

FEB 29 2016

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

WASHINGTON, D.C.

ORDER AMENDING THE RULES OF
PROCEDURE FOR THE COURT

Docket Number: 16-02

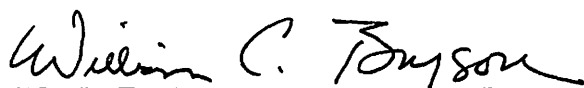
ORDER


Following the publication of the December 7, 2015, proposed amendments to the rules of procedure, the Court received comments from the following: Hon. Chuck Grassley, Chairman of the Senate Committee on the Judiciary, and Hon. Richard Burr, Chairman of the Senate Select Committee on Intelligence; the Electronic Frontier Foundation and the American Civil Liberties Union; and the United States Department of Justice. The Court has considered each of the comments carefully. It has adopted some of the comments and has made modifications to the proposed rules in light of other comments. The Court now adopts the attached rules as the Rules of Procedure of the United States Foreign Intelligence Surveillance Court of Review.

The Clerk of the Court is directed to transmit copies of these amended rules to the recipients designated under 50 U.S.C. § 1803(g).

IT IS SO ORDERED.

Dated: February 29, 2016


WILLIAM C. BRYSON, Presiding Judge


JOSE A. CABRANES, Judge


RICHARD C. TALLMAN, Judge

**UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
Washington, D.C.**

RULES OF PROCEDURE

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Title I. Applicability of Rules.

Rule 1. Scope of Rules.

(a) Scope. These rules, which are promulgated pursuant to 50 U.S.C. § 1803(g), govern procedure in the United States Foreign Intelligence Surveillance Court of Review (“FISCR”).

(b) Definitions.

(1) The “Act” refers to The Foreign Intelligence Surveillance Act of 1978 (“FISA”) and its subsequent amendments.

(2) The “Court” refers to the Foreign Intelligence Surveillance Court of Review.

(3) The “Clerk” refers to the Clerk of the Court for the FISCR and the Foreign Intelligence Surveillance Court (“FISC”).

(c) Amendment. Any amendment to these rules must be promulgated in accordance with 50 U.S.C. § 1803(g).

Rule 2. Suspension of Rules.

On its own or a party's motion, the Court may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs.

Title II. National Security Information.

Rule 3. National Security Information. In all matters, the Court, its staff, and anyone appearing before it must comply with the security measures in 50 U.S.C. §§ 1803(c), 1822(e), 1861(f)(4), and 1881a(k)(1), as well as Executive Order 13526, “Classified National Security Information,” or its successor. Members of the Court’s staff must possess a security clearance at a level commensurate with their responsibilities.

Title III. Structure and Powers of the Court.

Rule 4. Authority of the Judges and Structure.

(a) Scope of Authority. The FISCR is an appellate court established by act of Congress. The judges of the Court may exercise the authority granted by the Act and such other authority as is consistent with Article III of the Constitution and other statutes and laws of the United States.

(b) Quorum. A majority of the number of judges authorized to constitute the Court constitutes a quorum. Procedural motions may be accepted and acted on by any judge of the Court.

Title IV. Matters Presented to the Court.

Rule 5. Means of Requesting Relief from the Court.

(a) Notice of Appeal.

(1) Whether a Notice of Appeal Must be Filed. A notice of appeal shall constitute the motion referred to in 50 U.S.C. §§ 1803(a)(1) and 1822(c); or the petition referred to in 50 U.S.C. §§ 1861(f)(3), 1881a(h)(6)(A) and (i)(4)(A), 1881b(f)(1), and 1881c(e)(1).

(2) Filing the Notice of Appeal. An appeal referred to in subpart (1) may be taken only by filing a notice of appeal with the Clerk within 30 days after the challenged order is made available to the parties in interest.

(3) Contents of the Notice of Appeal. The notice of appeal must:
(A) name the party taking the appeal in the caption of the notice; and
(B) designate the order or part thereof being appealed.

