

# FOREIGN INTELLIGENCE SURVEILLANCE COURT

## RULES OF PROCEDURE

*Effective February 17, 2006*

### I. Scope, Construction, and Amendment of Rules

**Rule 1. Scope of Rules.** These rules govern all proceedings in the Foreign Intelligence Surveillance Court (hereafter, “the Court”). Issues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure.

**Rule 2. Amendment.** Any amendment to these rules shall be prescribed and promulgated in accordance with 28 U.S.C. § 2071.

### II. National Security Information

**Rule 3.** In all matters, the Court and its staff shall comply with the security measures established pursuant to 50 U.S.C. §§ 1803(c) and 1822(e), as well as Executive Order 12958, “Classified National Security Information,” as amended by Executive Order 13292 (or its successor). Each member of the Court’s staff must possess security clearances at a level commensurate to the individual’s responsibilities.

### III. Structure of the Court and Authority of Judges

**Rule 4. Structure.**

(a) **Composition.** In accordance with 50 U.S.C. § 1803(a), the Court consists of those United States District Court Judges appointed by the Chief Justice of the United States.

(b) **Presiding Judge.** The Presiding Judge is the Judge so designated by the Chief Justice.

**Rule 5. Authority of the Judges.**

(a) **Scope of Authority.** Each Judge of the Court may exercise the authority vested by the Foreign Intelligence Surveillance Act, as amended, 50 U.S.C. § 1801 et seq. (“the Act”), including the authority to issue an Order approving electronic surveillance or a physical search, and such other authority, consonant with Article III of the Constitution and other statutes and laws of the United States, to the extent not inconsistent with the Act.

(b) **Authority to Refer Matters.** Except for matters involving a denial of an application for a Court Order, a Judge may refer any matter to another Judge of the Court with that

Judge's consent. If a Judge directs the government to supplement an application, that Judge may direct the government to present the next renewal of that application to that Judge. If a matter is presented to a Judge whose tenure on the Court expires while the matter is pending, the Presiding Judge shall re-assign the matter.

**(c) Publication of Opinions.** On request by a Judge, the Presiding Judge, after consulting with other Judges of the Court, may direct that an Opinion be published. Before publication, the Opinion must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected pursuant to Executive Order 12958 as amended by Executive Order 13292 (or its successor).

#### **IV. Attorneys Authorized to Appear Before the Court**

**Rule 6. License and Other Requirements for Attorneys.** An attorney may appear on a matter with the permission of the Judge before whom the matter is pending. An attorney who appears before the Court must be a licensed attorney and a member, in good standing, of the bar of a federal court, except that an attorney who is employed by and represents the United States or any of its agencies in a matter before the Court may appear before the Court regardless of federal bar membership. All attorneys appearing before the Court must have the appropriate security clearances.

#### **V. Clerk's Office**

##### **Rule 7. Duties of the Clerk.**

**(a) Duties.** The Clerk will support the work of the Court consistent with the directives of the Presiding Judge. The Presiding Judge may permit the duties of the Clerk to be delegated.

##### **(b) Court Records.**

**(i) Maintenance of Court Records.** The Clerk will: (A) maintain the Court's docket and records — including records and recordings of proceedings before the Court — and the seal; (B) accept all documents for filing; (C) keep all records, pleadings, and files in a secure location, making those materials available only to persons authorized to have access to them; and (D) perform any other duties, consistent with the usual powers of a Clerk of Court, as the Presiding Judge may authorize.

**(ii) Release of Court Records.** Except when Orders or Opinions are provided to the government when issued, no Court records or other materials may be released without prior motion to and Order by the Court. Court records shall be released in conformance with the security measures referenced in Rule 3.

(c) **Electronic Filing.** The Clerk, when authorized by the Court, may accept and file applications, Orders, and other filings by any reliable, and appropriately secure, electronic means.

