

113TH CONGRESS
1ST SESSION

H. R. 3228

To establish the Office of the Constitutional Advocate to provide advocacy in cases before courts established by the Foreign Intelligence Surveillance Act of 1978, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 1, 2013

Mr. VAN HOLLEN (for himself and Mr. JORDAN) 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 establish the Office of the Constitutional Advocate to provide advocacy in cases before courts established by 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 “FISA Court Reform
5 Act of 2013”.

1 **SEC. 2. DEFINITIONS.**

2 In this title:

3 (1) **CONSTITUTIONAL ADVOCATE.**—The term
4 “Constitutional Advocate” means the Constitutional
5 Advocate appointed under section 3(b).

6 (2) **DECISION.**—The term “decision” means a
7 decision, order, or opinion issued by the FISA Court
8 or the FISA Court of Review.

9 (3) **FISA.**—The term “FISA” means the For-
10 eign Intelligence Surveillance Act of 1978 (50
11 U.S.C. 1801 et seq.).

12 (4) **FISA COURT.**—The term “FISA Court”
13 means the court established under section 103(a) of
14 FISA (50 U.S.C. 1803(a)).

15 (5) **FISA COURT OF REVIEW.**—The term
16 “FISA Court of Review” means the court of review
17 established under section 103(b) of FISA (50 U.S.C.
18 1803(b)).

19 (6) **OFFICE.**—The term “Office” means the Of-
20 fice of the Constitutional Advocate established under
21 section 3(a).

22 (7) **PETITION REVIEW POOL.**—The term “peti-
23 tion review pool” means the petition review pool es-
24 tablished by section 103(e) of FISA (50 U.S.C.
25 1803(e)) or any member of that pool.

1 (8) SIGNIFICANT CONSTRUCTION OR INTERPRE-
2 TATION OF LAW.—The term “significant construc-
3 tion or interpretation of law” means a significant
4 construction or interpretation of a provision, as that
5 term is construed under section 601(c) of FISA (50
6 U.S.C. 1871(c)).

7 **SEC. 3. OFFICE OF THE CONSTITUTIONAL ADVOCATE.**

8 (a) ESTABLISHMENT.—There is established within
9 the judicial branch of the United States an Office of the
10 Constitutional Advocate.

11 (b) CONSTITUTIONAL ADVOCATE.—

12 (1) IN GENERAL.—The head of the Office is the
13 Constitutional Advocate.

14 (2) APPOINTMENT AND TERM.—

15 (A) APPOINTMENT.—The Chief Justice of
16 the United States shall appoint the Constitu-
17 tional Advocate from the list of candidates sub-
18 mitted under subparagraph (B).

19 (B) CANDIDATES.—

20 (i) LIST OF CANDIDATES.—The Pri-
21 vacy and Civil Liberties Oversight Board
22 shall submit to the Chief Justice a list of
23 not less than 5 qualified candidates to
24 serve as a Constitutional Advocate.

1 (ii) SELECTION OF CANDIDATES.—In
2 preparing a list described in clause (i), the
3 Privacy and Civil Liberties Oversight
4 Board shall select candidates the Board
5 believes will be zealous and effective advo-
6 cates in defense of civil liberties and con-
7 sider each potential candidate’s—

8 (I) litigation and other profes-
9 sional experience;

10 (II) experience with the areas of
11 law the Constitutional Advocate is
12 likely to encounter in the course of
13 the Advocate’s duties; and

14 (III) demonstrated commitment
15 to civil liberties.

16 (C) SECURITY CLEARANCE.—An individual
17 may be appointed Constitutional Advocate with-
18 out regard to whether the individual possesses
19 a security clearance on the date of the appoint-
20 ment.

21 (D) TERM AND DISMISSAL.—A Constitu-
22 tional Advocate shall be appointed for a term of
23 3 years and may be fired only for good cause
24 shown, including the demonstrated inability to
25 qualify for an adequate security clearance.

1 (E) REAPPOINTMENT.—There shall be no
2 limit to the number of consecutive terms served
3 by a Constitutional Advocate. The reappoint-
4 ment of a Constitutional Advocate shall be
5 made in the same manner as appointment of a
6 Constitutional Advocate.

