

**AMENDMENT TO H.R. 2048**  
**OFFERED BY MR. JORDAN OF OHIO**

At the end of title IV, insert the following:

1 **SEC. 403. ESTABLISHMENT OF OFFICE OF CONSTITU-**  
2 **TIONAL ADVOCATE.**

3 (a) **DEFINITIONS.**—In this section:

4 (1) **CONSTITUTIONAL ADVOCATE.**—The term  
5 “Constitutional Advocate” means the Constitutional  
6 Advocate appointed under subsection (b).

7 (2) **DECISION.**—The term “decision” means a  
8 decision, order, or opinion issued by the FISA Court  
9 or the FISA Court of Review.

10 (3) **FISA.**—The term “FISA” means the For-  
11 eign Intelligence Surveillance Act of 1978 (50  
12 U.S.C. 1801 et seq.).

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

16 (5) **FISA COURT OF REVIEW.**—The term  
17 “FISA Court of Review” means the court of review  
18 established under section 103(b) of FISA (50 U.S.C.  
19 1803(b)).

1           (6) OFFICE.—The term “Office” means the Of-  
2           fice of the Constitutional Advocate established under  
3           subsection (b).

4           (7) PETITION REVIEW POOL.—The term “peti-  
5           tion review pool” means the petition review pool es-  
6           tablished by section 103(e) of FISA (50 U.S.C.  
7           1803(e)) or any member of that pool.

8           (8) SIGNIFICANT CONSTRUCTION OR INTERPRE-  
9           TATION OF LAW.—The term “significant construc-  
10          tion or interpretation of law” means a significant  
11          construction or interpretation of a provision, as that  
12          term is construed under section 601(c) of FISA (50  
13          U.S.C. 1871(e)).

14          (b) OFFICE OF THE CONSTITUTIONAL ADVOCATE.—

15           (1) ESTABLISHMENT.—There is established  
16          within the judicial branch of the United States an  
17          Office of the Constitutional Advocate.

18           (2) CONSTITUTIONAL ADVOCATE.—

19           (A) IN GENERAL.—The head of the Office  
20          is the Constitutional Advocate.

21           (B) APPOINTMENT AND TERM.—

22           (i) APPOINTMENT.—The Chief Justice  
23          of the United States shall appoint the Con-  
24          stitutional Advocate from the list of can-  
25          didates submitted under clause (ii).

1 (ii) CANDIDATES.—

2 (I) LIST OF CANDIDATES.—The  
3 Privacy and Civil Liberties Oversight  
4 Board shall submit to the Chief Jus-  
5 tice a list of not less than 5 qualified  
6 candidates to serve as a Constitu-  
7 tional Advocate.

8 (II) SELECTION OF CAN-  
9 DIDATES.—In preparing a list de-  
10 scribed in subclause (I), the Privacy  
11 and Civil Liberties Oversight Board  
12 shall select candidates the Board be-  
13 lieves will be zealous and effective ad-  
14 vocates in defense of civil liberties and  
15 consider each potential candidate's—

16 (aa) litigation and other pro-  
17 fessional experience;

18 (bb) experience with the  
19 areas of law the Constitutional  
20 Advocate is likely to encounter in  
21 the course of the Advocate's du-  
22 ties; and

23 (cc) demonstrated commit-  
24 ment to civil liberties.

1 (iii) SECURITY CLEARANCE.—An indi-  
2 vidual may be appointed Constitutional  
3 Advocate without regard to whether the in-  
4 dividual possesses a security clearance on  
5 the date of the appointment.

6 (iv) TERM AND DISMISSAL.—A Con-  
7 stitutional Advocate shall be appointed for  
8 a term of 3 years and may be fired only  
9 for good cause shown, including the dem-  
10 onstrated inability to qualify for an ade-  
11 quate security clearance.

12 (v) REAPPOINTMENT.—There shall be  
13 no limit to the number of consecutive  
14 terms served by a Constitutional Advocate.  
15 The reappointment of a Constitutional Ad-  
16 vocate shall be made in the same manner  
17 as appointment of a Constitutional Advo-  
18 cate.

