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Judge Bates and a FISA “Special Advocate”

By [Steve Vladeck](#)

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In the midst of the hubbub over the PRG and PCLOB reports and the President’s speech, one of January’s more interesting developments in the FISA reform conversation has largely gone unaddressed (albeit not unnoticed): the “[Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act](#),” and Judge Bates’s [cover letter transmitting those comments](#). The “Comments” did not purport to speak for the entire federal judiciary, but only for certain judges who have served on the FISA Court and the FISA Court of Review. Nevertheless, insofar as the comments raised concerns with one of the central procedural reforms under consideration—the creation of a “special advocate” to argue against the government before the FISA Court—they warrant at least some response, which I attempt below the fold. To preview the punchline, though, while Judge Bates suggests that a FISA “special advocate” is unnecessary, unwise, and potentially unconstitutional (on appeal, anyway), I believe that all three of his objections are off the mark.

I. Is a FISA Special Advocate “Unnecessary”?

One of Judge Bates’s sharpest critiques of the “special advocate” is that just isn’t needed. The “vast majority of FISC matters,” Bates explains, are what we might call “classic FISA”—requests for individualized search warrants, pen registers, or trap-and-trace orders, based upon the probable cause standard hard-wired into the 1978 statute. In those cases, Bates writes, there is simply “no need for a quasi-adversarial process,” and any such process would have the odd effect of “affording greater procedural protections for suspected foreign agents and international terrorists than for ordinary U.S. citizens in criminal investigations.”

The problem with this critique is that it dramatically misunderstands the point (and substance) of most of the “special advocate” proposals. As the text of, for example, the [Leahy/Sensenbrenner](#) and [Blumenthal](#) bills underscores, the FISA “special advocate” would specifically *not* be tasked with appearing in all, or even most, cases before the FISA Court—*especially* not individualized warrant applications. Indeed, very little *law* is made in those cases that has an effect beyond the individual target of the underlying warrant application. Instead, the purpose of the special advocate is to provide adversarial presentation in those (relatively small number of) cases in which the FISA Court is doing something materially *bigger*—signing off on directives issued under [section 702 of FISA](#) (as amended by the FISA Amendments Act of 2008), or issuing production orders under [section 215 of the USA PATRIOT Act of 2001](#). Even then, the special advocate would not be charged with appearing in *every* instance, but only in those proceedings in which new precedents are being set for future governmental surveillance operations. Moreover, not only would adversarial presentation in those contexts thereby raise virtually none of the policy concerns raised by Judge Bates in his letter, but such presentation has *already been authorized by Congress* under both section 215 and section 702—in the form of the recipient of the production order and/or directive.

Another argument for why such a special advocate might be unnecessary, albeit one that Judge Bates only alludes to, is that the FISA Court already has the discretion to choose to appoint *amici* in cases in which it believes it could benefit from outside assistance. Taking the section 215 telephone metadata program as an example, though, it does not appear that this ever happened. And if the whole point of the special advocate is to expose the FISA Court to such opposing views in *those* contexts, the absence of any evidence that the Court has affirmatively sought those views *sua sponte* is rather powerful support for Congress creating a mechanism that doesn’t depend upon such requests.

II. Is a FISA Special Advocate “Unwise”?

Judge Bates also devotes several pages to explaining the myriad ways in which a FISA special advocate would also be unwise—“counterproductive,” in his words. The gravamen of this particular complaint appears to be the ways in which Judge Bates predicts that participation of a special advocate would affect, for the negative, the relationship between the Executive Branch and the FISA Court, and would undermine the “heightened duty of candor” the government operates pursuant to vis-a-vis the FISA Court. The argument here appears to be that the government will be less willing to share information with a properly cleared special advocate than it would be with the FISA Court itself.

But there are three obvious responses. *First*, it is, again, based upon an overstatement of the role the special advocate would play. The special advocate would not be appearing in the vast majority of cases, including the “fact-driven” contexts in which Judge Bates is so worried about information sharing. Indeed, the role of the special advocate is primarily to challenge *legal* interpretations offered by the Executive Branch. Some factual presentation is certainly inevitable in such contexts, but only incidental to the legal presentation. This is all the more so if one considers that, under most of the proposals, the special advocate would only come in once the *initial* authorization has been obtained, an accommodation designed to ensure that the special advocate in no way hinders the government’s ability to act quickly in appropriate cases.

Second, and more significantly, as noted above, Congress in 215 and 702 provided for exactly this kind of adversarial process, and therefore already determined that, in at least some contexts, private, security-cleared counsel *can* be trusted to appear adversarially, and to participate on equal terms with the government. (And there are other contexts, including the [Alien Terrorist Removal Court](#) and the Guantánamo habeas litigation, where similar accommodations have been codified and/or relied upon.) Is Judge Bates saying that these, too, are unwise?

Third, think through the logic here: Judge Bates is worried that the government would have to choose whether to disclose certain evidence to the security-cleared special advocate or not disclose it and therefore not rely upon it before the FISA Court. This is *exactly* the choice that the government is faced with in criminal cases every day—except that here, unlike in criminal cases, disclosure would only be to security-cleared counsel, as opposed to criminal defendants. And as Judge Coleman [wrote last week in Daoud](#), “the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances.” Simply put, shouldn’t the government only be *allowed*

to rely upon evidence that can also be shared with other lawyers possessing the requisite security clearances? Isn't that the precise price that the law should demand the government to pay in order to obtain legal authorization?

III. Is a FISA Special Advocate “Unconstitutional”?

Finally, Judge Bates makes a series of implicit allusions to constitutional concerns both with regard to the appointment / removal of the special advocate, and the special advocate's standing to appeal adverse decisions by the FISA Court. In [a long post over at *Just Security*](#), Marty Lederman and I had already responded to these objections. Rather than regurgitate those arguments here, I refer interested readers to our earlier discussion.

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Lest the above critiques be taken in the wrong light, I have all the respect in the world for Judge Bates, who is a fantastic jurist and a brilliant lawyer. But one of the lessons we have (or should have) learned from the Snowden revelations is that even the finest jurists can occasionally benefit from exposure to viewpoints other than their own, and to arguments that they might not have known to ask for and/or affirmatively seek out. I share Judge Bates's concerns that a special advocate not be deployed in a manner that fundamentally undermines the purpose and structure of “classic FISA.” But post-9/11 authorities such as sections 215 and 702 are a different ballgame—as Congress itself understood when it enacted them. One may well think that a better solution would simply be to remove the oversight of those programs *qua* administrative law from the FISA Court altogether. But so long as the FISA Court will continue to supervise such mass, suspicion-less, and programmatic surveillance, a security-cleared special advocate will only help to ensure that such supervision and oversight serves the purpose for which it was originally created.



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