7 (F) ACTING CONSTITUTIONAL ADVO-
8 CATE.—If the position of Constitutional Advo-
9 cate is vacant, the Chief Justice may appoint
10 an Acting Constitutional Advocate from among
11 the qualified employees of the Office. If there
12 are no such qualified employees, the Chief Jus-
13 tice may appoint an Acting Constitutional Ad-
14 vocate from the most recent list of candidates
15 provided by the Privacy and Civil Liberties
16 Oversight Board pursuant to subparagraph (B).
17 The Acting Constitutional Advocate shall have
18 all of the powers of a Constitutional Advocate
19 and shall serve until a Constitutional Advocate
20 is appointed.

21 (3) EMPLOYEES.—The Constitutional Advocate
22 is authorized, without regard to the civil service laws
23 and regulations, to appoint and terminate employees
24 of the Office.

1 (c) SECURITY CLEARANCES.—The appropriate de-
2 partments, agencies, and elements of the executive branch
3 shall cooperate with the Office, to the extent possible
4 under existing procedures and requirements, to expedi-
5 tiously provide the Constitutional Advocate and appro-
6 priate employees of the Office with the security clearances
7 necessary to carry out the duties of the Constitutional Ad-
8 vocate.

9 (d) DUTIES AND AUTHORITIES OF THE CONSTITU-
10 TIONAL ADVOCATE.—

11 (1) IN GENERAL.—The Constitutional Advo-
12 cate—

13 (A) shall review each application to the
14 FISA Court by the Attorney General;

15 (B) shall review each decision of the FISA
16 Court, the petition review pool, or the FISA
17 Court of Review issued after the date of the en-
18 actment of this Act and all documents and
19 other material relevant to such decision in a
20 complete, unredacted form;

21 (C) may participate in a proceeding before
22 the petition review pool if such participation is
23 requested by a party in such a proceeding or by
24 the petition review pool;

1 (D) shall consider any request from a pro-
2 vider who has been served with an order, certifi-
3 cation, or directive compelling the provider to
4 provide assistance to the Government or to re-
5 lease customer information to assist that pro-
6 vider in a proceeding before the FISA Court or
7 the petition review pool, including a request—

8 (i) to oppose the Government on be-
9 half of the private party in such a pro-
10 ceeding; or

11 (ii) to provide guidance to the private
12 party if the private party is considering
13 compliance with an order of the FISA
14 Court;

15 (E) shall participate in a proceeding before
16 the FISA Court if appointed to participate by
17 the FISA Court under section 4(a) and may
18 participate in a proceeding before the petition
19 review pool if authorized under section 5(a);

20 (F) may request to participate in a pro-
21 ceeding before the FISA Court or the petition
22 review pool;

23 (G) shall participate in such a proceeding
24 if such request is granted;

1 (H) may request reconsideration of a deci-
2 sion of the FISA Court under section 4(b);

3 (I) may appeal or seek review of a decision
4 of the FISA Court, the petition review pool, or
5 the FISA Court of Review, as permitted by this
6 title; and

7 (J) shall participate in such appeal or re-
8 view.

9 (2) **ADVOCACY.**—The Constitutional Advocate
10 shall protect individual rights by vigorously advo-
11 cating before the FISA Court, the petition review
12 pool, or the FISA Court of Review, as appropriate,
13 in support of legal interpretations that minimize the
14 scope of surveillance and the extent of data collec-
15 tion and retention.

16 (3) **UTILIZATION OF OUTSIDE COUNSEL.**—The
17 Constitutional Advocate—

18 (A) may delegate to a competent outside
19 counsel any duty or responsibility of the Con-
20 stitutional Advocate with respect to partici-
21 pation in a matter before the FISA Court, the
22 FISA Court of Review, or the Supreme Court
23 of the United States; and

1 (B) may not delegate to outside counsel
2 any duty or authority set out in subparagraph
3 (A), (B), (D), (F), (H), or (I) of paragraph (1).

4 (4) AVAILABILITY OF DOCUMENTS AND MATE-
5 RIAL.—The FISA Court, the petition review pool, or
6 the FISA Court of Review, as appropriate, shall
7 order any agency, department, or entity to make
8 available to the Constitutional Advocate, or appro-
9 priate outside counsel if utilized by the Constitu-
10 tional Advocate under paragraph (3), any documents
11 or other material necessary to carry out the duties
12 described in paragraph (1).

