



31 January 2016

United States Foreign Intelligence Surveillance Court of Review
Washington, DC

**Re: REQUEST FOR COMMENT ON DRAFT OF PROPOSED AMENDMENTS
TO THE RULES OF PROCEDURES OF THE FOREIGN INTELLIGENCE
SURVEILLANCE COURT OF REVIEW**

Dear Administrator,

The Electronic Frontier Foundation (EFF)¹ and American Civil Liberties Union (ACLU)² submit the following comments to the United States Foreign Intelligence Surveillance Court of Review (FISCR) regarding its December 2015 Draft of Proposed Amendments to the Rules of Procedures.³

We thank the Court for requesting comments on the proposed rule changes, and we welcome the opportunity to provide our input. We encourage the court to:

- 1. Adopt a rule establishing a presumption of openness and public participation.**

¹ EFF is a nonprofit, member-supported civil liberties organization working to protect privacy, free expression, and transparency in technology, law, policy, and standards in the information society. EFF actively encourages and challenges the executive and judiciary to support privacy and safeguard individual rights as emerging technologies become more prevalent in society. With over 26,000 dues-paying members and over 300,000 mailing-list subscribers, EFF is a leading voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment.

² For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

³ See *United States Foreign Intelligence Surveillance Court of Review*, United States Foreign Intelligence Surveillance Court, <http://www.fisc.uscourts.gov/FISCR>.

In our court system, "transparency is pivotal to public perception of the judiciary's legitimacy and independence."⁴ We recognize the unique jurisdiction of the FISC and the sensitivity of the matters that come before it, but that does not justify blanket secrecy. We believe the FISC should adopt a rule that requires proceedings to be conducted transparently and publicly to the greatest extent practicable. The FISC, like the other federal courts of appeals, should operate in the public's view.

There is great need for heightened transparency in the FISC proceedings. The intense public debate about national security, transparency, and surveillance—culminating in the reforms enacted by the recent USA Freedom Act—underscore this need. Indeed, that debate, and the accompanying public outcry, must be viewed as a reaction to the FISC and FISC's prior, largely secret, practices. The President,⁵ a former Vice President,⁶ the Office of Director of National Intelligence,⁷ the President's Review Group on Intelligence and Communications Technology,⁸ and two former FISC judges⁹

⁴ *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008).

⁵ President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), in White House Briefing Room, <https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

⁶ Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, Minn. L. Rev. at 27 (forthcoming), available at <http://ssrn.com/abstract=2712892>.

⁷ James R. Clapper, Statement from DNI James R. Clapper on Intelligence Reforms Announced Today by President Obama (Jan. 17, 2014), in Press Releases 2014, <http://www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1002-statement-from-dni-james-r-clapper-on-intelligence-reforms-announced-today-by-president-obama>.

⁸ Richard A. Clarke et al., *Liberty And Security In A Changing World: Report And Recommendations Of The President's Review Group On Intelligence And Communications Technologies* (2013), https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

have all encouraged increased transparency in the FISC and FISCR's dealings and deliberations.

A presumption of transparency will also facilitate third-party *amicus* participation.¹⁰ The USA Freedom Act codified the requirement for *amicus* participation for novel or significant questions of law unless the court issues a finding that participation is not appropriate.¹¹ This broader public participation, in turn, would enhance the legitimacy and integrity of the FISCR's decisions. We encourage a more open, transparent, and public process for additional outside *amici* as their participation will further broaden the perspectives available to the Court.

⁹ Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. Times, July 9, 2013, at A16, <http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html>; Judge James G. Carr, *A Better Secret Court*, N.Y. Times, July 22, 2013, at A21, <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html>.

¹⁰ For those supporting an adversary in the Court, see President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), in White House Briefing Room, <https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>; see also Richard A. Clarke et al., *Liberty And Security In A Changing World: Report And Recommendations Of The President's Review Group On Intelligence And Communications Technologies* (2013), https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; Privacy & Civil Liberties Oversight Board, *Report On The Telephone Records Program Conducted Under Section 215 Of The USA Patriot Act And On The Operations Of The Foreign Intelligence Surveillance Court* (2014), https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf; <http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html>; Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. Times, July 9, 2013, at A16, <http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html>; Judge James G. Carr, *A Better Secret Court*, N.Y. Times, July 22, 2013, at A21, <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html>.

¹¹ Section 401 of the USA FREEDOM Act (codified as amended at 50 U.S.C.A. § 1803 (West 2015)).

Amicus participation in FISCR proceedings is not unprecedented: indeed, in one of only two (known)¹² proceedings of the FISCR, the Court allowed the participation of outside *amici curiae*, including ACLU and EFF. Other federal courts of appeals, too, consider cases that implicate national security concerns in ways that maximize public participation.¹³ Given the far-reaching effects of the FISCR's decisions,¹⁴ it is incumbent upon the Court to ensure its proceedings occur as openly as possible. Although we recognize this rule may require some accommodation in specific circumstances, we are confident that the Court can fashion rules appropriately balancing the significance of its appellate review with the need for secrecy in a specific case.

