

113TH CONGRESS  
1ST SESSION

# S. 1467

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

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## IN THE SENATE OF THE UNITED STATES

AUGUST 1, 2013

Mr. BLUMENTHAL (for himself, Mrs. MURRAY, Mr. WYDEN, Mr. UDALL of Colorado, Mr. MERKLEY, Mr. UDALL of New Mexico, Mrs. GILLIBRAND, Mr. COONS, Mr. WHITEHOUSE, Mr. TESTER, Mr. FRANKEN, Ms. BALDWIN, Mr. HEINRICH, Mr. MARKEY, Ms. HIRONO, and Mr. SCHATZ) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To establish the Office of the Special 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 Act:

3 (1) **DECISION.**—The term “decision” means a  
4 decision, order, or opinion issued by the FISA Court  
5 or the FISA Court of Review.

6 (2) **FISA.**—The term “FISA” means the For-  
7 eign Intelligence Surveillance Act of 1978 (50  
8 U.S.C. 1801 et seq.).

9 (3) **FISA COURT.**—The term “FISA Court”  
10 means the court established under section 103(a) of  
11 FISA (50 U.S.C. 1803(a)).

12 (4) **FISA COURT OF REVIEW.**—The term  
13 “FISA Court of Review” means the court of review  
14 established under section 103(b) of FISA (50 U.S.C.  
15 1803(b)).

16 (5) **OFFICE.**—The term “Office” mean the Of-  
17 fice of the Special Advocate established under sec-  
18 tion (3)(a).

19 (6) **SIGNIFICANT CONSTRUCTION OR INTERPRE-**  
20 **TATION OF LAW.**—The term “significant construc-  
21 tion or interpretation of law” means a significant  
22 construction or interpretation of a provision, as that  
23 term is construed under section 601(c) of FISA (50  
24 U.S.C. 1871(c)).

1           (7) SPECIAL ADVOCATE.—The term “Special  
2 Advocate” means the Special Advocate appointed  
3 under section 3(b).

4 **SEC. 3. OFFICE OF THE SPECIAL ADVOCATE.**

5           (a) ESTABLISHMENT.—There is established in the ex-  
6 ecutive branch as an independent establishment, as de-  
7 fined in section 104 of title 5, United States Code, an Of-  
8 fice of the Special Advocate.

9           (b) SPECIAL ADVOCATE.—

10           (1) IN GENERAL.—The head of the Office is the  
11 Special Advocate.

12           (2) APPOINTMENT AND TERM.—

13           (A) APPOINTMENT.—The presiding judge  
14 of the FISA Court of Review shall appoint the  
15 Special Advocate from the list of candidates  
16 submitted under subparagraph (B).

17           (B) LIST OF CANDIDATES.—The Privacy  
18 and Civil Liberties Oversight Board shall sub-  
19 mit to the presiding judge of the FISA Court  
20 of Review a list of not less than 5 qualified can-  
21 didates to serve as Special Advocate.

22           (C) SECURITY CLEARANCE.—An individual  
23 may be appointed Special Advocate without re-  
24 gard to whether the individual possesses a secu-  
25 rity clearance on the date of the appointment.

1           (D) TERM AND DISMISSAL.—A Special Ad-  
2           vocate shall be appointed for a term of 5 years  
3           and may be fired only for good cause shown, in-  
4           cluding the demonstrated inability to qualify for  
5           an adequate security clearance.

6           (E) REAPPOINTMENT.—There shall be no  
7           limit to the number of consecutive terms served  
8           by a Special Advocate. The reappointment of a  
9           Special Advocate shall be made in the same  
10          manner as appointment of a Special Advocate.

11          (F) ACTING SPECIAL ADVOCATE.—If the  
12          position of Special Advocate is vacant, the pre-  
13          siding judge of the FISA Court of Review may  
14          appoint an Acting Special Advocate from  
15          among the qualified employees of the Office. If  
16          there are no such qualified employees, the pre-  
17          siding judge of the FISA Court of Review may  
18          appoint an Acting Special Advocate from the  
19          most recent list of candidates provided by the  
20          Privacy and Civil Liberties Oversight Board  
21          pursuant to subparagraph (B). The Acting Spe-  
22          cial Advocate shall have all of the powers of a  
23          Special Advocate and shall serve until a Special  
24          Advocate is appointed.

1           (3) EMPLOYEES.—The Special Advocate is au-  
2           thorized, without regard to the civil service laws and  
3           regulations, to appoint and terminate employees of  
4           the Office.

5           (c) SECURITY CLEARANCES.—The appropriate de-  
6           partments, agencies, and elements of the executive branch  
7           shall cooperate with the Office, to the extent possible  
8           under existing procedures and requirements, to expedi-  
9           tiously provide the Special Advocate and appropriate em-  
10          ployees of the Office with the security clearances necessary  
11          to carry out the duties of the Special Advocate.