13 **SEC. 4. ADVOCACY BEFORE THE FISA COURT.**

14 (a) APPOINTMENT TO PARTICIPATE.—

15 (1) IN GENERAL.—The FISA Court may ap-
16 point the Constitutional Advocate to participate in a
17 FISA Court proceeding.

18 (2) STANDING.—If the Constitutional Advocate
19 is appointed to participate in a FISA Court pro-
20 ceeding pursuant to paragraph (1), the Constitu-
21 tional Advocate shall have standing as a party before
22 the FISA Court in that proceeding.

23 (b) RECONSIDERATION OF A FISA COURT DECI-
24 SION.—

1 (1) AUTHORITY TO MOVE FOR RECONSIDER-
2 ATION.—The Constitutional Advocate may move the
3 FISA Court to reconsider any decision of the FISA
4 Court made after the date of the enactment of this
5 Act by petitioning the FISA Court not later than 30
6 days after the date on which all documents and ma-
7 terials relevant to the decision are made available to
8 the Constitutional Advocate.

9 (2) DISCRETION OF THE FISA COURT.—The
10 FISA Court shall have discretion to grant or deny
11 a motion for reconsideration made pursuant to para-
12 graph (1).

13 (c) AMICUS CURIAE PARTICIPATION.—

14 (1) MOTION BY THE CONSTITUTIONAL ADVOCATE.—The Constitutional Advocate may file a motion with the FISA Court to permit and facilitate participation of amicus curiae, including participation in oral argument if appropriate, in any proceeding. The FISA Court shall have the discretion to grant or deny such a motion.

21 (2) FACILITATION BY THE FISA COURT.—The
22 FISA Court may, sua sponte, permit and facilitate
23 participation by amicus curiae, including participa-
24 tion in oral argument if appropriate, in proceedings
25 before the FISA Court.

1 (3) REGULATIONS.—Not later than 180 days
2 after the date of the enactment of this Act, the
3 FISA Court shall promulgate rules to provide the
4 public with information sufficient to allow interested
5 parties to participate as *amicus curiae*.

6 **SEC. 5. ADVOCACY BEFORE THE PETITION REVIEW POOL.**

7 (a) AUTHORITY TO PARTICIPATE.—The petition re-
8 view pool or any party to a proceeding before the petition
9 review pool may authorize the Constitutional Advocate to
10 participate in a petition review pool proceeding.

11 (b) RECONSIDERATION OF A PETITION REVIEW
12 POOL DECISION.—

13 (1) AUTHORITY TO MOVE FOR RECONSIDER-
14 ATION.—The Constitutional Advocate may move the
15 petition review pool to reconsider any decision of the
16 petition review pool made after the date of the en-
17 actment of this Act by petitioning the petition review
18 pool not later than 30 days after the date on which
19 all documents and materials relevant to the decision
20 are made available to the Constitutional Advocate.

21 (2) DISCRETION OF THE PETITION REVIEW
22 POOL.—The petition review pool shall have discre-
23 tion to grant or deny a motion for reconsideration
24 made pursuant to paragraph (1).

25 (c) AMICUS CURIAE PARTICIPATION.—

1 (1) MOTION BY THE CONSTITUTIONAL ADVOCATE.—The Constitutional Advocate may file a motion with the petition review pool to permit and facilitate participation of amicus curiae, including participation in oral argument if appropriate, in any proceeding. The petition review pool shall have the discretion to grant or deny such a motion.

8 (2) FACILITATION BY THE FISA COURT.—The petition review pool may, sua sponte, permit and facilitate participation by amicus curiae, including participation in oral argument if appropriate, in proceedings before the petition review pool.

13 (3) REGULATIONS.—Not later than 180 days after the date of the enactment of this Act, the petition review pool shall promulgate rules to provide the public with information sufficient to allow interested parties to participate as amicus curiae.

