



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER
to
THE FOREIGN INTELLIGENCE SURVEILLANCE COURT
"Proposed Amended FISC Rules"

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Introduction

The Foreign Intelligence Surveillance Court (FISC) has requested comment on proposed Rules of Procedure ("2010 Proposed Rules"), which would serve to replace the previous Rules of Procedure, as promulgated in 2006 ("2006 Rules").¹

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

EPIC has a particular interest in issues related to government administration of surveillance laws. EPIC regularly updates and maintains multiple web pages to provide valuable information to the public about current and developing issues involving wiretapping and the Foreign Intelligence Surveillance Act (FISA).²

In addition, EPIC contributes to government understanding of these issues through amicus briefs filed in the Supreme Court and other courts across the country.³ Various branches of the government, including the House of Representatives and the Department of Homeland Security (DHS), have recognized

¹ United States Courts: FISA Court Rules Published for Comment, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/FISCRules.aspx> (last visited Oct. 4, 2010).

² See, e.g., EPIC: Foreign Intelligence Surveillance Act (FISA), <http://epic.org/privacy/terrorism/fisa/> (last visited Oct. 4, 2010); EPIC: Foreign Intelligence Surveillance Court (FISC), <http://epic.org/privacy/terrorism/fisa/fisc.html> (last visited Oct. 4, 2010); EPIC: Wiretapping and Domestic Surveillance, <http://epic.org/privacy/wiretap/> (last visited Oct. 4, 2010).

³ See, e.g., Brief for the Electronic Privacy Information Center as Amici Curiae Supporting Appellant, *Commonwealth v. Everett H. Connolly*, (2009) (No. SJC-10355), available at <http://epic.org/privacy/connolly/042009amicus.pdf>; Brief for Electronic Privacy Information Center, et al. as Amici Curiae Supporting Appellee, *In re Appeal from July 19, 2002 Opinion of the United States Foreign Intelligence Surveillance Court*, (2002) (No. 02-001), available at http://www.epic.org/privacy/terrorism/fisa/FISCR_amicus_brief.pdf; Brief for Electronic Privacy Information Center as Amici Curiae Supporting Appellant, *Securities and Exchange Commission v. Raj Rajaratnam et al.*, (2010) (No. 10-464-cv), available at http://epic.org/amicus/EPIC_brief_Rajaratnam.pdf.

EPIC's expertise in these areas through invitations to testify in matters of surveillance and consumer protection.⁴

Background

The Foreign Intelligence Surveillance Act (FISA) of 1978 established the Foreign Intelligence Surveillance Court (FISC).⁵ The FISC was originally composed of seven district judges, from seven circuits, appointed by the Chief Justice of the United States to serve for a maximum of seven years.⁶

In 2001, the Patriot Act increased the number of judges on the Court to eleven, with three required to live within twenty miles of the District of Columbia.⁷ The Chief Justice appoints a Presiding Judge for the Court from amongst these eleven judges.⁸

FISA also created a Foreign Intelligence Surveillance Court of Review to handle appeals from applications denied by FISC.⁹ This Court is made up of three judges, also appointed by the Chief Justice, from U.S. district or appellate courts, who serve for seven years.¹⁰

The FISC has jurisdiction to "hear applications for and grant orders approving electronic surveillance" and "physical search[es]" for the "purpose of obtaining foreign intelligence information" on foreign nationals within the United States.¹¹ Applications to the FISC are secret and its hearings are widely considered to be non-adversarial since the target of the order is not informed of the presence of the order or given an opportunity to appear at the hearing.¹² However, electronic

⁴ See, e.g., *Communications Networks and Consumer Privacy: Recent Developments Before the H. Comm. On Energy and Commerce and Subcomm. On Communications, Technology and the Internet* (2009) (statement of Marc Rotenberg, Executive Director, Electronic Privacy Information Center), available at epic.org/privacy/dpi/rotenberg_HouseCom_4-09.pdf; *Expectations of Privacy in Public Spaces Before the Department of Homeland Security Advisory Comm. On Data Privacy and Integrity* (2006) (statement of Lillie Coney, Associate Director, Electronic Privacy Information Center), available at <http://www.epic.org/privacy/surveillance/coneytest060706.pdf>.