12          (d) DUTIES AND AUTHORITIES OF THE SPECIAL AD-  
13          VOCATE.—

14               (1) IN GENERAL.—The Special Advocate—

15                       (A) shall review each application to the  
16                       FISA Court by the Attorney General;

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

22                       (C) shall participate in a proceeding before  
23                       the FISA Court if appointed to participate by  
24                       the FISA Court under section 4(a);

1 (D) may request to participate in a pro-  
2 ceeding before the FISA Court;

3 (E) shall participate in such a proceeding  
4 if such request is granted;

5 (F) may request reconsideration of a deci-  
6 sion of the FISA Court under section 4(b);

7 (G) may appeal or seek review of a deci-  
8 sion of the FISA Court or the FISA Court of  
9 Review under section 5; and

10 (H) shall participate in such appeal or re-  
11 view.

12 (2) ADVOCACY.—The Special Advocate shall  
13 protect individual rights by vigorously advocating be-  
14 fore the FISA Court or the FISA Court of Review,  
15 as appropriate, in support of legal interpretations  
16 that minimize the scope of surveillance and the ex-  
17 tent of data collection and retention.

18 (3) UTILIZATION OF OUTSIDE COUNSEL.—The  
19 Special Advocate—

20 (A) may delegate to a competent outside  
21 counsel any duty or responsibility of the Special  
22 Advocate with respect to participation in a mat-  
23 ter before the FISA Court, the FISA Court of  
24 Review, or the Supreme Court of the United  
25 States; and

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

4 (4) AVAILABILITY OF DOCUMENTS AND MATE-  
 5 RIAL.—The FISA Court or the FISA Court of Re-  
 6 view, as appropriate, shall order any agency, depart-  
 7 ment, or entity to make available to the Special Ad-  
 8 vocate, or appropriate outside counsel if utilized by  
 9 the Special Advocate under paragraph (3), any docu-  
 10 ments or other material necessary to carry out the  
 11 duties described in paragraph (1).

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

13 (a) APPOINTMENT TO PARTICIPATE.—

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

17 (2) STANDING.—If the Special Advocate is ap-  
 18 pointed to participate in a FISA Court proceeding  
 19 pursuant to paragraph (1), the Special Advocate  
 20 shall have standing as a party before the FISA  
 21 Court in that proceeding.

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

24 (1) AUTHORITY TO MOVE FOR RECONSIDER-  
 25 ATION.—The Special Advocate may move the FISA

1 Court to reconsider any decision of the FISA Court  
2 made after the date of the enactment of this Act by  
3 petitioning the FISA Court not later than 30 days  
4 after the date on which all documents and materials  
5 relevant to the decision are made available to the  
6 Special Advocate.

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

11 (c) AMICUS CURIAE PARTICIPATION.—

12 (1) MOTION BY THE SPECIAL ADVOCATE.—The  
13 Special Advocate may file a motion with the FISA  
14 Court to permit and facilitate participation of ami-  
15 cus curiae, including participation in oral argument  
16 if appropriate, in any proceeding. The FISA Court  
17 shall have the discretion to grant or deny such a mo-  
18 tion.

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

24 (3) REGULATIONS.—Not later than 180 days  
25 after the date of the enactment of this Act, the



1 FISA Court shall promulgate rules to provide the  
2 public with information sufficient to allow interested  
3 parties to participate as amicus curiae.

4 **SEC. 5. APPELLATE REVIEW.**

5 (a) APPEAL OF FISA COURT DECISIONS.—

6 (1) AUTHORITY TO APPEAL.—The Special Ad-  
7 vocate may appeal any decision of the FISA Court  
8 issued after the date of the enactment of this Act  
9 not later than 90 days after the date the decision is  
10 issued, unless it would be apparent to all reasonable  
11 jurists that such decision is dictated by statute or by  
12 precedent handed down after such date of enact-  
13 ment.

14 (2) STANDING AS APPELLANT.—If the Special  
15 Advocate appeals a decision of the FISA Court pur-  
16 suant to paragraph (1), the Special Advocate shall  
17 have standing as a party before the FISA Court of  
18 Review in such appeal.

19 (3) MANDATORY REVIEW.—The FISA Court of  
20 Review shall review any FISA Court decision ap-  
21 pealed by the Special Advocate and issue a decision  
22 in such appeal.

23 (4) STANDARD OF REVIEW.—The standards for  
24 a mandatory review of a FISA Court decision pursu-  
25 ant to paragraph (3) shall be—

1 (A) de novo with respect to issues of law;  
2 and

3 (B) clearly erroneous with respect to deter-  
4 mination of facts.

5 (5) AMICUS CURIAE PARTICIPATION.—

6 (A) IN GENERAL.—The FISA Court of Re-  
7 view shall accept amicus curiae briefs from in-  
8 terested parties in all mandatory reviews pursu-  
9 ant to paragraph (3) and shall provide for ami-  
10 cus participation in oral argument if appro-  
11 priate.

12 (B) REGULATIONS.—Not later than 180  
13 days after the date of the enactment of this  
14 Act, the FISA Court of Review shall promul-  
15 gate rules to provide the public with informa-  
16 tion sufficient to allow interested parties to par-  
17 ticipate as amicus curiae.

18 (b) REVIEW OF FISA COURT OF REVIEW DECI-  
19 SIONS.—

20 (1) AUTHORITY.—The Special Advocate may  
21 seek a writ of certiorari from the Supreme Court of  
22 the United States for review of any decision of the  
23 FISA Court of Review.

