

THE LIMITS OF THE FREEDOM ACT'S AMICUS CURIAE

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ABSTRACT

The federal government's power to engage in surveillance for national security purposes is extensive. In an effort to reform the current national surveillance regime, scholars have called for, among other things, the creation of a "special advocate" to counter the government's arguments before the Foreign Intelligence Surveillance Court. Feeling political pressure to improve an ever-unpopular national surveillance regime, lawmakers passed the USA FREEDOM Act ("Freedom Act").

Section 401 of the Freedom Act provides for the creation of an "amicus curiae," a position that differs from earlier conceptions of a "special advocate" in important respects. This Essay examines those differences, and counsels against conflating the Freedom Act's amicus curiae with a true special advocate. By doing so, this Essay highlights the need for continued calls for a special advocate.

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INTRODUCTION

As surveillance technologies continue to evolve, a lawyer’s ability to employ both legal and technical skill has become an increasingly important attribute. To properly represent her client before a tribunal considering advanced surveillance technologies, a lawyer must be capable of incorporating complex technological issues into persuasive legal arguments. When it comes to many national security issues, however, a lawyer rarely gets to make her case. This is because many national security decisions are made outside of a traditional adversarial setting. Often, only the government’s argument is considered.

In an effort to reform the current national surveillance regime, scholars have long called for the creation of a “special advocate.”¹ While there have been various proposals, the general idea is that an advocate would represent the interests of the public before the Foreign Intelligence Surveillance Court (“FISC”)—the “secret” court charged with overseeing government requests to collect data for national security purposes.² Presently, the FISC operates on an

¹ See, e.g., Stephen I. Vladeck, *The Case for a FISA ‘Special Advocate’*, 2 TEX. A&M L. REV. (forthcoming 2015) (discussing proposals). Throughout the remainder of this Essay, “special advocate” will be used to refer to similarly named proposals such as “public interest advocate” unless otherwise noted.

² ANDRE NOLAN ET AL., CONG. RESEARCH SERV., 7-5700, INTRODUCING A

ex parte basis, meaning it grants or denies a government request to collect data after considering the government's argument.³ Inserting a special advocate into this process would allow the FISC to hear arguments both for and against a given government request, imitating the adversarial proceedings common in other American courtrooms.

Arguments in favor of inserting someone to argue against a government lawyer presenting her case before the FISC were bolstered when it was revealed that the FISC had rarely denied a government request.⁴ Feeling political pressure to do *something* to improve an increasingly unpopular national surveillance regime, Congress halfheartedly answered the calls for a special advocate by passing the USA FREEDOM Act ("Freedom Act").⁵ This Essay will focus on one specific aspect of the Freedom Act: the creation of an "amicus curiae," or "friend of the court" under Section 401.⁶ As this Essay will explain, the Freedom Act's amicus curiae is essentially a watered-down version of the type of special advocate discussed above.

In Part I, this Essay will argue that the creation of a special advocate is desirable. Part II will then examine the various ways in which the Freedom Act's amicus curiae falls short of providing the

PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES 5 (2013).

³ Orin Kerr, *A Rule of Lenity For National Security Law*, 100 VA. L. REV. 1513, 1521–24 (2014).

⁴ Dina Temple-Raston, *FISA Court Appears To Be Rubber Stamp For Government Requests*, NPR (June 13, 2013, 4:00 AM), <http://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests>.

⁵ USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, available at <https://www.congress.gov/114/plaws/publ23/PLAW-114publ23.pdf>; Frank Thorp V, *Obama signs 'USA Freedom Act' to reform NSA surveillance*, MSNBC (June 2, 2015, 4:45 PM), <http://www.msnbc.com/msnbc/senate-approves-usa-freedom-act-nsa-surveillance>. See Benjamin Wittes & Jodie Liu, *So What's in the New USA Freedom Act, Anyway?*, LAWFARE BLOG (May 14, 2015, 11:51 PM), <https://www.lawfareblog.com/so-whats-new-usa-freedom-act-anyway> [hereinafter *New USA Freedom Act*], for a helpful analysis of the Freedom Act.