18 **SEC. 6. APPELLATE REVIEW.**

19 (a) APPEAL OF FISA COURT DECISIONS.—

20 (1) AUTHORITY TO APPEAL.—The Constitutional Advocate may appeal any decision of the FISA Court or the petition review pool issued after the date of the enactment of this Act not later than 90 days after the date the decision is issued, unless it would be apparent to all reasonable jurists that

1 such decision is dictated by statute or by precedent
2 handed down after such date of enactment.

3 (2) **STANDING AS APPELLANT.**—If the Con-
4 stitutional Advocate appeals a decision of the FISA
5 Court or the petition review pool pursuant to para-
6 graph (1), the Constitutional Advocate shall have
7 standing as a party before the FISA Court of Re-
8 view in such appeal.

9 (3) **MANDATORY REVIEW.**—The FISA Court of
10 Review shall review any FISA Court or petition re-
11 view pool decision appealed by the Constitutional
12 Advocate and issue a decision in such appeal.

13 (4) **STANDARD OF REVIEW.**—The standards for
14 a mandatory review of a FISA Court or petition re-
15 view pool decision pursuant to paragraph (3) shall
16 be—

17 (A) de novo with respect to issues of law;
18 and

19 (B) clearly erroneous with respect to deter-
20 mination of facts.

21 (5) **AMICUS CURIAE PARTICIPATION.**—

22 (A) **IN GENERAL.**—The FISA Court of Re-
23 view shall accept amicus curiae briefs from in-
24 terested parties in all mandatory reviews pursu-
25 ant to paragraph (3) and shall provide for ami-

1 *cus curiae* participation in oral argument if ap-
2 propriate.

3 (B) REGULATIONS.—Not later than 180
4 days after the date of the enactment of this
5 Act, the FISA Court of Review shall promul-
6 gate rules to provide the public with informa-
7 tion sufficient to allow interested parties to par-
8 ticipate as *amicus curiae*.

9 (b) REVIEW OF FISA COURT OF REVIEW DECISIONS.—
10 SIONS.—

11 (1) AUTHORITY.—The Constitutional Advocate
12 may seek a writ of certiorari from the Supreme
13 Court of the United States for review of any decision
14 of the FISA Court of Review.

15 (2) STANDING.—In any proceedings before the
16 Supreme Court of the United States relating to a
17 petition of certiorari filed under paragraph (1) and
18 any proceedings in a matter for which certiorari is
19 granted, the Constitutional Advocate shall have
20 standing as a party.

21 **SEC. 7. DISCLOSURE.**

22 (a) REQUIREMENT TO DISCLOSE.—The Attorney
23 General shall publicly disclose—

24 (1) all decisions issued by the FISA Court, the
25 petition review pool, or the FISA Court of Review

1 after July 10, 2003, that include a significant con-
2 struction or interpretation of law;

3 (2) any decision of the FISA Court or the peti-
4 tion review pool appealed by the Constitutional Ad-
5 vocate pursuant to this title; and

6 (3) any FISA Court of Review decision that is
7 issued after an appeal by the Constitutional Advo-
8 cate.

9 (b) DISCLOSURE DESCRIBED.—For each disclosure
10 required by subsection (a) with respect to a decision, the
11 Attorney General shall make available to the public docu-
12 ments sufficient—

13 (1) to identify with particularity each legal
14 question addressed by the decision and how such
15 question was resolved;

16 (2) to describe in general terms the context in
17 which the matter arises;

18 (3) to describe the construction or interpreta-
19 tion of any statute, constitutional provision, or other
20 legal authority relied on by the decision; and

21 (4) to indicate whether the decision departed
22 from any prior decision of the FISA Court, the peti-
23 tion review pool, or the FISA Court of Review.

1 (c) DOCUMENTS DESCRIBED.—The Attorney General
2 shall satisfy the disclosure requirements in subsection (b)
3 by—

4 (1) releasing a FISA Court, petition review
5 pool, or FISA Court of Review decision in its en-
6 tirety or as redacted;

7 (2) releasing a summary of a FISA Court, peti-
8 tion review pool, or FISA Court of Review decision;
9 or

10 (3) releasing an application made to the FISA
11 Court, a petition made to the petition review pool,
12 briefs filed before the FISA Court, the petition re-
13 view pool, or the FISA Court of Review, or other
14 materials, in full or as redacted.