19 (vi) ACTING CONSTITUTIONAL ADVO-  
20 CATE.—If the position of Constitutional  
21 Advocate is vacant, the Chief Justice may  
22 appoint an Acting Constitutional Advocate  
23 from among the qualified employees of the  
24 Office. If there are no such qualified em-  
25 ployees, the Chief Justice may appoint an

1           Acting Constitutional Advocate from the  
2           most recent list of candidates provided by  
3           the Privacy and Civil Liberties Oversight  
4           Board pursuant to clause (ii). The Acting  
5           Constitutional Advocate shall have all of  
6           the powers of a Constitutional Advocate  
7           and shall serve until a Constitutional Ad-  
8           vocate is appointed.

9           (C) EMPLOYEES.—The Constitutional Ad-  
10          vocate is authorized, without regard to the civil  
11          service laws and regulations, to appoint and ter-  
12          minate employees of the Office.

13          (3) SECURITY CLEARANCES.—The appropriate  
14          departments, agencies, and elements of the executive  
15          branch shall cooperate with the Office, to the extent  
16          possible under existing procedures and requirements,  
17          to expeditiously provide the Constitutional Advocate  
18          and appropriate employees of the Office with the se-  
19          curity clearances necessary to carry out the duties of  
20          the Constitutional Advocate.

21          (4) DUTIES AND AUTHORITIES OF THE CON-  
22          STITUTIONAL ADVOCATE.—

23                  (A) IN GENERAL.—The Constitutional Ad-  
24          vocate—

1 (i) shall review each application to the  
2 FISA Court by the Attorney General;

3 (ii) shall review each decision of the  
4 FISA Court, the petition review pool, or  
5 the FISA Court of Review issued after the  
6 date of the enactment of this Act and all  
7 documents and other material relevant to  
8 such decision in a complete, unredacted  
9 form;

10 (iii) may participate in a proceeding  
11 before the petition review pool if such par-  
12 ticipation is requested by a party in such  
13 a proceeding or by the petition review pool;

14 (iv) shall consider any request from a  
15 provider who has been served with an  
16 order, certification, or directive compelling  
17 the provider to provide assistance to the  
18 Government or to release customer infor-  
19 mation to assist that provider in a pro-  
20 ceeding before the FISA Court or the peti-  
21 tion review pool, including a request—

22 (I) to oppose the Government on  
23 behalf of the private party in such a  
24 proceeding; or

1 (II) to provide guidance to the  
2 private party if the private party is  
3 considering compliance with an order  
4 of the FISA Court;

5 (v) shall participate in a proceeding  
6 before the FISA Court if appointed to par-  
7 ticipate by the FISA Court under sub-  
8 section (c) and may participate in a pro-  
9 ceeding before the petition review pool if  
10 authorized under subsection (d);

11 (vi) may request to participate in a  
12 proceeding before the FISA Court or the  
13 petition review pool;

14 (vii) shall participate in such a pro-  
15 ceeding if such request is granted;

16 (viii) may request reconsideration of a  
17 decision of the FISA Court under sub-  
18 section (c);

19 (ix) may appeal or seek review of a  
20 decision of the FISA Court, the petition  
21 review pool, or the FISA Court of Review,  
22 as permitted by this title; and

23 (x) shall participate in such appeal or  
24 review.

1 (B) **ADVOCACY.**—The Constitutional Advo-  
2 cate shall protect individual rights by vigorously  
3 advocating before the FISA Court, the petition  
4 review pool, or the FISA Court of Review, as  
5 appropriate, in support of legal interpretations  
6 that minimize the scope of surveillance and the  
7 extent of data collection and retention.

8 (C) **UTILIZATION OF OUTSIDE COUNSEL.**—  
9 The Constitutional Advocate—

10 (i) may delegate to a competent out-  
11 side counsel any duty or responsibility of  
12 the Constitutional Advocate with respect to  
13 participation in a matter before the FISA  
14 Court, the FISA Court of Review, or the  
15 Supreme Court of the United States; and

16 (ii) may not delegate to outside coun-  
17 sel any duty or authority set out in sub-  
18 paragraph (i), (ii), (iv), (vi), (viii), or (ix)  
19 of subparagraph (A).

20 (D) **AVAILABILITY OF DOCUMENTS AND**  
21 **MATERIAL.**—The FISA Court, the petition re-  
22 view pool, or the FISA Court of Review, as ap-  
23 propriate, shall order any agency, department,  
24 or entity to make available to the Constitutional  
25 Advocate, or appropriate outside counsel if uti-

1           lized by the Constitutional Advocate under sub-  
2           paragraph (C), any documents or other mate-  
3           rial necessary to carry out the duties described  
4           in subparagraph (A).

