

NO. 370 P. 9 2002

# UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

*Honorable Colleen Kollar-Kotelly*  
*Presiding Judge*  
*Honorable William H. Stafford, Jr.*  
*Honorable Stanley S. Brotman*  
*Honorable Harold A. Baker*  
*Honorable Michael J. Davis*  
*Honorable Claude M. Hilton*  
*Honorable Nathaniel M. Gorton*  
*Honorable John E. Conway*  
*Honorable James G. Carr*  
*Honorable James Robertson*

*Karen Sutton*  
*Clerk of the Court*  
*Beverly Queen*  
*Deputy Clerk*

*Dr. Allan Kornblum*  
*Legal Advisor*

July 24, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Honorable Arlen Specter  
Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Specter:

This responds to your letter of July 16, 2002, regarding the "procedures" for issuance of warrants under the Foreign Intelligence Surveillance Act (FISA).

While the FISA Court has not promulgated procedures, it does operate under stated rules. A copy of those rules is enclosed. To the extent your interest pertains to procedures that regulate the development and preparation of FISA applications, it would be appropriate for you to direct your request to the Department of Justice. At this time, the Court has no comments to offer on their procedures.

As I believe you know, the Court has determined that a meeting with members of Congress to discuss how the judges of the Court meet their responsibilities under the FISA statute would contravene the doctrine of separation of powers. However, if you or your colleagues have any questions regarding the enclosed rules, please forward them to me for clarification.

Sincerely,



Colleen Kollar-Kotelly  
Presiding Judge  
U.S. Foreign Intelligence Surveillance Court

Enclosure

MAY 17, 2002

RULES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTRule 1  
Name of Court

This court shall be known as the Foreign Intelligence Surveillance Court.

Rule 2  
Clerk of Court

The clerk shall maintain the docket, records, and seal of the court and shall have the usual powers of a clerk of court.

Rule 3  
Duties of Presiding Judge

The presiding judge designated by the Chief Justice of the United States from among the membership of the court shall be responsible for (a) allocating the business of the court to the judges thereof on an equitable and impartial basis, (b) calling the judges of the court to sit from time to time so that at least one judge will always be available to serve on the court at the seat of government, (c) placing matters before the judges for collegial consideration, such as administrative actions and amendments of these rules, and (d) calling meetings of the full court. The presiding judge or his designee will remain available to be reached in emergency situations by the Attorney General for the purposes set forth in section 105(e) of the Act.

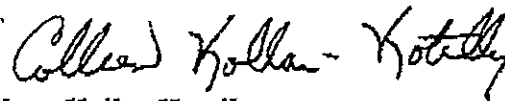
A brief description and explanation of the docket of the Court is in order. In general, the docket reflects all filings with the Court and is comprised almost exclusively of applications for electronic surveillance and/or searches, the orders authorizing the surveillance and the search warrants, and returns on the warrants. All of these docket entries are classified at secret and top secret level. Each application is ruled upon by an individual judge. It is very rare that the FISA Court sits en banc and renders a decision. As already noted, it is equally rare to have unclassified material on the docket. The May 17<sup>th</sup> order was such a case because the government made a request of the Court, raising an unclassified legal issue, that affected information that had been gathered pursuant to past surveillance orders and search warrants that had been authorized individually by all of the judges on the FISA Court. Therefore, it was appropriate for the Court to sit en banc and consider the request of the government.

You have also requested an explanation as to the genesis for Rule 10 of the FISA Court. Using the model of Title III returns, Rule 10 of the FISA Court was initiated *sua sponte* in 1995 by the judges on the Court to establish a means of notification as to how, in fact, search warrants previously authorized were carried out.

I have provided you with a copy of the Memorandum Opinion and Orders dated May 17<sup>th</sup>. One order is titled "as amended" because certain clerical errors and editorial changes were made once the whole FISA Court was able to review an earlier version. The May 17<sup>th</sup> version is the one that appears on the docket. I have also included four unclassified minimization procedures that are the subject of the opinion and orders. To the extent that you or the Committee are interested in the memorandum of law submitted by the government to the FISA Court when it made its request of the Court, the Court has no objection to the government providing it to you.

I have endeavored to respond to the concerns expressed in your letter to the extent that it is appropriate for a judge or court to comment on such matters.

