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## The Wars of the Judges

Stephen I. Vladeck

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# THE WARS OF THE JUDGES

Stephen I. Vladeck\*

## INTRODUCTION

Professor Anderson’s timely and trenchant study of “judicial lobbying” opens with an important vignette: the controversial role played by Judge John Bates in the surveillance reform debate sparked by the June 2013 disclosures by Edward Snowden.<sup>1</sup> The episode arose during Congress’s consideration of different bills (the final version of which ended up as law in the USA FREEDOM Act of 2015)<sup>2</sup> to reform the Foreign Intelligence Surveillance Act (FISA) and the specialized court—the Foreign Intelligence Surveillance Court (FISC)—that hears cases arising under FISA.<sup>3</sup> One of the central procedural elements of the reform effort was the proposal to introduce a “special advocate”—a security-cleared lawyer who could stake out and vigorously defend a position adversarial to the government in what were usually *ex parte* judicial proceedings.<sup>4</sup> And although Judge Bates also objected to other elements of the reforms (including proposals to require more transparency in FISC decisions), the “special advocate” proposal certainly appeared to be his central target.

To that end, Judge Bates took the initiative to send at least three (and perhaps more) letters to Congress objecting to various aspects of the different reform bills. His objections included both procedural and substantive critiques that evolved as the proposals made their way through the legislative process. The last of Judge Bates’s public letters

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\* Professor of Law, University of Texas School of Law.

1. J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 402–03 (2016).

2. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

3. For a general discussion of the FISC and its centrality to the post-Snowden reform conversation, see Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015).

4. See generally CONSTITUTION PROJECT, THE CASE FOR A FISA “SPECIAL ADVOCATE” (2014), [http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf) [https://perma.cc/J49S-ANL4]. For an elegant and powerful defense of the value of such adversarial participation before the typically *ex parte* FISC, see *ACLU v. Clapper*, 785 F.3d 787, 829–31 (2d Cir. 2015) (Sack, J., concurring).

was written in August 2014.<sup>5</sup> By that time, the Obama administration had acquiesced in a compromise bill introduced by Senator Patrick Leahy.<sup>6</sup> Thus, it is no exaggeration to suggest that Judge Bates had become the legislation's most visible and outspoken opponent, at least beyond Capitol Hill. Given how weak the final version of the USA FREEDOM Act turned out to be (especially the provisions that were the focus of Judge Bates's critiques),<sup>7</sup> there is little doubt that his efforts were successful, even if they were also inappropriate.

In the interest of full disclosure, I am not a disinterested party. As Professor Anderson's footnotes attest,<sup>8</sup> I was one of the loudest public critics of Judge Bates's involvement in the FISA reform debate—with respect to both the procedural and substantive implications of his actions. I have also long been (and remain) one of the strongest proponents of participation of a special advocate in at least a subset of the cases heard by the FISA Court.<sup>9</sup> And my support for the latter reform is certainly not unrelated to the former critique. But leaving the substance of the special advocate debate for other fora, I want to amplify, in two different ways, Professor Anderson's excellent article, which I hope all federal judges will read.

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5. Letter from Hon. John D. Bates, Dir., Admin. Office of the U.S. Courts, to Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Aug. 5, 2014), <http://online.wsj.com/public/resources/documents/Leahyletter.pdf> [<https://perma.cc/P37M-7AE2>].

6. See Spencer Ackerman, *Obama-Backed Surveillance Reform Bill Introduced in US Senate*, *GUARDIAN* (July 29, 2014), <https://www.theguardian.com/world/2014/jul/29/obama-surveillance-reform-bill-us-senate> [<https://perma.cc/X3EW-WHL9>].

