

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.

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## 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

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## 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.”.

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