(4) Serving the Notice of Appeal. Upon receipt of a notice of appeal, the Clerk must serve notice of its filing on each party's counsel of record, excluding the appellant's. The Clerk must note on the docket the names of the parties to whom the Clerk provided copies, with the date and manner of service. If an amicus curiae is appointed by the Court, the Clerk must similarly serve them with a filed notice of appeal within one day of appointment.

(b) Certification for Review. Where the FISC certifies for review a question of law under 50 U.S.C. § 1803(j), the FISCR will certify, by appropriate order, the procedures to be followed.

Rule 6. Stay Pending Appeal.

(a) Initial Motion in the FISC. A party must ordinarily first move in the FISC for the following relief:

- (1) a stay of a FISC order pending appeal; or
- (2) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(b) Motion in the Court of Appeals. A motion for relief described in Rule 6(a) may be made to the FISCR.

(1) The motion must:

- (A) show that moving in the FISC would be impracticable; or
- (B) state that, a motion having been made, the FISC denied the motion or failed to afford the relief requested and state any reason given by the FISC for its action.

(2) The motion must also include:

- (A) the reasons for granting the relief requested and facts relied on;
- (B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
- (C) relevant parts of the record.

(3) A motion under Rule 6(b) must be filed with the Clerk and normally will be considered by all members of the FISCR. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single FISCR judge.

Rule 7. The Record on Appeal.

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the FISC, including any original papers and exhibits filed ex parte;
- (2) the transcript of any proceedings, including those held ex parte; and
- (3) a certified copy of the docket entries prepared by the Clerk.

(b) Correction or Modification of the Record.

- (1) If any difference arises about whether the record truly discloses what occurred in the FISC, the difference must be submitted to and settled by the FISC judge who presided over the issue in dispute, and the record conformed accordingly.
- (2) If anything material to either party is omitted from or misstated in the record, whether by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
 - (A) on stipulation of the parties;
 - (B) by the FISC before or after the record has been forwarded; or
 - (C) by the FISCR.
- (3) All other questions as to the form and content of the record must be presented to the FISCR.

Rule 8. Extraordinary Writs. All writs that may be issued by United States courts of appeals shall be available to the FISCR.

Rule 9. Filing.

(a) Filing with the Clerk. A paper required or permitted to be filed in this Court must be filed with the Clerk.

(b) Filing: Method and Timeliness.

(1) Filing. A submission is filed by delivering it to the Clerk or as otherwise directed by the Clerk under Rule 9(b)(5).

(2) Electronic Filing. The Clerk may accept and file submissions by any reliable and appropriately secure electronic means approved in advance by the Clerk.

(3) Facsimile or Scanned Signature. The Clerk may accept for filing a submission bearing a facsimile or scanned signature in lieu of the original signature. On acceptance, a submission bearing a facsimile or scanned signature is the original Court record.

(4) Copies. Except as otherwise provided, a signed original and three copies must be filed with the Clerk.

(5) Instructions for Delivery to the Court. A party may obtain instructions for delivering submissions permitted under the Act and these rules by contacting the Clerk at (202) 357-6250.

(c) Form. Unless otherwise ordered, all submissions must follow the format below:

(1) on 8 ½ x 11 inch, opaque white paper;

(2) typed double-spaced or reproduced in a manner that produces a clear black image, but quotations more than two lines long may be indented and single-spaced;

(3) margins of at least one inch on all four sides; and

(4) page numbered in the lower margin of the page.

(d) Contact Information.

(1) A Party Other Than the Government. In an initial filing with the Court, a party other than the government must include full name, address, telephone number, and email address, but if a party is represented it must include counsel's full name, address, telephone number, facsimile number, email address, and bar membership information—in addition to the party's full name.

(2) Filing by the Government. In an initial filing with the Court, the government must include the full name of the attorney representing the United States, a mailing address, telephone number, facsimile number, and email address.