7. As I wrote shortly before the final bill was passed,

[T]he far larger problem [with the final bill] is the “special advocate” provision, which, compared to earlier proposals, have [sic] been watered down to a fare-thee-well. Now, instead of guaranteeing the presence of an outside lawyer to argue against the government whenever the government seeks new authority, or a new interpretation of an existing authority, the matter is committed to the discretion of the FISA Court, which can decline to appoint such an “amicus” at its own discretion. Just to cut to the chase, this is merely codifying the status quo—where FISA Court judges were already perfectly within their rights to appoint *amici* when appropriate, and to not do so when not. All the bill really does is add some (secret) paperwork.

Steve Vladeck, *How Rand Paul Hijacked Surveillance Reform*, *JUST SECURITY* (June 1, 2015), <https://www.justsecurity.org/23353/rand-paul-hijacked-surveillance-reform/> [<https://perma.cc/2W89-A4XF>].

8. Anderson, *supra* note 1, at 403 n.7 (citing Steve Vladeck, *Judge Bates (Unintentionally) Makes the Case for FISC Reform*, *JUST SECURITY* (Aug. 7, 2014), <https://www.justsecurity.org/13816/judge-bates-fisc-reform/> [<https://perma.cc/62VD-B5UZ>]).

9. I first started arguing for a “special advocate” just over one month after the Snowden disclosures. See Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, *LAWFARE* (July 8, 2013), <https://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr> [<https://perma.cc/QA3T-WJGE>].

First, in my view, Professor Anderson's story actually *understates* the problems with Judge Bates's role in the FISA reform debate. As I will show, Judge Bates's role far exceeded in both its form and its substance the roles played by federal judges in the other examples Professor Anderson recounts. Second, it provoked a rather testy—and pointed—response from a number of his fellow federal judges, including Judge Alex Kozinski, then the Chief Judge of the Ninth Circuit (and as such, a member of the Judicial Conference of the United States).<sup>10</sup> Although federal judges are hardly immune from snarking at each other, it should go without saying that when these non-substantive kerfuffles are splashed across newspaper headlines, it can demean the public perception of the integrity and impartiality of the federal courts.

Judges are at their best when they are sharply debating the finer points of particular legal issues. That being said, it is clear that when these debates exceed the scope of academia or jurisprudence, the public attention they draw does little other than undermine the prestige of the courts and the legitimacy of their counter-majoritarian decisions. Especially at this moment in our history, with a President who has publicly sought to undermine the role of the courts,<sup>11</sup> these kinds of hits to the public credibility of the judiciary are something we can ill afford.

Ultimately, Professor Anderson is correct in concluding that the unique relationship between judges and the specialized courts on which they sit provides critical insights into the virtues and vices of judicial lobbying. With Professor Anderson's helpful context in mind, my response is intended to offer a more modest and specific thesis: that the FISA reform episode was a singularly extreme example of judicial intervention in policymaking, and one that should concern even those less troubled than Professor Anderson by the specter of judicial lobbying.

## I. THE UNIQUENESS OF THE FISA REFORM EXAMPLE

Let me start with what should be obvious, but which ought to be said anyway: Judge Bates is an exceptionally bright, thoughtful, and diligent jurist. Indeed, I have long been a fan of his opinions—even in cases in

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10. See Letter from Hon. Alex Kozinski, C.J., U.S. Court of Appeals for the Ninth Circuit, to Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary (Aug. 14, 2014), [http://images.politico.com/global/2014/08/20/kozinski\\_to\\_leahy.html](http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html) [<https://perma.cc/6LP7-KFJ4>].

11. See Editorial, *After Mr. Trump's Din, the Quiet Grandeur of the Courts*, N.Y. TIMES (Feb. 8, 2017), [https://www.nytimes.com/2017/02/08/opinion/after-mr-trumps-din-the-quiet-grandeur-of-the-courts.html?\\_r=0](https://www.nytimes.com/2017/02/08/opinion/after-mr-trumps-din-the-quiet-grandeur-of-the-courts.html?_r=0) [<https://perma.cc/K9KW-HXH7>].

which I may have disagreed with the bottom line.<sup>12</sup> And even in the specific context of the FISC, it is my view that he wrote the single most important opinion pushing back against the government in any case of which we are publicly aware, at least as of this writing.<sup>13</sup> My co-authors and I have included this opinion in our *National Security Law and Counterterrorism Law* casebooks,<sup>14</sup> from which I repeatedly teach and to which I often cite.