⁶ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279–81.

same benefits that a special advocate would provide. By doing so, this Essay counsels against conflating the Freedom Act's amicus curiae with a true special advocate, and highlights the need for continued calls for such an advocate.

I. THE BENEFIT OF A SPECIAL ADVOCATE

While some scholars have questioned the benefit of a special advocate,⁷ this Essay, like others, adopts the position that such an advocate is desirable.⁸ Part I will first provide a general understanding of what a “true” special advocate would look like, and will then argue why such an advocate would help improve the current national security regime.

A. *What Is a Special Advocate?*

A 2013 Congressional Research Service Report generalized some of the leading special advocate proposals as being “unified” around the idea that the special advocate would have “a range of responsibilities, such as being able to intervene in ongoing cases, brief the FISC on relevant matters, conduct some forms of discovery, file motions seeking discrete forms of relief from the court . . . or even appeal an adverse ruling.”⁹ Similarly, one scholar noted that “a common theme” of several proposals was “an increase in the opportunities for adversarial litigation,” before both the FISC and the Foreign Intelligence Surveillance Court of Review (“FISCR”), “to ensure that, even behind closed doors, the government’s legal position is debated vigorously.”¹⁰

For the purposes of this Essay, a “true” special advocate is therefore one that: (a) has the unencumbered right to participate in at least some statutorily defined settings; (b) is properly equipped to act as an equal counter-party to the government lawyer presenting her case before the FISC; and (c) is afforded some

⁷ See, e.g., Kerr, *supra* note 3, at 1531–32 (arguing for the adoption of a rule of lenity as an alternative to introducing adversarial mechanisms).

⁸ See Vladeck, *supra* note 1.

⁹ NOLAN ET AL., *supra* note 2, at 5.

¹⁰ Vladeck, *supra* note 1.

ability to seek review by the FISC.¹¹ While the introduction of a special advocate would not cure the current national security regime of all its ills, Part I.B will address why the introduction of a special advocate would be a step in the right direction.

B. Debate Is Helpful In An Otherwise Opaque Area of the Law

Because the FISC deals with on-going national security issues, the inner workings of the court are largely kept “secret.”¹² The FISC was originally created following the Church Committee’s findings of intelligence abuses in the 1970s.¹³ As one scholar stated, “[t]he Executive Branch agreed to have many of its foreign intelligence surveillance activities subjected to far greater legal oversight and accountability, in exchange for which Congress and the courts agreed to provide such oversight and accountability in secret.”¹⁴ It is precisely because the FISC operates under a layer of secrecy that a special advocate is desirable.

The secretive nature of national security law can result in an “echo-chamber,” where similarly situated and isolated actors have a reduced opportunity to have their presumptions and conclusions tested by “outside” opinions.¹⁵ One recent example highlights this point. The leaks by former government contractor Edward Snowden revealed that the FISC was interpreting Section 215 of the Patriot Act broadly, authorizing the government’s bulk telephone metadata collection program.¹⁶ In the weeks leading up

¹¹ See Letter from The Constitution Project to Speaker of the House et al. 4 (May 20, 2014), available at <http://justsecurity.org/wp-content/uploads/2014/05/TCP-Letter-to-House-members-on-FISA-Special-Advocate-FINAL-SIGNED.pdf>.

¹² JOEL SAMAHA, CRIMINAL PROCEDURE 584 (9th ed. 2015).

¹³ S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Church Committee), Foreign and Military Intelligence, S. REP. NO. 94-755 (1976).

¹⁴ Vladeck, *supra* note 1, at 2.

¹⁵ See Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL’Y REV. 281, 285 (2014).