⁵ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1803 (2009), available at http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001803----000-.html.

⁶ Anne Bell, *Domestic Security: The Homefront and the War on Terrorism*, PBS NEWS, Mar. 1, 2006, http://www.pbs.org/newshour/indepth_coverage/terrorism/homeland/fisa.html.

⁷ *Id.*; See also Foreign Intelligence Surveillance Act § 1803, *supra* note 5.

⁸ ELIZABETH B. BAZAN, THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT AND THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: AN OVERVIEW, CRS REPORT FOR CONGRESS (2007), available at www.fas.org/sgp/crs/intel/RL33833.pdf.

⁹ Foreign Intelligence Surveillance Act § 1803, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² See, e.g., American Bar Association: Section of Individual Rights and Responsibilities, Report to the House of Delegates (2003), available at www.abanet.org/leadership/recommendations03/118.pdf.

service providers are allowed to appear in order to challenge or modify any order.¹³ In addition, records from FISC hearings are not revealed even to those persons whom the government wishes to investigate, though the FISC may choose to publish its opinions, at its discretion and with confidential information redacted.¹⁴

At a FISC hearing, the government is required to present evidence of probable cause, though the standard is quite different from what is necessary for obtaining a search warrant.¹⁵ Rather, under FISA, the government needs only to present evidence that the surveillance target is a foreign power or an agent of one.¹⁶

In these comments, EPIC evaluates the 2010 Proposed Rules and offers recommendations to the Court for maintaining judicial independence from the Executive Branch, strengthening Congressional oversight, increasing accountability concerning the lawful execution of its authority, and educating the public about how the Court functions.

Comments

I. Maintenance of Judicial Independence from the Executive Branch

Throughout our nation's history we have looked to the judiciary for continuity, stability, and impartiality in the interpretation of our laws. The founders believed that an independent judiciary would consider itself "in a peculiar manner the guardians of [the Bill of Rights]" and that they "will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution."¹⁷ In the spirit of that belief, EPIC urges the FISC to maintain its judicial independence.

The *New York Times* reported in late 2005 that the Bush Administration had deployed a widespread domestic spying program by claiming authority under FISA, but without having applied for orders from the FISC.¹⁸ In 2006, responding to that revelation, former Vice President Al Gore called attention to the special

¹³ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a(h)(4) (2009), *available at* http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001881---a000-.html.

¹⁴ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806 (2009), *available at* http://www.law.cornell.edu/uscode/50/usc_sec_50_00001806----000-.html.

¹⁵ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1805(a)(2) (2009), *available at* http://www.law.cornell.edu/uscode/50/usc_sec_50_00001805----000-.html.

¹⁶ *Id.*

¹⁷ James Madison, Speech to the House of Representatives (June 8, 1789), in Jack N. Rakove, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS*, 170, 179 (1998); *see also* THE FEDERALIST No. 78 (Alexander Hamilton) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which...have a tendency...to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

¹⁸ James Rise and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *nytimes.com*, December 16, 2005, *available at* <http://www.nytimes.com/2005/12/16/politics/16program.html>.

responsibility of the courts in preserving the rule of law. Gore, who had voted for FISA during his first term in Congress, explained its enactment was intended "expressly to ensure that foreign intelligence surveillance would be presented to an impartial judge to verify that there is a sufficient cause for the surveillance."¹⁹ Gore implored us to remember that "[i]n a properly functioning system, the Judicial Branch would serve as the constitutional umpire to ensure that the branches of government observed their proper spheres of authority, observed civil liberties and adhered to the rule of law."²⁰ He warned that we were on "the brink of a dangerous breach in the fabric of the Constitution."²¹