What's more, no one can dispute that Judge Bates was in a singular position to speak from personal experience as to the wisdom of the FISA reform proposals then circulating, informed by both his substantive experience and his unique administrative role. Substantively, Judge Bates had just finished his stint as the presiding judge of the FISC and, as such, was in as good a position as anyone to assess the virtues and vices of the proposed reforms—especially those that might affect litigation before the FISC. Administratively, he was also serving at that time as Director of the Administrative Office of the U.S. Courts (the “AO”), which made him the Secretary of the Judicial Conference of the United States—the official policy voice of the federal judiciary.<sup>15</sup>

Thus, as he explained in his January 2014 letter to Congress concerning one of the early versions of what would become the USA FREEDOM Act:

Traditionally, the views of the Judiciary on legislative matters are expressed through the Judicial Conference of the United States, for which I serve as Secretary. However, because the matters at issue here relate to special expertise and experience of only a small number of judges on two specialized courts, the Conference has not at this time been engaged to deliberate on them. In my capacity as Director of the Administrative Office of the United States Courts, I have responsibility for facilitating the administration of the federal courts and, furthermore, the Chief Justice of the United States has requested that I act as a liaison for the Judiciary on matters concerning the Foreign Intelligence

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12. One of my first law review articles after I entered the academy was the culmination of a larger project initially prompted by Judge Bates's 2004 ruling in *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004). See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1532–34 (2007) (discussing *Abu Ali*).

13. See [Caption Redacted], [Docket No. Redacted], 2011 WL 10945618 (FISA Ct. Oct. 3, 2011).

14. See STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW* 686–99 (6th ed. 2016); STEPHEN DYCUS ET AL., *COUNTERTERRORISM LAW* 314–27 (3d ed. 2016).

15. See 28 U.S.C. § 331 (2012) (setting forth the composition, mission, and powers of the Judicial Conference).

Surveillance Act (FISA).[<sup>16</sup>] In considering such matters, I benefit from having served as Presiding Judge of the Foreign Intelligence Surveillance Court (FISC).<sup>17</sup>

In other words, Judge Bates was, at least at first, exceedingly careful to stress the limited capacity in which he was speaking, even if any number of his letters' readers would not have appreciated the nuance. At the same time, many of the concerns Judge Bates raised in his January 2014 letter were directed at low-hanging fruit and had been overtaken by more nuanced, subsequent proposals.<sup>18</sup> If Judge Bates had done nothing more than send the January 2014 letter, it would be very difficult to be critical of his involvement.

Where I believe Judge Bates began to cross the line between appropriate and inappropriate involvement was in his second public letter, dated May 13, 2014.<sup>19</sup> That letter came in response to the bill that had emerged from the House Permanent Select Committee on Intelligence (a bill that would soon thereafter be passed on the House floor).<sup>20</sup> In its very first sentence, the May letter, unlike the January letter, purported to speak far more categorically “[o]n behalf of the Judicial Branch.”<sup>21</sup> The May letter also referred to all of its concerns in the plural (“we”)—which, to uninformed readers, certainly could have given the appearance that the entire federal judiciary (or even just the FISC or the Judicial Conference) shared Judge Bates’s concerns about this pending legislation.<sup>22</sup>

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16. This passage raises a fascinating question unto itself: whether the Chief Justice, who is solely responsible for appointing judges to the FISC, *see* 50 U.S.C. § 1803(a)(1) (2012), should have (or has had) any role in identifying a “liaison for the Judiciary” on matters pertaining thereto. Even if the work of a specialized court is too specific for the Judicial Conference as a whole, it would surely avoid potential conflicts if that body, and not the Chief Justice acting on his own authority, were responsible for delegating any liaison authority.