(e) Information Concerning Security Clearances. A party other than the government must:

- (1) State in the initial submission whether the party – or the party’s responsible officers or employees – and counsel for the party hold a security clearance;
 - (2) Identify the federal agency granting the clearance, a point of contact and contact information for the federal agency, and the classification level of the clearance.
- (f) Signature.** Every submission filed with the Court must be signed by the party filing the submission, or if the party is represented, by one of the party’s attorneys.

Rule 10. Service.

(a) By a Party Other Than the Government. A party other than the government must, at or before the time of filing a submission permitted under the Act and these rules, serve a copy on the government. Instructions for effecting service must be obtained by contacting the Litigation Security Group, United States Department of Justice, by telephone at (202) 514-9016.

(b) By the Government.

(1) At or before the time of filing a submission in an adversarial proceeding, the government must serve a copy by hand delivery or by overnight delivery on counsel for the other party, or, if the party is not represented by counsel, on the party directly. For submissions by the government containing classified information, the service requirements of this rule are satisfied when the government provides the submission to the Litigation Security Group for review by non-government counsel at a secure facility operated by the Security and Emergency Planning Staff.

(2) Except as otherwise ordered, if the government files ex parte a submission that contains classified information, the government must file and serve on the non-governmental party an unclassified or redacted version. To the extent practicable, the unclassified or redacted version must clearly articulate the government's legal argument.

(c) Certificate of Service. A party must include a certificate of service specifying the time and manner of service.

Rule 11. Computation of Time. Time periods specified by these rules or by order of this Court must be computed as follows:

(a) Day of the Event Excluded. Exclude the day of the event that triggers the period.

(b) Compute Time Using Calendar Days. Compute time using calendar days, not business days.

(c) Include the Last Day. Include the last day of the period; but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday.

(d) Extending Time. For good cause, the Court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires.

Rule 12. Corporate Disclosure Statements.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in the Court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. Such statement must also identify whether any parent corporation, or any person or corporation owning 10% or more of the corporation is under foreign ownership, control, or influence, as defined in Intelligence Community Standard 700-01.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 12(a) statement with the principal brief or when filing a motion, response, petition, or answer in the Court, whichever occurs first. Even if the statement has been previously filed, it must be included in the party's principal brief before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 12(a) changes.

Rule 13. Motions. A party seeking specific relief from the Court may do so by motion, which must conform to the requirements of Rule 9(c).

Rule 14. Briefs.

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

- (1) a corporate disclosure statement, if required by Rule 12;
- (2) a table of contents, with page references;
- (3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;
- (4) a jurisdictional statement;
- (5) a statement of the issues presented for review;
- (6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 14(f));
- (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;
- (8) the argument, which must contain:
 - (A) appellant's contentions and the reasons for them, with citation to the authorities and parts of the record on which the appellant relies; and
 - (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
- (9) a short conclusion stating the precise relief sought; and
- (10) the certificate of compliance.

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 14(a) (1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

- (1) the jurisdictional statement;
- (2) the statement of the issues;
- (3) the statement of the case; and
- (4) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. Unless the Court permits, no further briefs may be filed. A reply brief must contain a table of contents (with page references) and a table of authorities—cases alphabetically arranged, statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) Format. Briefs filed with the Court must conform to Federal Rule of Appellate Procedure 32(a).

(e) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the designation used in the FISC, or a descriptive term, such as “the service provider,” “the telephone company,” or “the government.”

(f) Appendix to the Briefs.

(1) Contents of the Appendix. The appellant must prepare and file an appendix to the briefs containing:

- (A)** the relevant docket entries in the proceeding below;
- (B)** the relevant portions of the pleadings, findings, or opinion;
- (C)** the judgment, order, or decision in question; and
- (D)** other parts of the record to which the parties wish to direct the Court’s attention.