## VI. Form and Filing of Applications for Court Orders

### Rule 8. Form of Applications for Court Order.

(a) **Compliance With the Foreign Intelligence Surveillance Act.** A Federal officer may file an application for a Court Order in accordance with the Foreign Intelligence Surveillance Act. The application must be approved and certified in accordance with the Act. The application must contain the statements and other information required by the Act.

(b) **Citations.** Each application must contain citations to pertinent provisions of the Act.

(c) **Facsimile or Digital Signatures.** With the Judge's consent, an application may be submitted by any reliable, and appropriately secure, electronic means, including facsimile.

### Rule 9. Time of Submission; Applications.

(a) **Time of Submission.** Other than for an application being submitted following the Attorney General's authorization of emergency physical search, electronic surveillance, or pen register/trap and trace surveillance, proposed applications and orders must be submitted at least seven calendar days before the date of the scheduled hearing. The final application with the Federal officer's written oath or affirmation, and the approval and certification required by the Act, may be submitted later, but no later than two hours before the scheduled hearing.

(b) **Notice of Changes.** The government may submit an amended application, but it must identify any differences from previous submissions at the time the Court reviews the final application.

### Rule 10. New Matters; Supplementation.

(a) **Notice to the Court.** If an application or other request for action involves an issue not previously before the Court — including, but not limited to, novel issues of technology or law — the applicant must inform the Judge of the nature and significance of that issue.

(i) **Memorandum Relating to New Technology.** Prior to requesting authorization to use a new surveillance or search technique, the government must submit a memorandum to the Court which: (A) explains the technique; (B) describes the circumstances of the likely use of the technique; (C) discusses legal issues apparently raised by the technique; and (D) describes proposed

minimization procedures to be applied to the use of the technique. At the latest, the memorandum must be submitted as part of the first application that seeks to employ the new technique.

**(ii) Legal Memorandum.** If an application or other request for action raises an issue of law not previously considered by the Court, the government must submit a memorandum of law in support of its position on each new issue. At the latest, the memorandum must be submitted as part of the first application that raises the issue.

**(b) Correction of Material Facts.** If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of: (i) the misstatement or omission; (ii) any necessary correction; (iii) the facts and circumstances relevant to the misstatement or omission; (iv) any modifications the government has made or proposes to make in how it will implement any authority granted by the Court; and (v) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission.

**(c) Disclosure of Non-Compliance.** If the government discovers that any authority granted by the Court has been implemented in a manner that did not comply with the Court's authorization, the government, in writing, must immediately inform the Judge to whom the submission was made of: (i) the non-compliance; (ii) the facts and circumstances relevant to the non-compliance; (iii) any modifications the government has made or proposes to make in how it will implement any authority granted by the Court; and (iv) how the government proposes to dispose of or treat any information obtained as a result of the non-compliance.

**(d) Supplementation.** The Court may require the applicant to furnish any information the reviewing Judge deems necessary for an informed review of that application and any proposed Orders relating to it.

**Rule 11. Motions.** Unless the Judge who issued the Order granting an application directs otherwise, a motion to amend the Order need not be presented to the Judge who issued it. The Judge to whom a motion is presented may refer the motion for review and determination to the Judge who ruled on the application.

**Rule 12. Applications Following Approval of Emergency Authorizations.**

**(a) Notification.** A Judge who has been notified of the emergency authorization of electronic surveillance, physical search, or pen register/trap and trace surveillance pursuant to 50 U.S.C. § 1805(f), § 1824(e), or § 1843, may refer the consequent application to another Judge of the Court.

**(b) Hearings.** To the extent practicable, hearings on applications consequent to emergency authorizations shall be added to regularly scheduled court sessions.

## VII. Hearings

### Rule 13. Hearings.

- (a) **Scheduling.** The Judge to whom an application is presented shall set the time for the hearing.
- (b) **Ex Parte.** Except as provided for under Rule 15, all hearings shall be ex parte and conducted in a secure location and manner.
- (c) **Appearances.** Unless excused, the official supplying the factual information upon which an Order is sought and an attorney for the applicant must attend the hearing, along with other representatives of the government as the Court may direct or permit.
- (d) **Testimony; Oath; Recording of Proceedings.** The Judge may take testimony under oath and receive other evidence. The testimony may be recorded electronically or as the Judge may otherwise direct, consistent with the security measures referenced in Rule 3.