17. Letter from Hon. John D. Bates, Dir., Admin. Office of the U.S. Courts, to Hon. Dianne Feinstein, Chairman, S. Select Comm. on Intelligence (Jan. 13, 2014), <https://fas.org/irp/news/2014/01/bates.pdf> [<https://perma.cc/8ZWH-NZES>].

18. *See* Steve Vladeck, *Judge Bates and FISA Reform*, JUST SECURITY (May 20, 2014), <https://www.justsecurity.org/10637/judge-bates-fisa-reform/> [<https://perma.cc/DAL4-STLP>].

19. Letter from Hon. John D. Bates, Dir., Admin. Office of the U.S. Courts, to Hon. Mike Rogers, Chairman, House Permanent Select Comm. on Intelligence (May 13, 2014), *reprinted in* H.R. REP. NO. 113-452, pt. 2, at 41 (2014).

20. The bill to which the May 13 letter was reacting, which was known as the “Manager’s Amendment to H.R. 3361,” was much weaker than either the original bill or the version Senator Leahy would subsequently introduce in the Senate. *See* Steve Vladeck, *The USA FREEDOM Act and a FISA “Special Advocate,”* LAWFARE (May 20, 2014), <https://www.lawfareblog.com/usa-freedom-act-and-fisa-special-advocate> [<https://perma.cc/8ECD-ESLB>].

21. Letter from Hon. John D. Bates to Hon. Mike Rogers, *supra* note 19.

22. *Id.*

Despite his broad language, it was already apparent that Judge Bates was not speaking even for his current or former colleagues on the FISC, two of whom had, the previous summer, publicly endorsed the very reforms Judge Bates criticized (including in a *New York Times* op-ed).<sup>23</sup> Regardless of who had the better of those arguments, the disagreements made obvious what many had thus far suspected: that whomever Judge Bates was speaking for, it was not his colleagues on the FISC or the federal judiciary more generally.

But the real misstep was the third public letter, transmitted on August 5, 2014, in response to the Leahy bill.<sup>24</sup> Notwithstanding the clear evidence that his views were not universally shared, Judge Bates opened by stating, “I am writing to express, on behalf of the Judiciary, several important concerns about the [Leahy bill].”<sup>25</sup> Like the May letter, the August letter used plural nouns to refer to each of its objections.<sup>26</sup> And whereas the May letter proposed three specific (and fairly modest) adjustments to the bill as it then stood,<sup>27</sup> the August letter went well beyond concerns over how the reforms would affect the FISC.<sup>28</sup> Indeed, the August missive even objected to one proposal on the ground that it might “prompt the government not to pursue potentially valuable intelligence-gathering activities under FISA.”<sup>29</sup>

In his article, Professor Anderson summarizes Judge Bates’s critiques as “an administrative complaint,”<sup>30</sup> which only merges with policy discussions because of the unique nature of specialized courts’ (like the FISC’s) jurisdiction.<sup>31</sup> To me, this undersells Judge Bates’s role. In fact, Judge Bates was offering substantive objections that, in at least some cases, had nothing whatsoever to do with the FISC. Furthermore, he purported to do so “on behalf of the judiciary,” despite the existence of

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23. See 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> [https://perma.cc/LP7U-UP3R]. The other FISC judge to comment publicly was Judge James Robertson, speaking at a July 2013 workshop hosted by the Privacy and Civil Liberties Oversight Board. See Pema Levy, *Former FISA Court Judge: Secret Court Needs Reform*, INT’L BUS. TIMES (July 9, 2013), <http://www.ibtimes.com/former-fisa-court-judge-secret-court-needs-reform-1338671> [https://perma.cc/L8CE-ZTDU].

24. Letter from Hon. John D. Bates to Hon. Patrick Leahy, *supra* note 5.

25. *Id.* at 1.