EPIC has frequently drawn attention to the constitutional role of the courts as a check on the Executive Branch. EPIC believes that the 2010 Proposed Rules are an opportunity to improve the judicial independence of the FISC. EPIC also believes that there are important and necessary law enforcement investigatory tools in the FISA. However, the FISC has to ensure that the FISA does not become a tool that allows the government to create a dragnet through electronic surveillance. Electronic surveillance, "by its nature, can intrude into the privacy of both the target of the surveillance and those with whom the target communicates. It also has the potential of chilling political discussion and lawful dissent."²²

Recommendations:

- EPIC commends the 2010 Proposed Rules for enabling judge to decide, *sua sponte* or by motion of the parties, whether to publish orders, opinions, or decisions.²³ We urge the Court to encourage the publication of these legal documents.
- In order to fully understand how FISA is being interpreted by the Court and to determine whether the Court has been an objective check to an overzealous government, the public and Congress needs access to the Court's rulings.
- We recommend the Court make this documents available on a FISC website, which would provide a central location for all information regarding the administration of FISA.

II. Strengthened Congressional Oversight

¹⁹ Al Gore, "Restoring the Rule of Law," as prepared January 16, 2006, *available at* <http://epic.org/privacy/terrorism/fisa/gorespeech0106.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² Elizabeth B. Bazan, CRS Report for Congress, "The Foreign Intelligence Surveillance Act: A Brief Overview of Selected Issues," December 7, 2007, *available at* <http://epic.org/privacy/terrorism/fisa/RL34279.pdf>.

²³ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title X, Rule 62, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf>.

EPIC supports the incorporation of increased Congressional oversight in the 2010 Proposed Rules. EPIC commends the Court for taking steps to ensure the ability of Congress to perform its oversight responsibilities. The 2010 Proposed Rules provide that copies of Court orders and records may be released to Congress without prior motion to and order by the Court.²⁴ We believe that this is a positive step by the Court to increase Congressional oversight and transparency, as the 2006 Rules make no provision for releasing records to Congress. The FISC has routinely provided only a brief accounting of orders applied for and denied to the Congress. We would urge the Court to take further steps.

In addition, the public must be given more extensive reporting about the types of applications presented, approved, and denied by the Court.²⁵ This public reporting should be on the order of what the judiciary typically provides Congress under Title III. This includes routine reports of the nature of the applications approved, the statutory charges filed, and the provision of a public docket. Presently the government reports unsatisfactorily detailed summaries of the Court's decisions. When the Court reviews applications numbering in the several hundreds each year, yet only provides the Congress a two-page report, the public interest in open government and accountability is not satisfied.

Recommendations:

- EPIC recommends that not only should the Congress receive a more detailed annual reporting of the FISC's activities, but the public should as well.
- EPIC recommends the publication of an annual report on a FISC website which would provide a central location for all information regarding the administration of FISA.
- There are already models of this type of reporting on the United States Courts' website. For example, the reports "present data on types of offenses under investigation, nature and location of intercept devices, costs and durations of intercepts, and intercept extensions granted. They do not include names, addresses, or phone numbers of subjects under surveillance."²⁶
- This type of reporting protects privacy, encourages oversight and accountability, and continues to provide law enforcement with the tools necessary to conduct investigations.

III. Increased Accountability Concerning the Lawful Execution of Authority

In 2009, President Barack Obama published a memorandum emphasizing the importance of transparency and open government in order to "ensure the public

²⁴ *Id.*

²⁵ *See, e.g.*, 18 U.S.C. 2519.

²⁶ United States Courts, Wiretap Reports, [uscourts.gov](http://www.uscourts.gov), available at <http://www.uscourts.gov/Statistics/WiretapReports.aspx>.

trust."²⁷ Despite these objectives, the FISC has a poor record in regard to these objectives.²⁸

Often referred to as a secret court, the FISC has repeatedly refused to publish any substantive information regarding the cases and controversies that are heard by its judges; only a handful of written opinions have been released since the Court's inception, and little else, despite the potential for these types of Court documents to provide valuable guidance on the Court's purpose and function.