## VIII. Orders

### Rule 14. Contents.

- (a) **Citations.** All Orders must contain citations to pertinent provisions of the Foreign Intelligence Surveillance Act.
- (b) **Denying Applications.**
  - (i). **Written Statement of Reasons.** If a Judge denies an application, the Judge must immediately prepare and file a written statement of each reason for the decision and cause a copy of the statement to be served on the government.
  - (ii). **Submission of Previously Denied Applications.** When a Judge denies an application, further submission of the application may be made only to that Judge.
- (c) **Approving Applications; Expiration Date.** The expiration date and time of an Order approving an application must be computed on the basis of calendar days, not judicial business days, and must be stated as Eastern Time. Expiration dates must be computed from the date and time of the Court's issuance of an Order, or, if applicable, of the Attorney General's exercise of emergency authorization pursuant to 50 U.S.C. § 1805(f), § 1824(e), or § 1843.
- (d) **Electronic Signatures.** The Judge may sign the Order by any reliable, and appropriately secure, electronic means, including facsimile.

### Rule 15. Enforcement; Sanctions.

- (a) **Show Cause Motions.** If a person or entity served with a Court Order (the "recipient") fails to comply with that Order, the government may move the Court for an Order to show cause why the recipient should not be held in contempt and sanctioned

accordingly. The motion must be filed with the Clerk of the Court and referred to the Judge of the Court who entered the underlying Order.

**(b) Proceedings.**

(i) An Order to show cause must confirm issuance of the underlying Order, schedule further proceedings, and afford the recipient an opportunity to show cause why the recipient should not be held in contempt.

(ii) Proceedings on motions and Orders to show cause must be *in camera*. All records of such proceedings must be maintained in conformance with 50 U.S.C. § 1803(c).

(iii) If the recipient fails to show cause for noncompliance with the underlying Order, the Court may find the recipient in contempt and enter any further Orders it deems necessary and appropriate to compel compliance and to sanction the recipient for noncompliance with the underlying Order.

(iv) If the recipient shows cause for noncompliance or if the Court concludes that the underlying Order should not be enforced as issued, the Court may enter any further Orders it deems appropriate.

**Rule 16. Returns; Time for Filing; Contents.**

**(a) Time for Filing.**

(i) **Search Orders.** Unless otherwise ordered by the Court, a return must be made following the issuance of a Search Order either at the time of submission of a renewal application or within ninety days of the execution of a Search Order, whichever is sooner.

(ii) **Other Orders.** The Court may order the filing of other returns at a time and in a manner as it deems appropriate.

**(b) Contents.** The return must: (i) notify the Court of the execution of the Order; (ii) describe the circumstances and results of the search or other activity including, where appropriate, an inventory; (iii) certify either that the execution was in conformity with the Order, or, if not in conformity, describe any deviation in execution from the Order and explain the reasons for any deviation; and (iv) include any other information as the Court may direct.

**IX. Sequestration or Destruction**

**Rule 17. Sequestration or Destruction.** If the government submits material for sequestration, the Presiding Judge may order the government to file a memorandum stating the circumstances of the material's acquisition, reasons for the request to sequester rather than destroy the material, and any other information as the Presiding Judge may direct. The Presiding Judge may direct the Clerk to keep the material, specifying the terms and conditions of its retention, or order the Clerk or the government to destroy the material.

## **X. Appeals**

**Rule 18. Motion to Transmit Record.** The government may file an appeal within 60 days of the denial of an application. Upon filing the appeal, the government must file a motion to transmit the record to the Foreign Intelligence Surveillance Court of Review (hereafter, “Court of Review”).