26. See *id.* at 1–7.

27. Letter from Hon. John D. Bates to Hon. Mike Rogers, *supra* note 19.

28. See *id.* at 4.

29. *Id.*

30. Anderson, *supra* note 1, at 450.

31. See *id.* at 450–51.

contrary public views from several of his colleagues—and no formal statement from the Judicial Conference.<sup>32</sup> As Judge Bates continued to publicly respond to different proposals as the legislative process unfolded, it became increasingly difficult to view him as an impartial observer of legislation that might impact his judicial function, instead of as the de facto leader of the opposition to the reform movement.

It is possible, of course, that other examples of judicial lobbying, even in the context of specialized courts, can be painted with a similarly problematic brush. That being said, the FISA reform debate was unique in one last respect: insofar as part of the reform conversation was focused on the FISC itself, it was provoked by concerns about the inadequacies of the judicial review provided by the FISC. Whatever the merits of the charge that the pre-Snowden FISC was a “rubber stamp” for the government, the animating idea behind a special advocate was to increase the quality and robustness of the litigation before the FISC. This would not only ensure that the government would be better held to account for potentially erroneous legal interpretations—as civil liberties groups demanded—but also would lend even greater legitimacy to decisions that *upheld* the authorities the government was seeking. This latter point may have a lot to do with why the Obama administration openly supported the idea of a special advocate<sup>33</sup>—and why it had apparently signed off on the language to that effect in the Leahy bill (which Judge Bates found so problematic).

In that regard, the true concern that arises from Judge Bates’s involvement is that, in many ways, it only *underscored* the imperative of the reform he was critiquing—a reform specifically designed and intended to improve the quality of decision-making by (and the perceived impartiality of) the FISC. After all, as I wrote in response to the August letter, “[H]ow much can we really trust the FISC to check the Executive Branch on its own if its judges are so invested in *defending* the Executive Branch from reforms to which the Executive Branch does not even *object*?”<sup>34</sup> Judged against this example, concerns about Federal Circuit judges commenting on proposed reforms to patent law, or Ninth Circuit judges expressing support for or opposition to proposals to split their court, seem to pale in comparison—and rightly so.

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32. See Vladeck, *supra* note 8.

33. See Ackerman, *supra* note 6.

34. Vladeck, *supra* note 8.

## II. THE WARS OF THE JUDGES

In the *Wall Street Journal* article that publicly disclosed Judge Bates's August letter (which had apparently been leaked),<sup>35</sup> my good friend and *Lawfare* colleague Ben Wittes summarized the Leahy bill (the subject of Judge Bates's critiques) as a "compromise involving the Obama administration, civil-liberties groups, industry and a lot of senators, but [one that] didn't involve the courts. The courts are dissenters from this compromise."<sup>36</sup> Of course, we already knew better—even by then—that "the courts," including the FISC, were *not* in fact speaking with one voice.<sup>37</sup>

But any doubt on that front was put to rest just over one week later in a letter sent to the Senate Judiciary Committee by Judge Alex Kozinski, then the Chief Judge of the Ninth Circuit.<sup>38</sup> Noting that he was writing "to clear up any misunderstanding that might arise as to whose views the [August 5 Bates] letter represents,"<sup>39</sup> Judge Kozinski went out of his way to stress that the matter had not been brought up before the Judicial Conference, and that, "having given the matter little consideration, and having had no opportunity to deliberate with the other members of the Judicial Conference, I have serious doubts about the views expressed by Judge Bates."<sup>40</sup> Thus, "[i]nsofar as Judge Bates's August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so."<sup>41</sup>

Given the identity of the author,<sup>42</sup> the rebuke of Judge Bates was actually rather mild. But the point was made—and widely reported in

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35. Indeed, two of the three Bates letters were only disclosed after the fact—the May letter because the House Permanent Select Committee on Intelligence appended it to the Committee Report on the bill, H.R. REP. NO. 113-452, pt. 2 (2014), and the August letter because it was leaked to the *Wall Street Journal*, *infra* note 36. Had Judge Bates, whether in his capacity as the Director of the AO or the Secretary of the Judicial Conference, circulated these letters to colleagues and received their acquiescence (or objections) before sending them, I dare say it would have changed the tenor of the entire episode.