¹⁶ Orin Kerr, *Second Circuit rules, mostly symbolically, that current text of Section 215 doesn’t authorize bulk surveillance*, VOLOKH CONSPIRACY (May 7, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/>

to Congress's passage of the Freedom Act, the United States Court of Appeals for the Second Circuit came to a different conclusion, holding that Section 215 of the Patriot Act did not authorize such a widespread surveillance program.¹⁷

While the Second Circuit's opinion represents just one decision, it is revealing that two courts interpreting the same law came to such drastically different outcomes, with the FISC operating on an *ex parte* basis and the Second Circuit operating within a traditional adversarial setting. One scholar went as far as to say that it was not inconsistent for legislators to vote for the Patriot Act in 2001, but against the telephone metadata program in 2015, because "the Patriot Act didn't authorize bulk surveillance; the FISC did, based on a major misreading of the Patriot Act."¹⁸ One should be careful, however, with conflating such reasoning with the notably different proposition that the federal judges who serve on the FISC and FISCR are less able to interpret the law than their colleagues who do not. The different interpretations of the Patriot Act were not a result of a difference in the quality of the judging, but rather the quality of the means available for the judges to come to an informed decision.

Just as judges rely on the adversarial system to make an informed decision in cases regarding complex securities or patents, an adversarial setting can help ensure that judges on the FISC and FISCR are properly informed about the constantly evolving technologies associated with government surveillance. Judge James G. Carr stated that during his "six years on the [FISC], there were several occasions when I and other judges faced issues none of us had encountered before," concluding that "[h]aving lawyers challenge novel legal assertions in [the FISC's] secret proceedings would result in better judicial outcomes."¹⁹ It is for this reason that

07/second-circuit-rules-mostly-symbolically-that-current-text-of-section-215-doesnt-authorize-bulk-surveillance/.

¹⁷ *ACLU v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015).

¹⁸ Orin Kerr, *How much has Congress changed on surveillance?*, VOLOKH CONSPIRACY (June 2, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/02/how-much-has-congress-changed-on-surveillance/>.

¹⁹ James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?_r=0.

this Essay counsels against conflating the Freedom Act's amicus curiae with a special advocate. Introducing a special advocate into FISC and FISCR proceedings can create the adversarial setting that judges rely on in a way that an amicus curiae cannot. As Judge Carr noted, appointing an amicus curiae "will not achieve true reform, which requires appointment of an attorney."²⁰ While an amicus curiae can help inform the court on important issues, Part II will examine how the Freedom Act's amicus curiae falls short of providing the same informative benefits that an adversarial special advocate could provide.

II. HOW THE AMICUS CURIAE FALLS SHORT

The amicus curiae provided for in Section 401 of the Freedom Act is a far cry from the type of special advocate discussed in Part I.²¹ While the Freedom Act should be celebrated for providing the FISC and FISCR with the ability to learn from both technological and legal experts acting as amicus curiae, it falls short in its ability to allow such experts to meaningfully participate in the court's decision-making process. Part II aims to highlight the importance of continued efforts to create a true special advocate by revealing the limitations of the amicus curiae provided for in the Freedom Act.²² Part II will first examine the ways in which the amicus curiae can be prevented from playing *any* role before the FISC and FISCR, let alone a minimal one. Second, the way in which the Freedom Act curtails the amicus curiae's ability to successfully counter the government's legal arguments will be addressed. Lastly, the limits on the ability for the amicus curiae to seek judicial review will be discussed.

²⁰ James G. Carr, *Fixing what ails the FISA*, THE HILL (July 24, 2014, 11:00 AM), <http://thehill.com/blogs/congress-blog/judicial/213137-fixing-what-ails-the-fisa>.

²¹ See Steve Vladeck, *The USA FREEDOM Act and a FISA "Special Advocate"*, LAWFARE BLOG (May 20, 2014, 4:19 PM), <https://www.lawfareblog.com/usa-freedom-act-and-fisa-special-advocate>.

²² This assumes one is in favor of a special advocate at all. See Kerr, *supra* note 3, for a discussion as to why the FISC should adopt a rule of lenity rather than imitate the adversarial nature of a traditional lawmaking court.

