

Vote “YES” on Amendment to Improve FISA Court Oversight by Strengthening the Role of Amici Curiae

The Problem

A core feature of the U.S. justice system is adversariality: when judges hear facts and arguments from both sides, they are more likely to get to the truth. The FISA Court process is inherently problematic because the court usually hears from only one side: the government. The problem is compounded by the government’s history of presenting inaccurate, misleading, or incomplete information to the court.

In 2015, Congress sought to address this problem by creating a panel of pre-cleared *amici curiae* (“friends of the court”), who could provide a perspective other than the government’s. Congress created a presumption that the FISA Court should appoint amici in cases involving a “novel or significant interpretation of the law.” This has improved the functioning of the court in several cases.

However, amici have encountered obstacles. There are too many important proceedings in which the FISA Court is not appointing amici. When they do participate, amici do not have full access to relevant information. And they have no ability to appeal a decision in the government’s favor.

Why RISAA Makes the Problem Worse, Not Better

RISAA creates a presumption that amici should participate in Section 702 proceedings. But it also specifies that the court should, “to the maximum extent possible,” appoint amici “who possess expertise in both privacy and civil liberties *and intelligence collection.*” Amici selection will thus be heavily weighted toward former government personnel, who may well come into the proceedings with institutional bias.

RISAA also limits the arguments amici can raise, in all cases, to those identified by the FISA Court. But of course, one of the most important functions amici serve is to raise arguments the Court has *not* considered. This provision places a handicap on amici that defeats the very purpose of their participation.

The Solution

The Senate should pass an amendment to replace RISAA’s amici provisions with the provisions of the “Lee-Leahy amendment.” **This amendment passed the Senate by a vote of 77-19 in 2020.** It would—

- Expand the categories of proceedings in which amici should be appointed (unless the FISC finds such appointment inappropriate) to include cases involving activities protected by the First Amendment; cases involving “a sensitive investigative matter” (defined as matters involving a public official, political candidate, religious or political organization or staff thereof, or news media within the United States); the approval of a new program, technology, or use of technology; the reauthorization of programmatic surveillance, such as Section 702; or cases involving novel or significant civil liberties issues.
- Expand amici’s access to information to include supporting materials for applications, exculpatory information reported to the court, and unredacted copies of all relevant FISA Court decisions involving questions of law; provides that amici must have access to FISA Court documents to the same extent as the government.
- Provide amici with the authority to petition the FISC to certify its decisions for review by the Foreign Intelligence Surveillance Court of Review (FISCR), and to petition the FISCR to certify its decisions for review by U.S. Supreme Court.

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