5           (c) ADVOCACY BEFORE THE FISA COURT.—

6           (1) APPOINTMENT TO PARTICIPATE.—

7           (A) IN GENERAL.—The FISA Court may  
8           appoint the Constitutional Advocate to partici-  
9           pate in a FISA Court proceeding.

10          (B) STANDING.—If the Constitutional Ad-  
11          vocate is appointed to participate in a FISA  
12          Court proceeding pursuant to subparagraph  
13          (A), the Constitutional Advocate shall have  
14          standing as a party before the FISA Court in  
15          that proceeding.

16          (2) RECONSIDERATION OF A FISA COURT DECI-  
17          SION.—

18          (A) AUTHORITY TO MOVE FOR RECONSID-  
19          ERATION.—The Constitutional Advocate may  
20          move the FISA Court to reconsider any deci-  
21          sion of the FISA Court made after the date of  
22          the enactment of this Act by petitioning the  
23          FISA Court not later than 30 days after the  
24          date on which all documents and materials rel-

1           evant to the decision are made available to the  
2           Constitutional Advocate.

3           (B) DISCRETION OF THE FISA COURT.—  
4           The FISA Court shall have discretion to grant  
5           or deny a motion for reconsideration made pur-  
6           suant to subparagraph (A).

7           (3) AMICUS CURIAE PARTICIPATION.—

8           (A) MOTION BY THE CONSTITUTIONAL AD-  
9           VOCATE.—The Constitutional Advocate may file  
10          a motion with the FISA Court to permit and  
11          facilitate participation of amicus curiae, includ-  
12          ing participation in oral argument if appro-  
13          priate, in any proceeding. The FISA Court  
14          shall have the discretion to grant or deny such  
15          a motion.

16          (B) FACILITATION BY THE FISA COURT.—  
17          The FISA Court may, sua sponte, permit and  
18          facilitate participation by amicus curiae, includ-  
19          ing participation in oral argument if appro-  
20          priate, in proceedings before the FISA Court.

21          (C) REGULATIONS.—Not later than 180  
22          days after the date of the enactment of this  
23          Act, the FISA Court shall promulgate rules to  
24          provide the public with information sufficient to

1 allow interested parties to participate as amicus  
2 curiae.

3 (d) ADVOCACY BEFORE THE PETITION REVIEW  
4 POOL.—

5 (1) AUTHORITY TO PARTICIPATE.—The petition  
6 review pool or any party to a proceeding before the  
7 petition review pool may authorize the Constitutional  
8 Advocate to participate in a petition review pool pro-  
9 ceeding.

10 (2) RECONSIDERATION OF A PETITION REVIEW  
11 POOL DECISION.—

12 (A) AUTHORITY TO MOVE FOR RECONSID-  
13 ERATION.—The Constitutional Advocate may  
14 move the petition review pool to reconsider any  
15 decision of the petition review pool made after  
16 the date of the enactment of this Act by peti-  
17 tioning the petition review pool not later than  
18 30 days after the date on which all documents  
19 and materials relevant to the decision are made  
20 available to the Constitutional Advocate.

21 (B) DISCRETION OF THE PETITION RE-  
22 VIEW POOL.—The petition review pool shall  
23 have discretion to grant or deny a motion for  
24 reconsideration made pursuant to subparagraph  
25 (A).

1 (3) AMICUS CURIAE PARTICIPATION.—

2 (A) MOTION BY THE CONSTITUTIONAL AD-  
3 VOCATE.—The Constitutional Advocate may file  
4 a motion with the petition review pool to permit  
5 and facilitate participation of amicus curiae, in-  
6 cluding participation in oral argument if appro-  
7 priate, in any proceeding. The petition review  
8 pool shall have the discretion to grant or deny  
9 such a motion.

10 (B) FACILITATION BY THE FISA COURT.—  
11 The petition review pool may, sua sponte, per-  
12 mit and facilitate participation by amicus cu-  
13 riae, including participation in oral argument if  
14 appropriate, in proceedings before the petition  
15 review pool.

16 (C) REGULATIONS.—Not later than 180  
17 days after the date of the enactment of this  
18 Act, the petition review pool shall promulgate  
19 rules to provide the public with information suf-  
20 ficient to allow interested parties to participate  
21 as amicus curiae.

