

LAW OFFICE OF PETER GOLDBERGER

50 Rittenhouse Place
Ardmore, PA 19003-2276

Of Counsel:
Anna M. Durbin*

*Also admitted in Connecticut
†Also admitted in Ohio

(610) 649-8200
FAX (610) 649-8362
E-mail peter.goldberger@verizon.net

Peter Goldberger*
Pamela A. Wilk
James H. Feldman, Jr.^{†‡}

**ON BEHALF OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**
1150 18th Street, suite 950, Washington, DC 20036

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Submitted Electronically

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

Hon. James G. Carr
United States District Judge
Chair of the Rules Committee
Foreign intelligence Surveillance Court

Re: Proposed Changes in Rules of Procedure
for the Foreign intelligence Surveillance Court
Request for Comments issued October 2005

Dear Judge Carr and Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the FISC Rules of Procedure. Our organization consists of more than 12,000 members including private criminal defense lawyers, public defenders, and law professors; NACDL's more than 75 state and local affiliates, in all 50 states, comprise a combined membership of some 28,000. Although by definition our members do not appear before the FISC, many of them have substantial experience in the federal district and circuit courts litigating issues arising out of the execution of FISA warrants. In addition, NACDL had the honor of being one of the few non-governmental parties to submit an amicus brief before the FISC, as amicus curiae, arguing in support of the 2002 FISC ruling that the government had appealed. See In re Sealed Case, 310 F.3d 717, 719 (FISCR 2002) (per curiam). (We then also sought leave -- unsuccessfully -- to intervene for the purpose of filing a petition for certiorari in that matter. See ACLU et al. v. United States, 538 U.S. 920 (2003) (No. 02M69).) On that basis, we offer the following comments on the proposed rules:

NACDL applauds the effort of your committee to make the Court's rules more informative by making them more detailed. Given that FISC proceedings are uniformly (and probably inevitably) *ex parte*, we agree with the principal implication of these amendments that when proceedings are conducted outside of our usual adversary system, special obligations devolve upon the Court to ensure the integrity of the proceedings. In particular, we support the helpful elaboration in Rule 9 ("New Matters; Supplementation"), which is designed to force the government to disclose material falsehoods and omissions as well as any other significant errors in its FISA submissions and implementation. As the Court is painfully aware, this is not a trivial problem. Similarly, we are pleased to see Proposed Rule 12(c), which will further assist the Court in avoiding any intentional or inadvertent misleading by applicants for FISA orders by requiring the official supplying the information on which the order is based to attend the hearing unless excused. We likewise concur in the appropriateness of adding Rule 14 to implement the authority conferred by § 215 of the PATRIOT Act. As the Court knows the exercise of this power is especially controversial in the public mind, thanks to the laudable efforts of the American Library Association and others to call attention to potential abuses. Of further particular interest to NACDL are Rules 17 through 20, providing new FISC procedures when the government appeals.

Our specific comments on particular proposals are these:

Rule 5 (Licensing and Other Requirements for Attorney).

Insofar as Rule 5 refers to non-governmental attorneys who may appear on behalf of private parties in enforcement proceedings, for example, the first sentence should be clarified so as to avoid any possible implication that the judge before whom the matter is pending may have discretion to *deny* the party permission to be represented by counsel. (See also our comment on Rule 14, below.) It might be helpful as well if the Rule would advert to the circumstances, such as enforcement proceedings (although there may be others that haven't occurred to us) when non-governmental attorneys may appear before the Court. We also suggest (again with particular reference in our minds to Rule 14) that a mechanism be specified here to implement the right under the Criminal Justice Act to appointment of counsel for any person "who faces loss of liberty," 18 U.S.C. § 3006A(a)(1)(I), in an enforcement proceeding.

Rule 9 (New Matters; Supplementation).

Subsection (a)(1) (Memorandum Relating to New Technology).

In addition to explaining new surveillance or search techniques, the government's Memorandum should be required to address any *Daubert* issues raised by the techniques. That is, the Memorandum should forthrightly address any question which may exist whether the surveillance technology in question is generally accepted in the relevant scientific community as likely to produce accurate or reliable results.

In addition, and again in light of the inherently *ex parte* nature of proceedings requesting the issuance of FISC orders, NACDL suggests that the Court might find helpful the inclusion of a new provision suggesting reliance on amicus briefs when novel legal issues arise in the context of applications for orders. In a new subsection (a)(iii) in Rule 9 the Court might provide for inviting one or more non-governmental interest groups of recognized competence, integrity and reputation, such as NACDL, ACLU, the Electronic Frontier Foundation, the Center on Democracy and Technology, or the like, to submit a memorandum *amicus curiae* commenting on the govern-

ment's memorandum. The Court's obvious sensitivity to the critical issues which are raised by new forms of surveillance technology is gratifying. It seems to us that the amicus mechanism might be one that could be profitably used to ensure that the Court remains fully and objectively informed in that regard.