**Rule 19. Transmission of the Record.** The Court must transmit the record under seal to the Court of Review as expeditiously as possible, and no later than 30 days after the government’s motion. A copy of the Judge’s statement of reasons denying the application must be included as part of the record on appeal.

**Rule 20. Oral Notification to the Court of Review.** The Clerk must orally notify the Presiding Judge of the Court of Review immediately upon receipt of a motion from the government to transmit a record to the Court of Review.

PROCEDURES FOR REVIEW OF PETITIONS FILED PURSUANT TO SECTION 501(f) OF  
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED

*Effective May 5, 2006*

**I. IN GENERAL**

**Section 1. Limited Scope.** These procedures govern the filing and disposition of petitions pursuant to Section 501(f) of the Foreign Intelligence Surveillance Act of 1978, as amended (hereafter, “the Act”).

**Section 2. Rules of the Foreign Intelligence Surveillance Court Apply.** These procedures supplement the *Rules of Procedure* of the Foreign Intelligence Surveillance Court (available at [www.uscourts.gov/rules](http://www.uscourts.gov/rules)), which govern all matters before this Court.

**II. PETITION AND OTHER PAPERS**

**Section 3. Filing.**

**(a) Who May File.** The recipient of an Order to produce a tangible thing under Section 501 of the Act may file a petition challenging the Order pursuant to Section 501(f) of the Act. A petition may be filed through counsel.

**(i) Petitioner’s Initial Filing.** The petition or other paper initially filed shall include the petitioner’s full name, mailing address, e-mail address, and telephone number. If the petitioner is represented by counsel, the petition or other paper initially filed shall include the petitioner’s full name and the full name of the petitioner’s attorney, as well as the attorney’s address, telephone number, e-mail address, facsimile number, and bar membership information.

**(ii) Government’s Initial Filing.** The government’s initial response shall include the full name of the attorneys representing the United States, and their mailing addresses, e-mail addresses, telephone numbers, and facsimile numbers.

**(b) Where to File.**

**(i) Challenging an Unclassified Order.** Filing a petition and any related papers challenging an unclassified Production Order or Nondisclosure Order may be accomplished by hand delivery or by overnight delivery to the Foreign Intelligence Surveillance Court’s Security Officer (hereafter, “the Court Security Officer”), c/o Security and Emergency Planning Staff, United States Department of Justice, Room 6217, 950 Pennsylvania Ave., NW, Washington, DC 20530. A signed original and one copy of all papers must be submitted.

**(ii) Challenging a Classified Order.** Filing a petition and any related papers

challenging a classified Production Order or Nondisclosure Order (i.e., marked Confidential, Secret, or Top Secret), may be accomplished by contacting the Court Security Officer by telephone to receive instructions about how to file and serve the petition and any related papers. (The Court Security Officer may be contacted by calling the Department of Justice Command Center at 202-514-5000, and asking to be directed to the Director, Security and Emergency Planning Staff).

**(c) Time to File Petition.**

**(i) Challenging a Production Order.** A petition challenging an Order to produce a tangible thing must be filed within 20 days after the Order has been served.

**(ii) Challenging a Nondisclosure Order.** A petition challenging a Nondisclosure Order issued under Section 501(d) may not be filed with this Court earlier than one year after the date of the issuance of the Production Order containing the challenged Nondisclosure Order.

**(iii) Subsequent Petition Challenging a Nondisclosure Order.** If a Judge denies a petition to modify or set aside a Nondisclosure Order, the petitioner may not file with this Court a subsequent petition challenging the same Nondisclosure Order earlier than one year after the date of the denial.

**(d) Effective Date of Filing.**

**(i) By Petitioner.** A petition or other papers submitted by the petitioner shall be considered to be filed on the date received by the Court Security Officer. The Court Security Officer shall transmit all submissions to the Clerk of the Foreign Intelligence Surveillance Court (hereafter, “the Clerk of the Court”) on the same date that they are received.