2. Amend all other proposed rules to reflect the presumption of openness and public participation.

With the overarching presumption of transparency in mind, the Court's other rules should be fashioned in order to maximize openness. Although by no means exhaustive, we have identified at least four rules that should either be added or amended in order to increase the Court's operational transparency:

- A rule should be added requiring public notification of the docketing of an appeal, the filing of a writ, or any other action before the Court.

¹² EFF is only aware of two decisions issued by the FISCR: *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), and *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008). If the Court has convened more times, secretly, this only underscores the need for greater transparency.

¹³ See, e.g., *In re National Security Letter*, No. 13-15957 (9th Cir. 2015) (considering constitutionality of National Security Letter statute in case involving classified information); *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014) (consideration of criminal appeal in case involving classified information where court held public and *ex parte* hearings).

¹⁴ See, e.g., *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1155 (2013) (citing *In re Directives*, 551 F.3d at 1006-16); *United States v. Mohamud*, 2014 WL 2866749 (D. Or. Jun. 24, 2014) (same); *United States v. Abu-Jihaad*, 630 F.3d 102, 119 (citing *In re Sealed Case*, 310 F.3d 717, and *In re Directives*, 551 F.3d 1004).

We encourage the FISCRC to add a rule notifying the public—at the outset—that a matter has been presented for the Court’s consideration. Providing this notification at the outset of any FISCRC action will allow the public to monitor the progress of the case, and reduce the Executive’s reliance on secrecy to avoid legitimate Congressional scrutiny—critical to protecting the separation of powers.

- Rule 20 should be amended to establish a presumption that all opinions of the Court and briefing to it containing significant legal analysis will be made public, subject to Court-approved declassification by the government.

We encourage the Court to amend Rule 20 to make clear that significant legal analysis, in its opinions and in briefs submitted to it, should be made public to the greatest extent possible. To facilitate that publication, we also encourage the Court to amend Rule 20 to direct members of the Court to "write for release," i.e., to draft any opinions that contain significant legal analysis in a way that is amenable to the greatest possible declassification. In addition, we urge the Court to further amend Rule 20 to make clear that the FISCRC retains the supervisory power to publish its own decisions, notwithstanding the disclosures required under statutes like 50 U.S.C. 1871.

- Rule 15 should be amended to ensure the immediate public disclosure of documents related to the appointment of *amicus curiae*.

We encourage the FISCRC to amend Rule 15 so that, immediately upon appointment, the FISCRC notifies the public of the selection of an *amicus* and the name(s)

of the amicus. If the Court elects not to appoint *amicus* when considering a novel or significant question of law, the rule should also require the FISCER to immediately publish the statutorily mandated written finding to support that decision.¹⁵

- Rule 3 should be amended to reflect the Court's authority, as a co-equal branch of government, to set its security practices.

We encourage the FISCER to amend Rule 3 to better reflect the Court's independent authority over its docket and cases. As written, Rule 3 appears to grant the Executive branch undue power over the security procedures of the Court through the rule's reliance on Executive Order 13526 ("EO 13526").

As an Article III court, the FISCER possesses supervisory power over its own records and documents.¹⁶ And, as other courts have recognized, "under no circumstances should the Judiciary become the handmaiden of the Executive."¹⁷ As written, Rule 3 allows the Executive to claim the authority to determine what the Court can and cannot share with the public and with Congress. Instead, the Court should abide by the security

¹⁵ The USA FREEDOM Act requires the FISCER to issue a written finding when it engages in a novel or significant legal issue, but does not select an *amicus curiae* to brief the issue. § 401(i)(2)(A) of the USA FREEDOM Act (codified in 50 U.S.C.A. § 1803(i)(2)(A)). Although the finding's immediate disclosure is not required, the USA FREEDOM does require its inclusion in annual public reports. § 602 of the USA FREEDOM Act (codified in 50 U.S.C.A. § 1873 (West 2015)). Accordingly, we encourage the FISCER to consider immediately unsealing its written finding if an *amicus* is not selected. 50 U.S.C.A. § 1803(i). Again, given the infrequency with which the FISCER has been convened and the significance of the decisions issued as a result of those limited sessions, we believe that appointment of *amicus* will almost always be required.

¹⁶ The FISCER possesses "supervisory power over its own records and files." *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978), *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (Stating "[i]t has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.'" (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487.

¹⁷ *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990).

practices it sees fit—which may include compliance with the security regime embodied in EO 13526. However, it should not treat EO 13526 as controlling on the Court.

Rule 3's potential domain extends beyond sharing documents, but also to the Court's personnel because Rule 3 subjects them to the clearance process created in EO 13526. The process may be used by the Executive to unduly constrain who can appear before, and even work as staff for, Article III judges. Again, such deference allows the Executive to exert undue control over the Court.