22 (e) APPELLATE REVIEW.—

23 (1) APPEAL OF FISA COURT DECISIONS.—

24 (A) AUTHORITY TO APPEAL.—The Con-  
25 stitutional Advocate may appeal any decision of

1 the FISA Court or the petition review pool  
2 issued after the date of the enactment of this  
3 Act not later than 90 days after the date the  
4 decision is issued, unless it would be apparent  
5 to all reasonable jurists that such decision is  
6 dictated by statute or by precedent handed  
7 down after such date of enactment.

8 (B) STANDING AS APPELLANT.—If the  
9 Constitutional Advocate appeals a decision of  
10 the FISA Court or the petition review pool pur-  
11 suant to subparagraph (A), the Constitutional  
12 Advocate shall have standing as a party before  
13 the FISA Court of Review in such appeal.

14 (C) MANDATORY REVIEW.—The FISA  
15 Court of Review shall review any FISA Court  
16 or petition review pool decision appealed by the  
17 Constitutional Advocate and issue a decision in  
18 such appeal.

19 (D) STANDARD OF REVIEW.—The stand-  
20 ards for a mandatory review of a FISA Court  
21 or petition review pool decision pursuant to sub-  
22 paragraph (C) shall be—

23 (i) de novo with respect to issues of  
24 law; and

1 (ii) clearly erroneous with respect to  
2 determination of facts.

3 (E) AMICUS CURIAE PARTICIPATION.—

4 (i) IN GENERAL.—The FISA Court of  
5 Review shall accept amicus curiae briefs  
6 from interested parties in all mandatory  
7 reviews pursuant to subparagraph (C) and  
8 shall provide for amicus curiae participa-  
9 tion in oral argument if appropriate.

10 (ii) REGULATIONS.—Not later than  
11 180 days after the date of the enactment  
12 of this Act, the FISA Court of Review  
13 shall promulgate rules to provide the public  
14 with information sufficient to allow inter-  
15 ested parties to participate as amicus cu-  
16 riae.

17 (2) REVIEW OF FISA COURT OF REVIEW DECI-  
18 SIONS.—

19 (A) AUTHORITY.—The Constitutional Ad-  
20 vocate may seek a writ of certiorari from the  
21 Supreme Court of the United States for review  
22 of any decision of the FISA Court of Review.

23 (B) STANDING.—In any proceedings before  
24 the Supreme Court of the United States relat-  
25 ing to a petition of certiorari filed under sub-

1 paragraph (A) and any proceedings in a matter  
2 for which certiorari is granted, the Constitu-  
3 tional Advocate shall have standing as a party.

4 (f) DISCLOSURE.—

5 (1) REQUIREMENT TO DISCLOSE.—The Attor-  
6 ney General shall publicly disclose—

7 (A) all decisions issued by the FISA Court,  
8 the petition review pool, or the FISA Court of  
9 Review after July 10, 2003, that include a sig-  
10 nificant construction or interpretation of law;

11 (B) any decision of the FISA Court or the  
12 petition review pool appealed by the Constitu-  
13 tional Advocate pursuant to this title; and

14 (C) any FISA Court of Review decision  
15 that is issued after an appeal by the Constitu-  
16 tional Advocate.

17 (2) DISCLOSURE DESCRIBED.—For each disclo-  
18 sure required by paragraph (1) with respect to a de-  
19 cision, the Attorney General shall make available to  
20 the public documents sufficient—

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

24 (B) to describe in general terms the con-  
25 text in which the matter arises;

1 (C) to describe the construction or inter-  
2 pretation of any statute, constitutional provi-  
3 sion, or other legal authority relied on by the  
4 decision; and

5 (D) to indicate whether the decision de-  
6 parted from any prior decision of the FISA  
7 Court, the petition review pool, or the FISA  
8 Court of Review.

9 (3) DOCUMENTS DESCRIBED.—The Attorney  
10 General shall satisfy the disclosure requirements in  
11 paragraph (2) by—

12 (A) releasing a FISA Court, petition re-  
13 view pool, or FISA Court of Review decision in  
14 its entirety or as redacted;

15 (B) releasing a summary of a FISA Court,  
16 petition review pool, or FISA Court of Review  
17 decision; or

18 (C) releasing an application made to the  
19 FISA Court, a petition made to the petition re-  
20 view pool, briefs filed before the FISA Court,  
21 the petition review pool, or the FISA Court of  
22 Review, or other materials, in full or as re-  
23 dacted.

24 (4) EXTENSIVE DISCLOSURE.—The Attorney  
25 General shall release as much information regarding

1 the facts and analysis contained in a decision de-  
2 scribed in paragraph (1) or documents described in  
3 paragraph (3) as is consistent with legitimate na-  
4 tional security concerns.

