear directly on the work of the FISA Courts and how that work is presented to the public. We sincerely appreciate the ongoing efforts of the bipartisan leadership of all the congressional committees of jurisdiction to listen to and attempt to accommodate our perspectives and concerns.

We respectfully request that, if possible, this letter be included with your Committee’s report to the House on the bill.

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<sup>1</sup> Following the practice set forth in a letter from the Honorable John D. Bates (my predecessor as Director of the Administrative Office of the United States Courts (“AO”)) to the congressional committees of jurisdiction on January 13, 2014, these views have been formulated through consultation with the presiding judges of the Foreign Intelligence Surveillance Courts (and now with Judge Bates, a former presiding judge of the FISC). For the sake of convenience, throughout this letter the terms “we” and “our” are used to describe these institutional perspectives. Because the matters at issue here relate to special expertise and experience of only a small number of judges on two specialized courts, the Judicial Conference has not been engaged to deliberate on them.

<sup>2</sup> Our May 13, 2014 letter was included in the Committee’s report on H.R. 3361, filed May 15, 2014.

## Summary of Concerns

We have three main concerns. First, H.R. 2048 proposes a “panel of experts” for the FISA Courts which could, in our assessment, impair the courts' ability to protect civil liberties by impeding their receipt of complete and accurate information from the government (in contrast to the helpful *amicus curiae* approach contained in the FISA Improvements Act of 2013 (“FIA”), which was approved in similar form by the House in 2014).<sup>3</sup> Second, we continue to have concerns with the prospect of public “summaries” of FISA Courts’ opinions when the opinions themselves are not released to the public. Third, we have a few other specific technical concerns with H.R. 2048 as drafted.

## Nature of the FISA Courts

With the advent of a new Congress and newly proposed legislation, it seems helpful to restate briefly some key attributes of the work of the FISA Courts.

- The vast majority of the work of the FISC involves individual applications in which experienced judges apply well-established law to a set of facts presented by the government – a process not dissimilar to the *ex parte* consideration of ordinary criminal search warrant applications. Review of entire programs of collection and applications involving bulk collection are a relatively small part of the docket, and applications involving novel legal questions, though obviously important, are rare.
- In all matters, the FISA Courts currently depend on – and will always depend on – prompt and complete candor from the government in providing the courts with all relevant information because the government is typically the only source of such information.
- A “read copy” practice – similar to the practices employed in some federal district courts for Title III wiretap applications – wherein the government provides the FISC with an advance draft of each planned application, is the major avenue for court modification of government-sought surveillance. About a quarter of “read copies” are modified or withdrawn at the instigation of the FISC before the government presents a final application – in contrast to the overwhelming majority of *formal* applications that are approved by the Court because

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<sup>3</sup> S. 1631, the “FISA Improvements Act of 2013”, was approved by the Senate Select Committee on Intelligence on October 31, 2013 by a vote 11-4. The USA Freedom Act of 2014 followed a roughly similar approach, and was approved by the House on May 22, 2014 by a vote of 303-121. We have previously provided technical suggestions regarding this approach to the committees of jurisdiction.

modifications at the “read copy” stage have addressed the Court’s concerns in cases where final applications are submitted.

- The FISC typically operates in an environment where, for national security reasons and because of statutory requirements, time is of the essence, and collateral litigation, including for discovery, would generally be completely impractical.
- At times, the FISA Courts are presented with challenging issues regarding how existing law applies to novel technologies. In these instances, the FISA Courts could benefit from a conveniently available explanation or evaluation of the technology from an informed non-government source. Congress could assist in this regard by clarifying the law to provide mechanisms for this to occur easily (*e.g.*, by providing for pre-cleared experts with whom the Court can share and receive information to the extent it deems necessary).

### **The “Panel of Experts” Approach of H.R. 2048 Could Impede the FISA Courts’ Work**

H.R. 2048 provides for what proponents have referred to as a “panel of experts” and what in the bill is referred to as a group of at least five individuals who may serve as an “amicus curiae” in a particular matter.<sup>4</sup> However, unlike a true amicus curiae, the FISA Courts would be required to appoint such an individual to participate in any case involving a “novel *or* significant interpretation of law” (emphasis added)<sup>5</sup> – unless the court “issues a finding” that appointment is not appropriate. Once appointed, such amici are required to present to the court, “as appropriate,” legal arguments in favor of privacy, information about technology, or other “relevant” information. Designated amici are required to have access to “all relevant” legal precedent, as well as certain other materials “the court determines are relevant.”

Our assessment is that this “panel of experts” approach could impede the FISA Courts’ role in protecting the civil liberties of Americans. We recognize this may not be the intent of the drafters, but nonetheless it is our concern. As we have indicated, the full cooperation of rank-and-file government personnel in promptly conveying to the FISA Courts complete and candid factual information is critical. A perception on their part that the FISA process involves a “panel of experts” officially charged with opposing the government’s efforts could risk deterring the necessary and critical cooperation and candor. Specifically, our concern is that imposing the

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<sup>4</sup> The bill also provides in subparagraph (2)(B) for a “true” amicus that would serve entirely at the discretion of the FISA Courts.

<sup>5</sup> This construction suggests that Congress or others might expect the appointment of amici to be considered even when an application presents novel but not significant interpretations of law, or involves only modest factual differences.

mandatory “duties” – contained in subparagraph (i)(4) of proposed section 401 (in combination with a quasi-mandatory appointment process) – could create such a perception within the government that a standing body exists to oppose intelligence activities.