A. No Consistent Representation

The appointment procedures described in Section 401 of the Freedom Act are split into two scenarios: one in which appointment is mandatory, and one in which appointment is optional. In the mandatory provision, Section 401 provides that the FISC and FISCR

shall appoint an individual . . . to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate²³

Though the use of the word “shall” implies that the court must appoint an amicus curiae in the described setting, two exceptions are explicitly provided for in the above quoted statutory language that allow for the court to opt out of appointing an amicus curiae.

The first exception to the mandatory appointment provision is that the court can simply refuse to appoint an amicus curiae when the court deems an appointment is not “appropriate.”²⁴ Privacy advocates at the Constitution Project highlighted this clause, fearing that it would allow “FISC judges to sidestep [the appointment] requirement simply by asserting that such an appointment is unnecessary.”²⁵ Of course, if the FISC did decide that such an appointment would be inappropriate, the court is required to issue a “finding” explaining that it has indeed found so.²⁶ It is unclear, however, what a “finding” entails in this context.

²³ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(2)(A), 129 Stat. 268, 279.

²⁴ *Id.*

²⁵ Letter from The Constitution Project to Speaker of the House et al. 3 (May 20, 2014), *available at* <http://justsecurity.org/wp-content/uploads/2014/05/TCP-Letter-to-House-members-on-FISA-Special-Advocate-FINAL-SIGNED.pdf>.

²⁶ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(2)(A), 129 Stat. 268, 279.

If the court merely decides to state that it has concluded that an appointment was inappropriate in the case at hand, then the finding requirement will be of little practical value. If the court instead takes the finding requirement as an opportunity to elucidate the court's internal decisions, doing so would be an admirable attempt to bring transparency into an otherwise opaque area of the law.

Due to the secretive nature of the requests before the FISC and FISCR, however, the finding requirement may not reveal much in practice. In many of the scenarios in which the FISC or FISCR might find it "appropriate" to opt out of the mandatory appointment process, one can imagine that the court would decide so as a result of the secretive nature of the underlying national security information.²⁷ If the FISC or FISCR opts out of appointing an amicus curiae because of the secretive nature of the underlying information, the court is unlikely to go into much detail in its explanation—as doing so might defeat the purpose of opting out of an appointment in the first place.

The second exception to the mandatory appointment provision is that Section 401 of the Freedom Act explicitly states that it is a matter of the *court's* opinion to determine whether "any application for an order or review . . . presents a novel or significant interpretation of the law."²⁸ If the FISC or FISCR determines that the case at hand does not present a novel or significant issue, and the government refrains from objecting to the court's favorable decision, then the amicus curiae would play no role at all in that particular proceeding.

An earlier draft of the Freedom Act proposed by Senator Patrick Leahy included language to quell such fears, requiring a broad mode of construction when determining what constitutes "novel or significant" interpretations of the law.²⁹ Senator Leahy's

²⁷ This scenario, however, should occur less frequently than one might think. This is because Section 401 requires potential amicus curiae to "be persons who are determined to be eligible for access to classified information necessary to participate in matters before the courts." *Id.*

²⁸ *Id.*; Jodie Liu, *So What Does the USA Freedom Act Do Anyway?*, LAWFARE BLOG (June 3, 2015, 5:29 PM), <https://www.lawfareblog.com/so-what-does-usa-freedom-act-do-anyway>.

²⁹ *New USA Freedom Act*, *supra* note 5.

statutory language provided:

An application for an order or review shall be considered to present a novel or significant interpretation of the law if such application involves application of settled law to novel technologies or circumstances, or any other novel or significant construction or interpretation of any provision of law or of the Constitution of the United States, including any novel and significant interpretation of the term ‘specific selection term.’³⁰

This language, however, was not adopted, providing the court with the ability to more easily opt out of the mandatory appointment provision.