5 (5) TIMING OF DISCLOSURE.—

6 (A) DECISIONS ISSUED PRIOR TO ENACT-  
7 MENT.—A decision issued prior to the date of  
8 the enactment of this Act that is required to be  
9 disclosed under paragraph (1)(A) shall be dis-  
10 closed not later than 180 days after the date of  
11 the enactment of this Act.

12 (B) FISA COURT AND PETITION REVIEW  
13 POOL DECISIONS.—The Attorney General shall  
14 release FISA Court or petition review pool deci-  
15 sions appealed by the Constitutional Advocate  
16 not later than 30 days after the date the appeal  
17 is filed.

18 (C) FISA COURT OF REVIEW DECISIONS.—  
19 The Attorney General shall release FISA Court  
20 of Review decisions appealed by the Constitu-  
21 tional Advocate not later than 90 days after the  
22 date the appeal is filed.

23 (6) PETITION BY THE CONSTITUTIONAL ADVO-  
24 CATE.—

1 (A) AUTHORITY TO PETITION.—The Con-  
2 stitutional Advocate may petition the FISA  
3 Court, the petition review pool, or the FISA  
4 Court of Review to order—

5 (i) the public disclosure of a decision  
6 of such a Court or review pool, and docu-  
7 ments or other material relevant to such a  
8 decision, previously designated as classified  
9 information; or

10 (ii) the release of an unclassified sum-  
11 mary of such decisions and documents.

12 (B) CONTENTS OF PETITION.—Each peti-  
13 tion filed under subparagraph (A) shall contain  
14 a detailed declassification proposal or a sum-  
15 mary of the decision and documents that the  
16 Constitutional Advocate proposes to have re-  
17 leased publicly.

18 (C) ROLE OF THE ATTORNEY GENERAL.—

19 (i) COPY OF PETITION.—The Con-  
20 stitutional Advocate shall provide to the  
21 Attorney General a copy of each petition  
22 filed under subparagraph (A).

23 (ii) OPPOSITION.—The Attorney Gen-  
24 eral may oppose a petition filed under sub-  
25 paragraph (A) by submitting any objec-

1           tions in writing to the FISA Court, the pe-  
2           tition review pool, or the FISA Court of  
3           Review, as appropriate, not later than 90  
4           days after the date such petition was sub-  
5           mitted.

6           (D) PUBLIC AVAILABILITY.—Not less than  
7           91 days after receiving a petition under sub-  
8           paragraph (A), and taking into account any ob-  
9           jections from the Attorney General made under  
10          subparagraph (C)(ii), the FISA Court, the peti-  
11          tion review pool, or the FISA Court of Review,  
12          as appropriate, shall declassify and make read-  
13          ily available to the public any decision, docu-  
14          ment, or other material requested in such peti-  
15          tion, to the greatest extent possible, consistent  
16          with legitimate national security considerations.

17          (E) EFFECTIVE DATE.—The Constitu-  
18          tional Advocate may not file a petition under  
19          subparagraph (A) until 181 days after the date  
20          of the enactment of this Act, except with re-  
21          spect to a decision appealed by the Constitu-  
22          tional Advocate.

23          (g) ANNUAL REPORT TO CONGRESS.—

1           (1) REQUIREMENT FOR ANNUAL REPORT.—The  
2           Constitutional Advocate shall submit to Congress an  
3           annual report on the implementation of this title.

4           (2) CONTENTS.—Each annual report submitted  
5           under paragraph (1) shall—

6                   (A) detail the activities of the Office;

7                   (B) provide an assessment of the effective-  
8           ness of this title; and

9                   (C) propose any new legislation to improve  
10          the functioning of the Office or the operation of  
11          the FISA Court, the petition review pool, or the  
12          FISA Court of Review.

13          (h) PRESERVATION OF RIGHTS.—Nothing in this  
14          title shall be construed—

15                 (1) to provide the Attorney General with au-  
16          thority to prevent the FISA Court, the petition re-  
17          view pool, or the FISA Court of Review from declas-  
18          sifying decisions or releasing information pursuant  
19          to this title; and

20                 (2) to eliminate the public's ability to secure in-  
21          formation under section 552 of title 5, United States  
22          Code (commonly known as the "Freedom of Infor-  
23          mation Act") or any other provision of law.

