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October 4, 2010

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. Lee H. Rosenthal
United States District Judge
Chair of the Rules Committee
Foreign Intelligence Surveillance Court

Hon. John D. Bates
Presiding Judge
Foreign Intelligence Surveillance Court

Re: Proposed Amendments to the Rules of Procedure for the Foreign Intelligence Surveillance Court

Dear Judge Bates, Judge Rosenthal, and Mr. McCabe:

The National Association of Criminal Defense Lawyers ("NACDL") is pleased to submit its comments with respect to the proposed amendments to the Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure. NACDL consists of approximately 10,000 members in the United States and 32 countries abroad, including private criminal defense lawyers, public defenders, and law professors. NACDL's more than 90 state, local, and provincial affiliates, located in all 50 states (and abroad), comprise a membership of approximately 35,000.

The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

In addition, NACDL has the privilege of being among the few non-governmental entities to have been permitted to appear before the Foreign Intelligence

Surveillance Court of Review (“FISCR”) as *amicus curiae* in *In re Sealed Case*, 310 F.3d 717, 719 (FISCR 2002) (per curiam), in which NACDL argued that the FISC’s decision below, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp.2d 611 (FISC 2002), be affirmed. NACDL also sought leave – unsuccessfully – to intervene in that matter for purposes of filing a petition for writ of *certiorari* (as no party “adversary” existed for that purpose). See *ACLU, et al. v. United States*, 538 U.S. 920 (2003) (No. 02M69).

The current proposed amendments, such as Rules 6-10 and 20-53, provide a welcome codification of certain FISC practices, including *en banc* proceedings and perfecting appeals, standardizing them and making them appropriately transparent for practitioners as well parties who might be involved in or affected by FISC proceedings. While certain protocols have been adopted *ad hoc*, see, e.g., *In re Directives [redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISCR 2008), specific provisions formalizing the process, and guiding counsel and the FISC, offer a superior solution.

The current proposed amendments will also have the additional salutary impact of institutionalizing adversarial proceedings within the FISC system. Again, that will be beneficial not only for more accurate and reliable decision-making – the hallmarks of adversarial adjudication – but also for the public and legal community’s perception of the work of the FISC, which heretofore has both been predominantly shrouded in mystery and overwhelmingly *ex parte* and limited to government participation only.

There is little cause for objection to the content of the current proposed amendments themselves. However, as detailed below, in some instances the amendments perpetuate or create an uneven playing field that can easily be remedied by making the amendments more symmetrical. In that context, NACDL’s comments regarding certain particular proposed amendments are as follows:

Rule 7(j)

Proposed Rule 7(j) creates a mechanism for the government to file *ex parte* submissions (which may include classified information), and for redacted, unclassified versions to be provided to a “non-governmental party.” While the requirement that the submissions be provided to a non-governmental party in *some* form – and particularly that the unclassified version, “at a minimum, must clearly articulate the government’s legal arguments[.]” – is a positive amendment, there is not any reason why the full, classified government submission cannot be provided to security-cleared counsel for the non-governmental party. Proposed Rule 63 requires that any counsel appearing for a non-governmental party possess “appropriate security clearances[.]” thereby obviating the need for the redacted versions prescribed by proposed Rule 7(j). Indeed, the need for a security clearance for non-governmental is largely superfluous if such counsel does not also gain access to classified information relevant to the litigation before the FISC.

In fact, NACDL believes the FISC rules should apply the provisions of the Classified Information Procedures Act, 18 U.S.C. App. III (1980) (“CIPA”), in their entirety (as relevant) to any “adversarial” proceedings in the FISC. CIPA has proven both workable and efficient in the context of criminal prosecutions, and has effectively protected classified information. It also provides a set of procedures, protocols, and precedents that can easily be adapted to proceedings

in the FISC. Employing CIPA in FISC proceedings would also promote more accurate and reliable adjudications – the purpose and advantage of adversarial proceedings in the first place – as well as fairness and transparency (as litigants would be afforded a more realistic opportunity to contest the government’s arguments and factual assertions).

Rule 11(d)

Proposed Rule 11(d) requires the government to submit a legal memorandum addressing any “new minimization or other issues[.]” The proposed Rule should also afford the FISC the ability, in its discretion, to appoint “*amicus* counsel,” consisting of non-governmental counsel possessing appropriate security clearance, to submit a memorandum of law addressing the government’s arguments. Again, CIPA could govern such a process.