EPIC recognizes that the 2010 Proposed Rules attempt to make substantial improvements toward a more accountable system for the FISC. One way the 2010 Proposed Rules accomplish this is through expanding or clarifying language to make it more apparent what the proper standards and procedures are. For example, the 2010 Proposed Rules include a section regarding when publication of an opinion will be allowed and the process that must be followed.²⁹ Though the actual procedures appear to not have changed significantly, the 2010 Proposed Rules clarify that publication can be requested either "*sua sponte* or on motion by a party."³⁰ By expanding this language, the 2010 Proposed Rules help to increase accountability by providing a clearer understanding of the party's rights and responsibilities.

Another change is the inclusion of a new title that allows en banc hearings, for matters that are "of such immediate and extraordinary importance that initial consideration by the en banc Court is necessary [and feasible]."³¹ En banc proceedings are provided for in the FISA, though were not addressed before in the 2006 Rules.³² EPIC believes that the inclusion of procedures for en banc hearings are another positive step toward increased accountability, since the very nature of these proceedings is one of heightened review. A possibility for an en banc panel review offers an additional level of evaluation, and can help ensure that difficult cases receive heightened attention.

²⁷ Memoranda from Barack Obama, President of the United States, on Transparency and Open Government (January 21, 2009), http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

²⁸ See, e.g., Jason Ryan, *Going Around the FISA Court*, ABC NEWS, Jan. 24, 2006, <http://abcnews.go.com/Politics/story?id=1537691>; Philip Colangelo, *The Secret FISA Court: Rubber Stamping on Rights*, COVERT ACTION QUARTERLY, <http://mediafilter.org/caq/Caq53.court.html>; Del Quentin Wilber, *Surveillance Court Quietly Moving*, WASHINGTON POST ONLINE (Mar. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030101730.html>.

²⁹ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure Rule 62, *supra* note 23; Foreign Intelligence Surveillance Court: Rules of Procedure (Feb. 17, 2006), Title III, Rule 5(c), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2006%20FISC%20Rules.pdf>.

³⁰ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure Rule 62, *supra* note 23.

³¹ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title VIII, Rule 46, *available at*

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf>.

³² Foreign Intelligence Surveillance Act § 1803, *supra* note 5.

However, the 2010 Proposed Rules do not address many of the issues that remain in regard to increasing accountability. The public remains concerned by the secrecy that surrounds the FISC and its proceedings. The sensitive nature of the proceedings that come in front of the FISC must protect national security and provide notice to the individual targeted by the proceeding, at an appropriate time.³³ Currently, the FISC is only required to report on the number of orders it issues and denies: no other information accompanies the annual report and the public receives no other information about what cases come in front of the FISC each year. In addition, the FISC webpage, hosted by the U.S. Courts System, is strictly concerned with information about the Main Office of the FISC: an address, map, and phone number.³⁴

The 2010 Proposed Rules should promote transparency and give assurances to the public that the Court is acting within the lawful bounds of its authority. This could include a provision for a web presence, or other source of data that can be easily accessed and that is frequently updated in order to provide the public with information that could provide a valuable look into the Court, without compromising the government's security interest. Such information could include an overview of the Courts docket and the identity of the judge who is assigned to each case.

Recommendations:

- The FISC should create and maintain a web presence that includes important facts and history about the Court;
- Annual reports should be expanded to provide meaningful insight into the Court functions by offering important statistics on FISC cases and docket information;
- All documents that clarify or explain the 2010 Proposed Rules, and any amendments, either in existence or later written, should be made publicly available.

IV. Responsibility to Promote Public Understanding

The purpose of procedural rules is to provide better understanding and comprehension into the processes of the Court. Therefore, providing for practices that are ambiguous or incomprehensible can defeat the very purpose of the document: those who are involved with the government cannot effectively operate within a system of rules that they cannot understand.