24 (2) STANDING.—In any proceedings before the  
25 Supreme Court of the United States relating to a

1 petition of certiorari filed under paragraph (1) and  
2 any proceedings in a matter for which certiorari is  
3 granted, the Special Advocate shall have standing as  
4 a party.

5 **SEC. 6. DISCLOSURE.**

6 (a) REQUIREMENT TO DISCLOSE.—The Attorney  
7 General shall publicly disclose—

8 (1) all decisions issued by the FISA Court or  
9 the FISA Court of Review after July 10, 2003, that  
10 include a significant construction or interpretation of  
11 law;

12 (2) any decision of the FISA Court appealed by  
13 the Special Advocate pursuant to this Act; and

14 (3) any FISA Court of Review decision that is  
15 issued after an appeal by the Special Advocate.

16 (b) DISCLOSURE DESCRIBED.—For each disclosure  
17 required by subsection (a) with respect to a decision, the  
18 Attorney General shall make available to the public docu-  
19 ments sufficient—

20 (1) to identify with particularity each legal  
21 question addressed by the decision and how such  
22 question was resolved;

23 (2) to describe in general terms the context in  
24 which the matter arises;

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

4           (4) to indicate whether the decision departed  
5           from any prior decision of the FISA Court or FISA  
6           Court of Review.

7           (c) DOCUMENTS DESCRIBED.—The Attorney General  
8           shall satisfy the disclosure requirements in subsection (b)  
9           by—

10           (1) releasing a FISA Court or FISA Court of  
11           Review decision in its entirety or as redacted;

12           (2) releasing a summary of a FISA Court or  
13           FISA Court of Review decision; or

14           (3) releasing an application made to the FISA  
15           Court, briefs filed before the FISA Court or the  
16           FISA Court of Review, or other materials, in full or  
17           as redacted.

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

23           (e) TIMING OF DISCLOSURE.—

24           (1) DECISIONS ISSUED PRIOR TO ENACT-  
25           MENT.—A decision issued prior to the date of the

1 enactment of this Act that is required to be disclosed  
2 under subsection (a)(1) shall be disclosed not later  
3 than 180 days after the date of the enactment of  
4 this Act.

5 (2) FISA COURT DECISIONS.—The Attorney  
6 General shall release FISA Court decisions appealed  
7 by the Special Advocate not later than 30 days after  
8 the date the appeal is filed.

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

13 (f) PETITION BY THE SPECIAL ADVOCATE.—

14 (1) AUTHORITY TO PETITION.—The Special Ad-  
15 vocate may petition the FISA Court or FISA Court  
16 of Review to order—

17 (A) the public disclosure of a decision of  
18 such a Court, and documents or other material  
19 relevant to such a decision, previously des-  
20 ignated as classified information; or

21 (B) the release of an unclassified summary  
22 of such decisions and documents.

23 (2) CONTENTS OF PETITION.—Each petition  
24 filed under paragraph (1) shall contain a detailed  
25 declassification proposal or a summary of the deci-

1 sion and documents that the Special Advocate pro-  
2 poses to have released publicly.

3 (3) ROLE OF THE ATTORNEY GENERAL.—

4 (A) COPY OF PETITION.—The Special Ad-  
5 vocate shall provide to the Attorney General a  
6 copy of each petition filed under paragraph (1).

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

13 (4) PUBLIC AVAILABILITY.—Not less than 91  
14 days after receiving a petition under paragraph (1),  
15 and taking into account any objections from the At-  
16 torney General made under paragraph (3)(B), the  
17 FISA Court or FISA Court of Review, as appro-  
18 priate, shall declassify and make readily available to  
19 the public any decision, document, or other material  
20 requested in such petition, if such decision, docu-  
21 ment, or other material pertain to a decision that  
22 contains a significant construction or interpretation  
23 of law, to the greatest extent possible, consistent  
24 with legitimate national security considerations.

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

6 **SEC. 7. ANNUAL REPORT TO CONGRESS.**

7           (a) REQUIREMENT FOR ANNUAL REPORT.—The Spe-  
8           cial Advocate shall submit to Congress an annual report  
9           on the implementation of this Act.

10          (b) CONTENTS.—Each annual report submitted  
11          under subsection (a) shall—

12               (1) detail the activities of the Office;

13               (2) provide an assessment of the effectiveness  
14               of this Act; and

15               (3) propose any new legislation to improve the  
16               functioning of the Office or the operation of the  
17               FISA Court or the FISA Court of Review.

18 **SEC. 8. PRESERVATION OF RIGHTS.**

19          Nothing in this Act shall be construed—

20               (1) to provide the Attorney General with au-  
21               thority to prevent the FISA Court or FISA Court of  
22               Review from declassifying decisions or releasing in-  
23               formation pursuant to this Act; and

24               (2) to eliminate the public's ability to secure in-  
25               formation under section 552 of title 5, United States

- 1 Code (commonly known as the “Freedom of Infor-
- 2 mation Act”) or any other provision of law.

○