Also, as it did in its 2005 comments, NACDL restates its position that Rule 11 should require that any questions about the reliability of surveillance technology be provided to the court presiding over any subsequent criminal prosecution (and to defense counsel therein, pursuant to CIPA) in which the surveillance or seizure authorized by the FISC (and any evidence derived therefrom) is at issue, in order to ensure that the defendant in that case’s Fourth and Fifth Amendment rights be protected and enforced consistent with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Franks v. Delaware*, 438 U.S. 154 (1978).

Rule 13(a)(4), (a)(5) & (b)(4)

The proposed Rule(s) addressing sanctions on the government should also include more detailed and specific procedures and standards for imposing sanctions, as well as enumeration of possible sanctions themselves. Also, NACDL believes that proposed Rules 13(a)(5) & (b)(4), which require the government to inform the FISC how the government will correct certain non-compliance, should also require (a) a firm and assured monitoring mechanism implemented by the FISC (and not merely the government policing itself); and (b) specific and meaningful sanctions for non-compliance.

Moreover, as it did in its 2005 comments, and as is the case with Rule 11 (*see ante*), NACDL restates its position that Rule 13 should require that any corrections of errors and/or material omissions, and/or disclosures of non-compliance (by the government) be provided to the court presiding over any subsequent criminal prosecution (and to defense counsel therein, pursuant to CIPA) in which the surveillance or seizure authorized by the FISC (and any evidence derived therefrom) is at issue, in order to ensure that the defendant in that case’s Fourth and Fifth Amendment rights be protected and enforced consistent with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Franks v. Delaware*, 438 U.S. 154 (1978).

Rule 17(b), (c) & (d)

Proposed Rule 17(b) directs that all FISC hearings be conducted *ex parte* “except as the Court directs or the Rules provide otherwise[.]” NACDL believes that (a) all hearings attendant to “adversarial” proceedings (*i.e.*, those pursuant to Rules 20-31 and 32-43, as well as appeals) be presumptively *not ex parte*; and (b) the discretion afforded FISC judges for providing access to

adverse parties (their counsel) be guided and informed by articulable standards, *i.e.*, when Due Process (or some other constitutional principle) requires, or when providing such access would assist the Court's decision-making process, and/or lead to a more reliable and/or accurate decision.

Again, the involvement of non-governmental counsel possessing the appropriate security clearance obviates the need for *ex parte* proceedings at all in the context of adversarial proceedings in the FISC. Also, utilization of CIPA in FISC matters would also resolve the issue of *ex parte* proceedings in a coherent, consistent, and predictable fashion.

In addition, NACDL believes that proposed Rule 17(d), which permits a FISC judge to "take testimony under oath and receive other evidence[.]" should add provisions (at the court's discretion pursuant to a standard similar to that suggested for Rule 17(a) earlier in this particular comment) permitting security-cleared counsel for a non-governmental party to (a) conduct cross-examination; (b) review and rebut documentary evidence; and (c) present evidence in the form of documents and/or testimony. If traditional cross-examination cannot be conducted for some reason, interrogatories or some other equivalent form of examination should be allowed. Also, Rule 17(d) should provide for discovery governed by CIPA.

Rule 62(a)

NACDL favors proposed Rule 62(a), which vests in the FISC rather than the Executive Branch control over publication of the FISC's decisions.

Rule 63

Proposed Rule 63 does not make any substantive change. However, NACDL reiterates its comments regarding the Rule (then Rule 5) in 2005: the first sentence should be clarified in order to avoid any possible implication that the FISC judge before whom the matter is pending possesses discretion to deny the non-governmental party permission to be represented by counsel *altogether*. As a result, NACDL proposes the following additional language, to be inserted after the first sentence of the Rule: "A non-governmental party has the right to be represented by counsel of the party's choice, unless the Court, for good cause (including but not limited to the need for an appropriate security clearance), denies that attorney leave to appear. If a lawyer seeking to appear for a non-governmental party is denied permission to appear, the non-governmental party will be allowed to choose replacement counsel acceptable to the court."

NACDL is acutely aware of the significance of the FISC's work, and appreciates the opportunity to offer comments on the current proposed amendments to the FISC rules. NACDL looks forward to working further with your Court and the Standing Committee on these important matters.

Very truly yours,

Joshua L. Dratel
Chair, National Security Committee
National Association of Criminal Defense Lawyers

Peter Goldberger
Co-Chair, Committee on Rules of Procedure
National Association of Criminal Defense Lawyers