15 (d) EXTENSIVE DISCLOSURE.—The Attorney Gen-
16 eral shall release as much information regarding the facts
17 and analysis contained in a decision described in sub-
18 section (a) or documents described in subsection (c) as is
19 consistent with legitimate national security concerns.

20 (e) TIMING OF DISCLOSURE.—

21 (1) DECISIONS ISSUED PRIOR TO ENACT-
22 MENT.—A decision issued prior to the date of the
23 enactment of this Act that is required to be disclosed
24 under subsection (a)(1) shall be disclosed not later

1 than 180 days after the date of the enactment of
2 this Act.

3 (2) FISA COURT AND PETITION REVIEW POOL
4 DECISIONS.—The Attorney General shall release
5 FISA Court or petition review pool decisions ap-
6 pealed by the Constitutional Advocate not later than
7 30 days after the date the appeal is filed.

8 (3) FISA COURT OF REVIEW DECISIONS.—The
9 Attorney General shall release FISA Court of Re-
10 view decisions appealed by the Constitutional Advo-
11 cate not later than 90 days after the date the appeal
12 is filed.

13 (f) PETITION BY THE CONSTITUTIONAL ADVO-
14 CATE.—

15 (1) AUTHORITY TO PETITION.—The Constitu-
16 tional Advocate may petition the FISA Court, the
17 petition review pool, or the FISA Court of Review to
18 order—

19 (A) the public disclosure of a decision of
20 such a Court or review pool, and documents or
21 other material relevant to such a decision, pre-
22 viously designated as classified information; or

23 (B) the release of an unclassified summary
24 of such decisions and documents.

1 (2) CONTENTS OF PETITION.—Each petition
2 filed under paragraph (1) shall contain a detailed
3 declassification proposal or a summary of the deci-
4 sion and documents that the Constitutional Advocate
5 proposes to have released publicly.

6 (3) ROLE OF THE ATTORNEY GENERAL.—

7 (A) COPY OF PETITION.—The Constitu-
8 tional Advocate shall provide to the Attorney
9 General a copy of each petition filed under
10 paragraph (1).

11 (B) OPPOSITION.—The Attorney General
12 may oppose a petition filed under paragraph (1)
13 by submitting any objections in writing to the
14 FISA Court, the petition review pool, or the
15 FISA Court of Review, as appropriate, not later
16 than 90 days after the date such petition was
17 submitted.

18 (4) PUBLIC AVAILABILITY.—Not less than 91
19 days after receiving a petition under paragraph (1),
20 and taking into account any objections from the At-
21 torney General made under paragraph (3)(B), the
22 FISA Court, the petition review pool, or the FISA
23 Court of Review, as appropriate, shall declassify and
24 make readily available to the public any decision,
25 document, or other material requested in such peti-

1 tion, to the greatest extent possible, consistent with
2 legitimate national security considerations.

3 (5) EFFECTIVE DATE.—The Constitutional Ad-
4 vocate may not file a petition under paragraph (1)
5 until 181 days after the date of the enactment of
6 this Act, except with respect to a decision appealed
7 by the Constitutional Advocate.

8 **SEC. 8. ANNUAL REPORT TO CONGRESS.**

9 (a) REQUIREMENT FOR ANNUAL REPORT.—The
10 Constitutional Advocate shall submit to Congress an an-
11 nual report on the implementation of this title.

12 (b) CONTENTS.—Each annual report submitted
13 under subsection (a) shall—

14 (1) detail the activities of the Office;

15 (2) provide an assessment of the effectiveness
16 of this title; and

17 (3) propose any new legislation to improve the
18 functioning of the Office or the operation of the
19 FISA Court, the petition review pool, or the FISA
20 Court of Review.

21 **SEC. 9. PRESERVATION OF RIGHTS.**

22 Nothing in this title shall be construed—

23 (1) to provide the Attorney General with au-
24 thority to prevent the FISA Court, the petition re-
25 view pool, or the FISA Court of Review from declas-

1 sifying decisions or releasing information pursuant
2 to this title; and

3 (2) to eliminate the public's ability to secure in-
4 formation under section 552 of title 5, United States
5 Code (commonly known as the "Freedom of Infor-
6 mation Act") or any other provision of law.

○