**(ii) By Government.** The government’s response and other papers submitted by the government shall be considered to be filed on the date that they are received by the Clerk of the Court.

**Section 4. Content of Petition.**

**(a) Grounds for Petition.** A petition shall concisely state the factual and legal grounds for modifying or setting aside the challenged Order.

**(b) Access to Classified Information.** A petition shall state whether the petitioner and/or the petitioner’s attorney previously have been provided access to classified information and the circumstances of such access.

**(c) Request to Stay Production.**

**(i) Petition Does Not Automatically Effect a Stay.** A petition does not automatically effect a stay of the underlying Order. In order to stay a Production Order, petitioner must request such relief and it must be granted by the judge to

whom the matter is assigned.

**(ii) Stay May Be Requested Prior to Filing of a Petition.** A petitioner may request a stay of a Production Order prior to filing a petition challenging such Order.

**(d) Underlying Order.** A petition shall include a copy of the Production Order to which it relates and state the date on which such Order was served upon petitioner.

**(e) Petitioner's Request for Hearing.** A petition shall state whether a hearing is requested and, if so, whether the petitioner (or petitioner's counsel) seeks to appear personally in the Washington, D.C., area at petitioner's expense, or to participate in a hearing via teleconference.

### **Section 5. Form and Length of Petition and Other Papers.**

**(a) Form.** A petition and other papers filed shall be:

- (i)** on 8½ by 11 inch opaque white paper;
- (ii)** typed (double space) or reproduced in a manner that produces a clear black image;
- (iii)** conspicuously marked "SECTION 501(f) PETITION" on the document itself and any accompanying envelope; and
- (iv)** filed under seal.

**(b) Length.**

**(i) Petition.** Unless otherwise authorized by the assigned Judge, a petition shall not exceed 20 pages in length, including any attachment.

**(ii) Other Papers.**

**(A) Government's Response.** Unless otherwise authorized by the assigned Judge, the government's response shall not exceed 20 pages in length, including any attachment.

**(B) Petitioner's Reply.** Unless otherwise authorized by the assigned Judge, the petitioner's reply, if any, shall not exceed 10 pages in length, including any attachment.

**(C) Additional Papers.** No sur-replies may be filed without leave of the Court.

### **Section 6. Service.**

**(a) By Petitioner.** A petitioner shall, at or before the time of filing a petition or other paper, serve a copy by hand delivery or by overnight delivery on the United States Department of Justice, National Security Division, 950 Pennsylvania Ave., NW, Room 6150, Washington, D.C. 20530 and on the Federal Bureau of Investigation, Office of General Counsel, National Security Law Branch, 935 Pennsylvania Ave., NW, Room

7947, Washington, D.C. 20535.

**(b) By Government.** The government shall, at or before the time of filing a response or other paper, serve a copy by hand delivery or by overnight delivery on petitioner's counsel of record or, if the petitioner is proceeding *pro se*, on the petitioner.

**Section 7. Computation of Time.** In proceedings governed by these procedures, any period of time shall be computed in the manner specified in Rule 6(a) of the Federal Rules of Civil Procedure. The provisions of Rule 6(e) of the Federal Rules of Civil Procedure shall not apply to the computation of time in these proceedings.

### III. ASSIGNMENT TO A JUDGE

**Section 8. Notifying Presiding Judge.** Upon receipt, the Clerk of the Court shall notify the Presiding Judge of the Foreign Intelligence Surveillance Court that a petition has been received from the Court Security Officer.

**(a) Presiding Judge Unavailable.** If the Presiding Judge is not reasonably available when the Clerk of the Court receives a petition, the Clerk of the Court shall notify the local Judge, other than the Presiding Judge, who has the most seniority on the Court. If no local Judge is reasonably available, the Clerk of the Court shall notify the Judge with the most seniority on the Foreign Intelligence Surveillance Court who is reasonably available. The Judge who receives notification shall be the Acting Presiding Judge (hereafter, "the Presiding Judge") for the case.