Simply put, delays and difficulties in receiving full and accurate information from Executive Branch agencies (including, but not limited to, cases involving non-compliance) present greater challenges to the FISA Courts’ role in protecting civil liberties than does the lack of a non-governmental perspective on novel legal issues or technological developments. To be sure, we would welcome a means of facilitating the FISA Courts’ obtaining assistance from non-governmental experts in unusual cases, but it is critically important that the means chosen to achieve that end do not impair the timely receipt of complete and accurate information from the government.

It is on this point especially that we believe the “panel of experts” system in H.R. 2048 may prove counterproductive. The information that the FISA Courts need to examine probable cause, evaluate minimization and targeting procedures, and determine and enforce compliance with court authorizations and orders is exclusively in the hands of the government – specifically, in the first instance, intelligence agency personnel. If disclosure of sensitive or adverse information to the FISA Courts came to be seen as a prelude to disclosure to a third party whose mission is to oppose or curtail the agency’s work, then the prompt receipt of complete and accurate information from the government would likely be impaired – ultimately to the detriment of the national security interest in expeditious action *and* the effective protection of privacy and civil liberties.<sup>6</sup>

In contrast, a “true” amicus curiae approach, as adopted, for example, in the FIA, facilitates appointment of experts outside the government to serve as amici curiae and render any form of assistance needed by the court, without any implication that such experts are expected to oppose the intelligence activities proposed by the government. For that reason, we do not believe the FIA approach poses any similar risk to the courts’ obtaining relevant information.

### **“Summaries” of Unreleased FISA Court Opinions Could Mislead the Public**

In our May 13, 2014, letter to the Committee on H.R. 3361, we shared the nature of our concerns regarding the creation of public “summaries” of court opinions that are not themselves released. The provisions in H.R. 2048 are similar and so are our concerns. To be clear, the FISA Courts have never objected to their opinions – whether in full or in redacted form – being

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<sup>6</sup> The “panel of experts” approach in H.R. 2048 appears to be a modified form of the “special advocate” provisions in S. 2685 in the 113<sup>th</sup> Congress. We note with appreciation that some of the worrisome aspects of that bill have been helpfully modified in H.R. 2048; nonetheless, our core concern about impeding the FISA Courts’ work remains.

released to the public to the maximum extent permitted by the Executive's assessment of national security concerns. Likewise, the FISA Courts have always facilitated the provision of their full opinions to Congress. *See, e.g.*, FISC Rule of Procedure 62(c). Thus, we have no objection to the provisions in H.R. 2048 that call for maximum public release of court opinions. However, a formal practice of creating summaries of court opinions without the underlying opinion being available is unprecedented in American legal administration. Summaries of court opinions can be inadvertently incorrect or misleading, and may omit key considerations that can prove critical for those seeking to understand the import of the court's full opinion. This is particularly likely to be a problem in the fact-focused area of FISA practice, under circumstances where the government has already decided that it cannot release the underlying opinion even in redacted form, presumably because the opinion's legal analysis is inextricably intertwined with classified facts.

#### **Additional Technical Comments on H.R. 2048**

The Judiciary, like the public, did not participate in the discussions between the Administration and congressional leaders that led to H.R. 2048 (publicly released on April 28, 2015 and reported by the Judiciary Committee without changes on April 30). In the few days we have had to review the bill, we have noted a few technical concerns that we hope can be addressed prior to finalization of the legislation, should Congress choose to enact it. These concerns (all in the amicus curiae subsection) include:

- Proposed subparagraph (9) appears inadvertently to omit the ability of the FISA Courts to train and administer amici between the time they are designated and the time they are appointed.
- Proposed subparagraph (6) does not make any provision for a "true amicus" appointed under subparagraph (2)(B) to receive necessary information.
- We are concerned that a lack of parallel construction in proposed clause (6)(A)(i) (apparently differentiating between access to legal precedent as opposed to access to other materials) could lead to confusion in its application.
- We recommend adding additional language to clarify that the exercise of the duties under proposed subparagraph (4) would occur in the context of Court rules (for example, deadlines and service requirements).
- We believe that slightly greater clarity could be provided regarding the nature of the obligations referred to in proposed subparagraph (10).

Honorable Devin Nunes  
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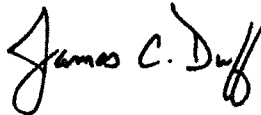
These concerns would generally be avoided or addressed by substituting the FIA approach. Furthermore, it bears emphasis that, even if H.R. 2048 were amended to address all of these technical points, our more fundamental concerns about the “panel of experts” approach would not be fully assuaged. Nonetheless, our staff stands ready to work with your staff to provide suggested textual changes to address each of these concerns.

Finally, although we have no particular objection to the requirement in this legislation of a report by the Director of the AO, Congress should be aware that the AO’s role would be to receive information from the FISA Courts and then simply transmit the report as directed by law.

For the sake of brevity, we are not restating here all the comments in our previous correspondence to Congress on proposed legislation similar to H.R. 2048.<sup>7</sup> However, the issues raised in those letters continue to be of importance to us.

We hope these comments are helpful to the House of Representatives in its consideration of this legislation. If we may be of further assistance in this or any other matter, please contact me or our Office of Legislative Affairs at 202-502-1700.

Sincerely,



James C. Duff  
Director

Identical letter sent to:      Honorable Bob Goodlatte  
   Honorable John Conyers, Jr.  
   Honorable Adam Schiff

<sup>7</sup> In addition to the letters on January 13 and May 13, 2014, mentioned above, we also wrote to the Senate committees of jurisdiction on August 5, 2014, regarding S. 2685.