(2) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellee may file a separate appendix but the appellee’s supplemental appendix must not duplicate any material contained within appellant’s appendix. The parties may file a separate appendix containing materials filed ex parte in the FISC.

(3) Format. Any appendix filed with the Court must meet the requirements of Rule 9(c) and Federal Rule of Appellate Procedure 32(b), in addition to the following:

- (A)** the appendix must begin with a table of contents identifying the page at which each part begins;
- (B)** the appendix must be organized chronologically, beginning with the most recent information;
- (C)** the pages of the appendix must be numbered sequentially with the appellant’s pages beginning with “App. 1,” and continuing;
- (D)** the appellee’s supplemental appendix, if necessary, will be numbered sequentially beginning with “S. App. 1,” and continuing; and
- (E)** when pages of a transcript are included in an appendix, the original pagination of the transcript must be legible.

(4) References to the Record. References to the parts of the record contained in the appendix filed with the appellant’s brief must be to the pages of the appendix. Parties’ briefs may refer only to parts of the record that are reproduced in the appendix.

(5) Ex parte Appeals. If an appeal is taken ex parte by the government, then the government must comply with these rules as they apply to the appellant.

Rule 15. Amicus Curiae.

(a) Whether to Appoint an Amicus Curiae.

(1) Request of the Parties. Parties to a matter may request that the Court appoint an amicus curiae to participate in that particular matter. But any such request is not binding on the Court.

(2) Amicus Curiae Appointed in the FISC.

(A) The FISCR is not bound by the FISC's decision to appoint an amicus curiae and will make its own independent decision whether to do so.

(B) If the FISC has previously determined, consistent with 50 U.S.C. § 1803(i), that a matter involves a novel or significant interpretation of the law, the FISCR will appoint an amicus curiae unless it issues a finding that such appointment is not appropriate.

(3) Requests to Participate as an Amicus Curiae. An individual or organization may request to participate as an amicus curiae in any matter, whether or not such individual or organization has been previously designated under 50 U.S.C. § 1803(i)(1). Such request must be made by motion, consistently with these rules. But any such request is not binding on the Court.

(4) Appointment by the Court. The Court – when necessary – may appoint one or more individuals as amicus curiae. Such appointment, if the Court deems it appropriate, will be made in accordance with 50 U.S.C. § 1803(i)(2)(A) or (B) and will be made within a reasonable time after the filing of the notice of appeal. The Court may appoint amici for any purpose it deems appropriate, including the provision of legal advice and technical expertise.

(b) Assistance. Once appointed, an amicus curiae may petition the Court to designate additional amici to assist in preparing arguments subject to the following limitations:

(1) the additional amici must meet the qualifications identified under 50 U.S.C. § 1803(i)(3);

(2) the parties will have 7 days to file a motion opposing the amicus curiae's petition for additional amici; and

(3) the Court must approve the appointment of any additional amici.

(c) Conflicts of Interest.

(1) The Court will seek to avoid all conflicts of interest in its appointment of an amicus curiae under 50 U.S.C. § 1803(i). The Court will inquire of any amicus it intends to appoint whether any personal or professional relationships could reasonably influence the positions the

amicus may take before the Court. Based on this inquiry and the letter submitted under subpart (c)(2), the Court will choose an amicus who is able to undertake the appointment free of any conflicts.

- (2) Upon designation, amicus curiae must file a conflicts-of-interest letter with the Court and must update that letter whenever changes occur. The Clerk will provide instructions for the letter on request.

(d) Brief of an Amicus Curiae.

- (1) **Content.** An amicus curiae brief must conform to the requirements of Rule 14(a)(2)-(8) and (10), except that none of the following need appear:

- (A) the jurisdictional statement;
- (B) the statement of the issues; and
- (C) the statement of the standard of review.

- (2) **Format and Length.** An amicus curiae brief must meet the requirements of Rule 9(c) and Federal Rules of Appellate Procedure 29(d) and 32(a).