Sincerely,



Colleen Kollar-Kotelly  
Presiding Judge, United States  
Foreign Intelligence Surveillance Court

Enclosures

# UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

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*Honorable James Robertson*

*Karen Sutton*  
*Clerk of the Court*  
*Beverly Queen*  
*Deputy Clerk*

*Dr. Allan Kornblum*  
*Legal Advisor*

August 20, 2002

Honorable Patrick J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Honorable Arlen Specter  
 Committee on the Judiciary  
 United States Senate  
 152 Dirksen Senate Office Building  
 Washington, D.C. 20510

Honorable Charles E. Grassley  
 Committee on the Judiciary  
 United States Senate  
 152 Dirksen Senate Office Building  
 Washington, D.C. 20510

Dear Mr. Chairman, Senator Specter, and Senator Grassley:

This letter is in response to your correspondence of July 31, 2002. You have requested a copy of an unclassified Memorandum Opinion and two Orders entered on May 17, 2002, and concurred in by all seven of the judges who were on the United States Foreign Intelligence Surveillance Court ("FISA Court") at the time. After conferring on August 15, 2002, with the ten judges now on the FISA Court, as well as the past presiding judge of the FISA Court, we have all agreed, not only to provide the unclassified opinion and orders to you and the respective Senate Committees that have oversight responsibilities, but also to publish them. Never before has the entire Court issued an unclassified opinion and order, although in the early 1980's Presiding Judge George Hart issued a brief unclassified memorandum opinion affirming that the FISA Court had no jurisdiction to issue warrants for physical searches. As you know, legislation now authorizes such searches. Should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them.

Rule 11  
Criminal Investigations in FISA Cases

All FISA applications shall include informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutors at the Department of Justice or a United States Attorney's Office. (Added April 2002)

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(c) Suitable indices of the docket and of any order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court.

Rule 9  
Attorneys and Government Agents

(a) Only those attorneys who have been duly admitted to the bar of any United States court, and who have been duly empowered by the Attorney General to practice before this court, will be permitted to represent the government before the bar of this court.

(b) Only those agents whose authority to represent the government is established to the satisfaction of the court shall be permitted to be present in the court or to participate in any hearing before the court. Any agent appearing as a witness, or any other government witness, must be duly sworn to testify truthfully or must affirm, and a record shall be made of his oath or affirmation.

Rule 10  
Search Warrant Returns

All search warrant returns shall contain a cover filing from the Government's attorney certifying that they have reviewed the return and believe it to be true and correct.

Returns on search warrants shall be timely filed with the Clerk of Court no later than 21 days following execution of the warrant. Returns filed more than 21 days after execution of the warrant shall contain an explanation of the reason for the delay. (Added November 2000)

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Rule 7  
Meetings of the Full Court

The full court shall meet at the call of the presiding judge or on the request of any judge of the court. Policy determinations by the court shall be governed by majority vote of those present and voting.

Rule 8  
Docket, Order File, and Indices

(a) The clerk shall maintain a computerized record system known as the "docket" in such form as may be approved by the court and shall enter therein all applications and other filings to which these rules are made applicable. Applications shall be assigned consecutive file numbers which file numbers shall be entered in the docket, along with a description of each filing. All matters filed with the clerk and all appearances, orders, exhibits, papers and other records required by the court to be filed shall be entered chronologically in the docket. Docket entries shall be brief but shall reflect the nature of each filing and each order issued. The docket shall also show the dates filings are made and orders entered.

(b) The clerk shall keep in such form as the court may prescribe a copy of each order and any memorandum opinion.

(Amended May 2002)

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denied previously by another judge of the court. When an application is denied, the judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted by the clerk, under seal, to the Foreign Intelligence Surveillance Court of Review.

(b) If the emergency employment of electronic surveillance has been previously authorized by the Attorney General pursuant to section 105(e), and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of --

- (1) the fact of the application;
- (2) the period of the surveillance; and
- (3) the fact that, during the period, information was or was not obtained.

On an ex parte showing of good cause to the judge, the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court may forego ordering the serving of the notice required under this subsection.

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Rule 4  
Powers of Individual Judges

Each judge of the court is empowered to administer oaths and affirmations; to hold hearings and to consider applications and such affidavits, exhibits, testimony, and other evidence as may be presented to the court; to require the applicant to furnish such other information as may be necessary to a determination; to issue orders pursuant to section 105 of the Act; to grant extensions of an order upon an application for an extension; and to assess compliance with minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated. A judge may, for the court, also act on an application to approve an emergency authorization pursuant to section 105(e).

Rule 5  
Submission of Applications

Each application for an order under section 104 of the Act shall contain, in addition to other information required to be provided by statute or by the court, a marginal annotation to the left of the first line of each paragraph thereof indicating the appropriate part of the Act to which each paragraph pertains.

Rule 6  
Procedure on Denial of Application

(a) No judge of the court may hear the same application for electronic surveillance under the Act which has been

## Copies to:

Honorable Orrin G. Hatch  
Ranking Member  
Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, D.C. 20510

Honorable Bob Graham  
Chairman  
Select Committee on Intelligence  
United States Senate  
Attention: Bob Filippone  
524 Hart Senate Office Building  
Washington, D.C. 20510

Honorable Richard C. Shelby  
Vice Chairman  
Select Committee on Intelligence  
United States Senate  
Attention: Kathy Casey  
110 Hart Senate Office Building  
Washington, D.C. 20510

Honorable John Ashcroft  
Attorney General  
United States Department of Justice  
Main Justice Building, Room 5137  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530