36. Siobhan Gorman, *U.S. Judge Blasts Bill to Revamp Surveillance*, WALL STREET J. (Aug. 6, 2014), <http://www.wsj.com/articles/u-s-judge-blasts-bill-to-revamp-surveillance-1407367365> (quoting Ben Wittes).

37. *See supra* notes 19–23 and accompanying text.

38. *See* Letter from Hon. Alex Kozinski to Hon. Patrick J. Leahy, *supra* note 10.

39. *Id.* at 1.

40. *Id.* at 2.

41. *Id.*

42. For one of the more pointed examples of Judge Kozinski's rather blunt writing style, see Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (book review).

both major newspapers and popular legal blogs.<sup>43</sup> The breadth of the coverage was all the more noteworthy given that it came in the middle of August, the time of year when official Washington customarily absconds from both the capital and its political battles. Indeed, the Bates-Kozinski affair provoked public responses from one sitting and one former federal district judge. The former, Judge Richard Kopf, wrote that “Bates has been ‘bench slapped’ by Kozinski, and there is ‘trouble in paradise.’ . . . No matter how one expresses it, this dispute is extraordinary (and perhaps unsettling) for those who ‘are inside baseball.’”<sup>44</sup> The latter, Judge Nancy Gertner, wrote the following for the *National Law Journal*:

There are real concerns when a judge—particularly one charged only with administrative responsibilities—purports to speak for the entire bench on proposed legislation. It runs the risk of compromising judicial independence, forecasting the courts’ position on cases that could come before individual judges after the legislation is enacted. For example, while Bates’ letter hints darkly that there are “fundamental constitutional difficulties” with the Senate bill, he concedes—somewhat disingenuously—that he should not address them in any detail because they may one day be presented to the courts.<sup>45</sup>

As these pieces suggest, the episode was widely noted, and in no way enhanced public perception of the federal courts in general, or the FISC in particular. And that, to me, is perhaps the most important takeaway from both the FISA reform example and Professor Anderson’s broader thesis: at the end of the day, the real casualty of inappropriate judicial lobbying is judicial credibility. And thanks to President Trump’s

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43. See, e.g., David McAfee, *9th Circ. Chief Judge Not On Board with Attack on NSA Bill*, LAW360 (Aug. 21, 2014), <https://www.law360.com/articles/569691/9th-circ-chief-judge-not-on-board-with-attack-on-nsa-bill> [https://perma.cc/F8GG-TB6N]; Tim Cushing, *Judge Kozinski Calls Out Former FISC Judge John Bates for Claiming to Speak for the Entire Judicial Branch*, TECHDIRT (Aug. 22, 2014), <https://www.techdirt.com/articles/20140822/09575528293/justice-kozinski-writes-letter-to-senators-calling-out-former-fisc-judge-john-bates-claiming-to-speak-entire-judicial-branch.shtml> [https://perma.cc/2D7W-NA3W]; Joe Patrice, *Non-Sequiturs: 08.21.14*, ABOVE THE LAW (Aug. 21, 2014), <http://abovethelaw.com/2014/08/non-sequiturs-08-21-14/> [https://perma.cc/2XKW-2VSA].

44. See Richard G. Kopf, *A Bench Slap Portends Trouble in Paradise*, HERCULES AND THE UMPIRE (Aug. 22, 2014), <https://wednesdaywiththedecentlyprofane.me/2014/08/22/a-bench-slap-portends-trouble-in-paradise> [https://perma.cc/NQ5K-HQ7H].