Subsection (a)-(c) (Disclosure of Reliability Issues and of Non-Compliance).

A provision should be added to this important new Rule under which the Court ensures that disclosures of questions about reliability of surveillance technology provided under subsection (a), as well as corrections of errors and material omissions under subsection (b), and non-compliance disclosures under subsection (c) are all provided later to any Court which sits to hear a motion to suppress under CIPA or any other procedure concerning the fruits of FISA surveillance which may later be offered or proposed to be offered in a criminal proceeding. Such an addition to the Rule would allow the other Court to fulfill its duties under the Fourth and Fifth Amendments, as implemented in such cases as *Brady v. Maryland*, 373 U.S. 83 (1963), and *Franks v. Delaware*, 438 U.S. 154 (1978).

Proposed additional subsection 9(e) (Sanctions)

NACDL suggests that the Court add, perhaps as Rule 9(e), a clear statement of standards and procedures for imposing sanctions on any officer of the Court, or perhaps also on any government official, who intentionally or recklessly misstates or omits a material fact from a FISA application or who intentionally or recklessly fails to comply with a FISA order. It is now apparent--both from the 2002 FISC opinion and from additional, more recent press reports, that the government has, in a number of instances, abused its *ex parte* status before the FISC. The Court has the inherent authority to sanction such misconduct, and should make clear in its Rules how it will exercise that authority.

Rule 14 (Enforcement; Sanctions).

The present proposal for a new Rule 14 is seriously deficient in one critical respect -- it fails to spell out the due process procedures to be afforded the respondent in a Show Cause proceeding. If we correctly understand the implications of this proposed Rule, the Court believes that it has inherent authority to enforce its orders and to impose appropriate sanctions on those who may disobey. Although an argument could be made that the FISC may properly only refer such possible contempt matters to the district court sitting in the location of the alleged noncompliance, NACDL does not dispute the Court's apparent assessment of its own authority in this regard. Accordingly, the Rule should spell out:

the respondent's right to fair notice --

of the nature and cause of the accusation, and

of the Court's alleged authority to proceed against the respondent;

that the respondent has a right to consult with and to be represented by counsel of choice in this connection (subject to the requirements of Rule 5);

that if the respondent cannot afford to retain counsel, then competent and independent counsel will be appointed to represent the respondent;

that the respondent has a right of discovery and disclosure prior to the hearing;

the government must bear the burden of going forward and of persuasion in the enforcement proceeding, by clear and convincing evidence;

the respondent's right to be present at the hearing and to hear the presentation of the government's evidence, subject to the Court's obligation to protect the national security;

that the respondent, by counsel, may confront and cross-examine the government's witnesses at the hearing;

that the Rules of Evidence will be applied at the hearing, subject to the Court's obligation to protect the national security;

the respondent's right to be heard before the Court on the issue of compliance or cause for non-compliance, including --

the right to present witnesses;

the right to testify in his, her or its own defense;

the right to present evidence;

that the respondent, if found not to have complied and not to have good cause in that regard, has a separate right to address the Court and to be heard, both personally and by counsel, on the question of the appropriate sanction; and

what right of appeal, if any, a sanctioned respondent may have.

Rule 19 (Appeals - Statement of Reasons).

NACDL suggests, in line with our comments proposing an added Rule 9(a)(iii), that this Rule provide that in furnishing his or her Statement of Reasons to the FISCR, the judge may also suggest the appointment of *amicus curiae* on appeal. The *amicus* would be expected to brief (or to brief and argue) in support of the challenged order. This would permit the FISA appellate process to be more fully informative and to maximize the probability of arriving on appeal at a correct result through the nearest equivalent possible to a true adversary process.

We recognize, of course, that these proposed rules apply only to the FISC, and not to the Foreign intelligence Surveillance Court of Review. Even though the Court of Review has not to date been called upon to hear many cases, it might be wise now to develop Rules to govern its operations. Those rules also unquestionably should authorize the court to seek *amicus* briefs on legal issues.

Acutely aware of the significance of the FISA courts' work, NACDL appreciates the opportunity to offer our comments on your proposals. We look forward to working with you further on these important matters.

Very truly yours,

S/Peter Goldberger
WILLIAM J. GENEGO
Santa Monica, CA
PETER GOLDBERGER
Ardmore, PA
Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger, Esq.
50 Rittenhouse Pl.
Ardmore, PA 19003