The final version of Section 401 of the Freedom Act also provides an *optional* appointment provision, granting the FISC and FISCR the ability to appoint an amicus curiae “in any instance as such court deems appropriate.”³¹ As is the case with the mandatory appointment requirement, it will be interesting to see in what settings the court deems it “appropriate” to appoint an amicus curiae. After the Freedom Act takes effect, further research will be necessary to reveal how often this optional appointment method is deployed, and whether there is a correlation between the court’s optional appointment of an amicus curiae and the court’s decision to deny a government request.

B. Curtailment of Ability to Counter Legal Arguments

Unlike earlier proposals for a special advocate, the Freedom Act’s amicus curiae is provided with substantially restricted access to necessary information.³² While the Freedom Act provides that the amicus curiae “shall have access to any legal precedent, application, certification, petition, motion, or such other materials,”

³⁰ S. 2685, 113th Cong. § 401(i)(3) (2014) (as introduced by Sen. Leahy), available at <http://www.leahy.senate.gov/imo/media/doc/HEN14602.pdf>.

³¹ S. 2685, 113th Cong. § 401(i)(2)(B) (2014) (as introduced by Sen. Leahy), available at <http://www.leahy.senate.gov/imo/media/doc/HEN14602.pdf>.

³² See *New USA Freedom Act*, *supra* note 5.

access to at least some of those materials is limited to those “that *the court determines are relevant* to the duties of the amicus curiae.”³³ Similarly, the amicus curiae “may have access to classified documents, information, and other materials or proceedings *only if that individual is eligible* for access to classified information and *to the extent consistent with the national security of the United States.*”³⁴ In addition, Section 401 of the Freedom Act explicitly states that “[n]othing in this section shall be construed to require the Government to provide information to an amicus curiae appointed by the court that is privileged from disclosure.”³⁵

Compare the hedged access provided to the Freedom Act’s amicus curiae to the language within Congressman Adam Schiff’s proposed legislation that provided for a “public interest advocate” with “access to all relevant evidence in such matter [for which the advocate was appointed].”³⁶ Congressman Schiff’s proposal also provided the public interest advocate with the ability to “petition the court to order the Federal Government to produce documents, materials, or other evidence necessary to perform the duties of the public interest advocate.”³⁷ Similarly, a Privacy and Civil Liberties Oversight Board report suggested that “[o]nce a Special Advocate has been invited to participate with respect to an application or other matter, the Special Advocate . . . should have access to *all* government filings.”³⁸

With restricted access to necessary information, the amicus curiae could end up being little more than a shell of its intended

³³ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(6)(A)(i), 129 Stat. 268, 280 (emphasis added).

³⁴ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(6)(C), 129 Stat. 268, 280 (emphasis added).

³⁵ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(6)(D), 129 Stat. 268, 280 (emphasis added).

³⁶ H.R. 3159, 113th Cong., § 2(b)(i)(3)(C) (2013).

³⁷ *Id.*

³⁸ PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, *REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT*, 186 (2014), available at <http://fas.org/irp/offdocs/pcllob-215.pdf> (emphasis added).

purpose. Indeed, without the necessary information to develop an informed opinion, the amicus curiae cannot even properly brief the court, let alone provide an adversarial check against the government. Withholding information from the amicus curiae therefore represents one way in which the position is less useful than even a traditional amicus curiae, let alone a special advocate. Outside of the Freedom Act, a traditional amicus curiae would typically have access to much of the preliminary briefing and other docket materials in a given case. Because of the secretive nature of the underlying information in a given proceeding before the FISC or FISCR, however, the amicus curiae provided for in the Freedom Act may not even have the ability to obtain those basic documents.

C. Limits on Judicial Review

The final aspect of the Freedom Act to be examined in this Essay regards the amicus curiae's reduced role in FISCR review of FISC decisions.³⁹ An earlier version of the Freedom Act required the court to “designate a special advocate to serve as amicus curiae to assist [the FISC or FISCR] in the consideration of any certification pursuant to subsection (j).”⁴⁰ The referred to subsection (j) provided:

After issuing an order, [the FISC] shall certify for review to the [FISCR] any question of law that the [FISC] determines warrants such review because of a need for uniformity or because consideration by the [FISCR] would serve the interests of justice. Upon certification of a question of law under this paragraph, the [FISCR] may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.⁴¹

³⁹ See Liu, *supra* note 28; *New USA Freedom Act*, *supra* note 5.