#### **Section 9. Assignment.**

**(a) Presiding Judge.** Immediately upon receiving notification from the Clerk of the Court that a petition has been filed, the Presiding Judge shall assign the matter to a Foreign Intelligence Surveillance Court Judge in the petition review pool (hereafter, "the Judge"). The Clerk of the Court shall record the date and time of the assignment.

**(b) Transmitting Petition.** As soon as possible, and no later than 24 hours after being notified by the Presiding Judge that a petition has been assigned to one of the pool Judges, the Clerk of the Court shall transmit the original or a copy of petition to that Judge.

## IV. CONSIDERATION OF PETITION

### Section 10. Initial Review.

(a) **When.** The Judge shall conduct an initial review of the petition within 72 hours after being assigned the petition.

(b) **Frivolous Petition.** If the Judge determines that the petition is frivolous, the Judge shall:

- (i) immediately deny the petition and affirm the challenged Order;
- (ii) promptly provide a written statement of the reasons for the denial; and
- (iii) provide a written ruling, together with the statement of reasons, to the Clerk of the Court, who will transmit them to the Court Security Officer for immediate delivery to the petitioner and the government.

(c) **Non-Frivolous Petition.**

(i) **Scheduling.** If the Judge determines that the petition is not frivolous, the Judge shall promptly issue an Order that sets a schedule for its consideration. The Clerk of the Court shall transmit a copy of the Order to the petitioner and the government.

(ii) **Manner of Proceeding.** At the Judge's discretion, a hearing may be held or the proceedings may be conducted solely on the papers submitted by the petitioner and the government.

### Section 11. Response and Reply.

(a) **Government's Response.** Unless otherwise ordered by the Judge, the government's response must be filed within 20 days after the issuance of the initial scheduling order. If the government's response, or any other paper the government is permitted to file, contains classified information that is submitted *ex parte*, the government also shall file with the Court and serve on the petitioner an unclassified or redacted version. The unclassified or redacted version, at a minimum, should clearly articulate the government's legal arguments.

(b) **Petitioner's Reply.** The petitioner may file a reply to the government's response within 10 days after the date the government's response is served.

### Section 12. Hearing.

(a) **Request.** The petitioner or the government may request a hearing.

(b) **Location.** Hearings shall be held in the Washington D.C. area at a location to be determined by the Judge.

(c) **In Camera.** All hearings shall be *in camera*.

(d) **Recording.** All hearings shall be recorded, either by sound or stenographic means.

**Section 13. Ex Parte Proceedings.** At the request of the government, the Judge shall review *ex parte* and *in camera* any papers submitted by the government, or portions thereof, which may include classified information.

**Section 14. Rulings on Non-frivolous Petitions.**

(a) **Written Statement of Reasons.** The Judge shall promptly provide a written statement of the reasons for modifying, setting aside, or affirming a Production or Nondisclosure Order. The statement may include classified information.

(b) **Reinstatement of Underlying Order.** If the Judge does not modify or set aside the underlying Order, the Judge shall immediately affirm it and order the recipient to comply therewith.

(c) **Transmitting the Judge's Ruling.** The Clerk of the Court shall transmit the Judge's ruling and written statement of reasons to the Court Security Officer for immediate delivery to the petitioner and the government. If the Judge's ruling or written statement contains classified information, an unclassified or redacted version shall be provided to the petitioner.

**Section 15. Appeals and Sanctions**

(a) **Appeals.** The government or the petitioner may request the Foreign Intelligence Surveillance Court of Review to review the Judge's ruling.

(b) **Failure to Comply.** If a recipient fails to comply with an Order affirmed under Section 501(f) of the Act and these procedures, the government, pursuant to Rule 15 of the Foreign Intelligence Surveillance Court *Rules of Procedure*, may file a motion with the Foreign Intelligence Surveillance Court (for referral to the Judge of the Court who entered the underlying Order) seeking enforcement of the affirmed Order. The Court may consider the government's motion without convening further proceedings on the matter.