- (e) **Oral Argument.** The Court will determine whether it deems oral argument necessary and whether the amicus curiae will be granted time for argument.

Rule 16. Serving and Filing Briefs.

- (a) Time to Serve and File a Brief.** The appellant must serve and file a brief within 28 days after the notice of appeal is made available to the parties in interest. The appellee must serve and file a brief within 28 days after the Litigation Security Group makes the appellant's brief available. An amicus curiae, if appointed, must serve and file a brief within 28 days after appellant's brief is made available by the Litigation Security Group. The appellant may serve and file a reply brief within 14 days after the Litigation Security Group makes the appellee's brief available.
- (b) Number of Copies.** Four copies of each brief must be filed with the Clerk and two copies must be served on counsel for each separately represented party.
- (c) Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument.

Title V. Oral Argument, Entry of Judgment.

Rule 17. Oral Argument.

- (a) In General.** The Court will grant oral argument at its discretion. If the Court grants oral argument, the Clerk must advise all parties and any amicus curiae of the date, time, and place of the argument, and how much time will be given for argument. Any motion to postpone the argument must be filed reasonably in advance of the hearing date.
- (b) Order and Contents of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.
- (c) Attendance at Argument.** To be present at oral argument, a person must be eligible under Rule 3 for access to classified national security information that may be discussed. Ordinarily, that will entail the appropriate level of security clearance, a need to know the information, and entry into a non-disclosure agreement, as provided for under applicable law.

Rule 18. Entry of Judgment.

- (a) Entry.** A judgment is entered when the Court’s opinion is filed with the Clerk.
- (b) Notice.** On the date when the judgment is entered, the Clerk must serve on all parties and the amicus curiae—if appointed—notice that an opinion has been filed. On receiving notice, parties and the amicus curiae may make arrangements with the Clerk to receive a copy of the opinion, if they have access to a facility where the opinion can be stored in compliance with Executive Order 13526 and agency-implementing directives. If parties or the amicus curiae do not have access to such a facility, they may make arrangements with the Clerk to view the opinion in the Court’s secure facility.
- (c) Unclassified Summary.** The Court may draft an unclassified summary of each decision, order, or opinion and make that available to the Attorney General for consideration as part of the review required under 50 U.S.C. § 1872.

Title VI. Administrative Provisions.

Rule 19. Practice Before the Court. An attorney who appears before the Court must be a licensed attorney in good standing in any state of the United States or the District of Columbia and a member, in good standing, of the bar of a United States district or circuit 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 clearance.

Rule 20. Release of Court Records.

(a) Publication of Opinions.

(1) If a quorum of the FISCR judges agree, the Court may sua sponte or on motion by a party publish an opinion.

(2) Before publication the Court will request that the Executive Branch review the Court's opinion or other documents to ensure that classified information is appropriately protected.

(b) Other Records. Except when an opinion is published or provided to a party upon issuance, the Clerk must not release it, or other related records, without a Court order. Such records must be released in conformance with the security measures referred to in Rule 3.

(c) Provisions of Court Records to Congress.

(1) **By the Government.** The government may provide copies of Court orders, opinions, decisions, or other Court records, to Congress, under 50 U.S.C. §§ 1871(a)(5), 1871(c), or 1881f(b)(1)(D), or any other statutory requirement, without prior motion to and order by the Court. The government, however, must contemporaneously notify the Court in writing whenever it provides copies of Court records to Congress and must include in the notice a list of the documents provided.

(2) **By the Court.** The Court may provide copies of Court orders, opinions, decisions, or other Court records to Congress. Such disclosures will be made in conformance with the security measures referred to in Rule 3.

Rule 21. Effective Date. These rules are effective six months after transmittal to Congress under 50 U.S.C. § 1803(g) unless otherwise provided by law. The Court may determine the extent to which the rules apply to proceedings pending prior to their effective date.