Accordingly, the FISC should amend Rule 3 to convey that it will adopt appropriate security measures it sees fit, which "may include" (as opposed to "must comply with") EO 13526.

3. Clarify and codify the Court's legal assistant-adviser role and duties.

Lastly, we encourage the FISC (and also the FISC) to clarify the legal assistant-adviser role and duties. Although this request may be unsuitable for inclusion in the FISC's Rules of Procedure, we nevertheless urge both courts to publish a code of conduct and the specific duties of its legal assistant-advisers.¹⁸

Such clarification is necessary because public reports suggest that the FISC's legal assistant-advisers are effectively delegated decision-making authority over whether or not an application will be approved by a FISC duty judge. This practice may undermine

¹⁸ Public clarification can take the form of a formal written code of ethics or code of conduct similar to the Ethics for Judicial Law Clerks, the Code of Conduct for Judicial Employees, or the Law Clerk Handbook. *See Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, 2011 (Federal Judicial Center, 2d ed.), available at https://oscar.uscourts.gov/assets/Maintaining_the_Public_Trust_Ethics_for_Federal_Judicial_Law_Clerks_2011.pdf; Sylvan A. Sobel, *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges*, 2007 (Federal Judicial Center, 2d ed.), available at [http://www.fjc.gov/public/pdf.nsf/lookup/lawclhbk.pdf/\\$file/lawclhbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/lawclhbk.pdf/$file/lawclhbk.pdf); *See also* Code of Conduct for Judicial Employees, available at <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees>.

public trust in the FISCR and FISC in at least two ways. First, it is not clear whether these exchanges are documented in the courts' dockets, and so they may amount to off-the-record communications. Second, these exchanges, to the extent not documented, may lead to the incorrect reporting of the number of applications denied, modified, or approved by the FISC.¹⁹

In testimony before the Senate Judiciary Committee, a former FISC judge recalled that the assistant-advisers review all applications before the government presents them to a FISC duty judge and will "often raise questions" with the DOJ.²⁰ The Senate Judiciary Committee also discussed the fact that the FISC approves over 99% of all government requested applications.²¹ In response, former Chief Judge Reggie Walton explained: "these statistics do not reflect the fact many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that

¹⁹ The DOJ reports annually on all applications made by the government for authority to conduct electronic surveillance for foreign intelligence purposes under the Foreign Intelligence Surveillance Act, all applications made by the government for access to certain business records (including the production of tangible things) for foreign intelligence purposes, all applications made for authority to conduct physical searches for foreign intelligence purposes, and requests made by the Federal Bureau of Investigation pursuant to national security letter authorities. § 107 of FISA (codified at 50 U.S.C.A. § 1807); § 502 of FISA (codified at 50 U.S.C.A. § 1862(c)(1)); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub L. No. 109-177 (2006) (West 2016).

²⁰ *Questions for the Record from Ranking Member Charles E. Grassley to Sr. U.S. District Judge James G. Carr* at 1, (July 31, 2013), available at <https://web.archive.org/web/20141206182739/http://www.judiciary.senate.gov/imo/media/doc/073113QFRs-Carr.pdf>.

²¹ *Foreign Intelligence Surveillance Act Court Orders 1979-2014*, Electronic Privacy Information Center (EPIC.org) (Jan. 17, 2014), https://web.archive.org/web/20160117072121/https://epic.org/privacy/wiretap/stats/fisa_stats.html.

a judge would not approve them."²² Other sources, like the President's Review Group, confirm the close relationship between the legal assistant-advisers and DOJ.²³

This close relationship likely distorts the number of denials or modifications of applications occurring on behalf of the Court.²⁴ The numbers may thus mislead the public and Congress into believing that government applications are less problematic than they actually are; or, alternatively, that the FISC and FISCR do not scrutinize government applications closely. While it is reasonable for legal assistant-advisers to perform an initial review of an application and "ask questions" to ensure the courts' efficiency, only the FISC duty judge should be permitted to grant, modify, or deny applications. Clarifying the role of the assistant-advisers would ensure that communications between the government and the FISC or FISCR are documented on the record, and it would improve the accuracy of statutory reporting on the FISCR's and FISC's operations.

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The proposed additions and edits offer ways in which the FISCR can introduce more transparency into the Court and, by so doing, earn back the trust of the American public in the federal judiciary and our nation's foreign intelligence surveillance oversight regime. We thank you for reading. Please contact Mark Jaycox by email at jaycox@eff.org or by phone at 415-436-9333x128 if you have any comments or further questions.

²² Letter from Chief Judge Reggie Walton to Hon. Patrick Leahy (July 29, 2013), available at <http://fas.org/irp/news/2013/07/fisc-leahy.pdf>.

²³ Richard A. Clarke et al., *Liberty And Security In A Changing World: Report And Recommendations Of The President's Review Group On Intelligence And Communications Technologies* (2013) at 201.

²⁴ The most recent report is available at <http://fas.org/irp/agency/doj/fisa/2014rept.pdf>.