⁴⁰ S. 2685, 113th Cong., § 401(i)(2)(A) (2014) (as introduced by Sen. Leahy), available at <http://www.leahy.senate.gov/imo/media/doc/HEN14602.pdf>.

⁴¹ S. 2685, 113th Cong., § 401(j) (2014) (as introduced by Sen. Leahy), available at <http://www.leahy.senate.gov/imo/media/doc/HEN14602.pdf>.

While the final version of the Freedom Act provides for some FISCR review of the FISC,⁴² it does not contain the provision calling for the amicus curiae to assist in the FISC's consideration of whether certification to the FISCR is warranted.⁴³ Suggesting that such a change was more than a mere oversight, the final version of the Freedom Act also provides for Supreme Court review of the FISCR, but explicitly states that “[u]pon certification . . . the Supreme Court of the United States may appoint an amicus curiae . . . to provide briefing or other assistance.”⁴⁴

Limiting the amicus curiae's role in FISCR review restricts the ability of the amicus curiae to influence the FISC's legal interpretations over the long term. The Freedom Act's amicus curiae is only appointed to provide “legal arguments” or “information” when the court deems it “appropriate.”⁴⁵ Compare these duties with, for example, Congressman Schiff's proposal, which called on the public interest advocate to “participate fully in the matter before the court for which such public interest advocate was appointed with the same rights and privileges as the Federal Government.”⁴⁶

The discrete duties outlined in the Freedom Act, combined with the requirement that the court designate “not fewer than [five] individuals to be eligible to serve as amicus curiae,”⁴⁷ results in limiting the amicus curiae's ability to influence the court to a volatile series of one-off arguments. A special advocate, who could participate in the FISC's consideration of whether certification to the FISCR is warranted, would have the opportunity to help shape national security law over the long-term in instances where there is

⁴² USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(j), 129 Stat. 268, 280–81.

⁴³ See Liu, *supra* note 28; *New USA Freedom Act*, *supra* note 5.

⁴⁴ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(k)(2), 129 Stat. 268, 281.

⁴⁵ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(4)(A)–(B), 129 Stat. 268, 279.

⁴⁶ H.R. 3159, 113th Cong. § 2(b)(i)(3)(A) (1st Sess. 2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/3159/text>.

⁴⁷ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(i)(1), 129 Stat. 268, 279.

“a need for uniformity.”⁴⁸ Restricting the influence of the amicus curiae to one-off arguments provided by a rotating cast of designees falls short of accomplishing the same. As Judge Carr put it, “[f]ailure to appoint counsel for the targets [of government surveillance] will silence the advocate’s voice when it most must be heard—on appeal. Enabling adversarial appellate review is crucial to increased confidence in the FISC and its work.”⁴⁹ Allowing a special advocate to play a role in determining whether review is warranted would increase the likelihood that more than one side of the issue is presented before the FISC interprets important national security provisions, an opaque area of law already lacking adversarial safeguards.⁵⁰

CONCLUSION

The amicus curiae provided for in the final version of the Freedom Act is a far cry from the “special advocate” that scholars originally proposed. By addressing the various ways in which the amicus curiae’s duties are restricted, this Essay has counseled against conflating the Freedom Act’s amicus curiae with a true special advocate. While the amicus curiae provided for in the Freedom Act is a step in the right direction, continued calls for a special advocate are warranted. National security issues often involve the application of complex legal principles to novel technologies. The type of special advocate argued for in this Essay is better equipped to balance those overlapping legal and technological concerns in a way that the Freedom Act’s amicus curiae cannot.

⁴⁸ USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401(j), 129 Stat. 268, 280–81.

⁴⁹ Carr, *supra* note 20.

⁵⁰ See Benkler, *supra* note 15, at 285 (referring to the “national security system’s echo-chamber”).