45. See Nancy Gertner, *Op-Ed: Who Speaks for the Bench About Surveillance?*, NAT’L L.J. (Sept. 15, 2014), <http://www.nancygertner.com/news/op-ed-who-speaks-bench-about-surveillance> [https://perma.cc/PTR6-S8AM].

repeated attacks on the courts,<sup>46</sup> judicial credibility is an invaluable commodity that is perhaps more important today than it has been for generations. Although assessments of how particular lobbying episodes impact judicial credibility will be necessarily subjective, that does not mean that they are incapable of being compared to each other.

By that yardstick, the central problem with the lobbying in the context of the FISA reform episode was not the substance of the objections—inappropriate though they may have been. Nor was it their persistence or timing. Rather, there was just something surreal in the specter of a judge purporting to speak on behalf of his colleagues—and then being publicly chastised for having done so once they found out.

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Perhaps surprisingly, August 2014 was not the last time views purporting to be of “the judiciary” were offered (and relied upon) as part of the FISA reform conversation. On the eve of the USA FREEDOM Act’s passage in June 2015, Senate Republicans proposed an amendment that would have eviscerated the (by-then dramatically weakened) “special advocate” provision.<sup>47</sup> In a Senate staff memorandum, the amendment was described as being “responsive to the judiciary’s continual opposition to the amicus structure of the USA Freedom Act,” as manifested in “a letter to Congress from the director of the Administrative Office of the U.S. Courts.”<sup>48</sup> That letter, it turned out, had been prepared by James Duff—Judge Bates’s successor as Director of the AO. As Director Duff noted in a footnote:

These views have been formulated through consultation with the presiding judges of the Foreign Intelligence Surveillance Courts (and now with Judge Bates, a former presiding judge of the FISC). For the sake of convenience, throughout the [*sic*] this letter the terms “we” and “our” are used to describe these institutional perspectives. Because the matters at issue here relate to special expertise and experience of only a small number of judges on two specialized courts, the Judicial Conference has not been engaged to deliberate on them.<sup>49</sup>

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46. See *After Mr. Trump’s Din, the Quiet Grandeur of the Courts*, *supra* note 11.

47. See Steve Vladeck, *Amendment 1451, the “Judiciary,” and FISA Reform*, LAWFARE (June 2, 2015), <https://www.lawfareblog.com/amendment-1451-judiciary-and-fisa-reform-0> [https://perma.cc/2DBQ-YW7Q].

48. See *id.*

49. Letter from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Hon. Devin Nunes, Chairman, House Permanent Select Comm. on Intelligence, at 1 n.1. (May 4, 2015),

By that point, given the very public spectacle Judge Kozinski's letter sparked, even the mere insinuation of consensus among the judiciary bordered on intentional misrepresentation. Whether Director Duff was to blame, or the authors of the Senate memo, or both, the reality was that the letter's critiques simply represented the views of a cherry-picked group of former FISC judges. And the letter was even more problematic in that it failed to even acknowledge the myriad procedural or substantive objections that the previous letters had provoked. Perhaps for those reasons (or maybe just sheer exhaustion), the amendment failed.

But even as Judge Bates and those of similar views lost this particular battle, they won the war; what Congress finally enacted in the USA FREEDOM Act of 2015 was remarkably close to what Judge Bates had clamored for in his three public letters. Thus, for example, the transparency provisions were diluted to the point of toothlessness, and the special advocate was reduced to merely a court-appointed *amicus curiae* (with the FISC retaining the power to decline to even appoint such an *amicus* whenever it deemed such an appointment unnecessary). Moreover, there was no mechanism for the *amicus* to appeal adverse rulings to the FISA Court of Review.<sup>50</sup>

Thus, when all was said and done, Judge Bates got what he wanted, despite (or even especially because of) the fact that the judiciary did not necessarily agree—even as he purported to speak on its behalf. In that context, especially, such aggressive and problematic judicial lobbying should concern all of us, especially Judge Bates's colleagues.

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<https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2015/06/Duff-Letter.pdf>  
[<https://perma.cc/VL2T-UT37>].

50. See Vladeck, *supra* note 20.