However, while pure information is the goal of a transparent system, to grant public understanding, that information must be presented in an understandable

³³ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806 (2009), *supra* note 14.

³⁴ United States Courts: Foreign Intelligence Surveillance Court (Main Office) (last visited Oct. 4, 2010), *available at* http://www.uscourts.gov/court_locator/CourtLocatorDetails.aspx?LocnId=1433.

fashion. The best method to accomplish this would be publication of past FISC orders and opinions, which could offer a look at the operations and function of the Court in their natural form. The process to successfully accomplish this may be long and arduous, but the Court's opinions may be the most genuine method of providing public understanding.

Focusing on the 2010 Proposed Rules, there are several issues that are not addressed, and at times the 2010 Proposed Rules more ambiguous than the 2006 Rules. For example, the 2006 Rules provide specific addresses for filings with both the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI).³⁵ However, the 2010 Proposed Rules only provide that "a party may obtain instructions for making submissions permitted under the Act and the Rules by contacting the Clerk," and give a phone number.³⁶ In addition, when a party other than the government endeavors to serve a copy of the submission filing, the party must obtain instructions from the "Security and Emergency Planning Staff" at the DOJ, by telephone.³⁷

Instead of streamlining what can already be a difficult process, the 2010 Proposed Rules make things more difficult for parties. The 2010 Proposed Rules also have the unfortunate side effect of keeping all of the actual filing procedures concealed. The phone numbers in the FISC proposed rules introduce an additional step into the parties' filing and increase the degree of complexity involved. This will cloud the process for all parties involved.

Compare this with another change in the 2010 Proposed Rules concerning the location for *ex parte* hearings: the 2006 Rules indicate that a hearing will take place in a "secure location and manner," while the 2010 Proposed Rules clarify that the hearings will be heard "within the Court's secure facility." Internet resources further clarify this language by giving both an address and a map to the Court's facility in Washington D.C. The Internet could be used in a similar fashion to cure the problems with the filing ambiguities. By posting filing information on the FISC website, in addition to having them available by telephone, the FISC will increase transparency while promoting meaningful understanding of these procedures.

³⁵ Procedures for Review of Petitions Filed Pursuant to Section 501(f) of the Foreign Intelligence Surveillance Act, as Amended (May 5, 2006), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2006%20FISC%20Rules.pdf>.

³⁶ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title IV, Rule 7, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf>.

³⁷ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title IV, Rule 8, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf>.

EPIC supports other changes that have been made in the 2010 Proposed Rules, namely where more detail was added into rules. This occurs on two separate occasions. First, by adding language to explain how an Acting Presiding Judge will be selected in the case that the Presiding Judge is unavailable.³⁸ The second occasion sees the language expanded to define the recipient of Court orders as an "electronic communication service provider."³⁹

Recommendations:

- Past FISC orders and opinions should be redacted, de-classified, and made available for public dissemination;
- The FISC should publish specific instructions related to filing and service of submissions. This can be accomplished in the Rules of Procedure or separately on the FISC website.

Conclusion

The 2010 Proposed Rules strengthen judicial independence, increase Congressional oversight, and promote greater transparency. At the same time, the FISC could supplement the 2010 Proposed Rules, adding provisions that would require enhanced annual reporting, increase information made available to the public, and establish a web presence.

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³⁸ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title VI, Rule 37, available at

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf> (specifically providing that "if the Presiding Judge is not reasonably available when the Clerk receives the petition, the Clerk must notify each of the local judges, in order of seniority on the Court, and, if necessary, each of the other Judges, in order of seniority on the Court, until a Judge who is reasonably available has received notification.").

³⁹ Foreign Intelligence Surveillance Court: Proposed Rules of Procedure (Aug. 26, 2010), Title VI, Rule 21, available at

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Proposed%20Amended%20FISC%20Rules.pdf>.