

PROCEDURES FOR REVIEW OF PETITIONS FILED UNDER SECTION 105B(h) OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (CODIFIED AS AMENDED AT 50 U.S.C. § 1805B (2007))

Effective \_\_\_\_\_, 2007

**DRAFT**

**I. IN GENERAL**

**Section 1. Limited Scope.** These procedures govern the filing and disposition of petitions pursuant to section 105B(h) of the Foreign Intelligence Surveillance Act of 1978, as amended (hereafter, “the Act”).

**Section 2. Applicability of the Rules of the Foreign Intelligence Surveillance Court.** These procedures supplement the *Rules of Procedure* of the Foreign Intelligence Surveillance Court (available at [www.uscourts.gov/rules](http://www.uscourts.gov/rules)), which govern all matters before this Court.

**II. PETITION AND OTHER PAPERS**

**Section 3. Filing.**

**(a) Who May File.** A person receiving a directive issued under section 105B(e) of the Act (“directive”) regarding acquisitions of foreign intelligence information concerning persons located outside the United States may file a petition challenging the legality of the directive in accordance with section 105B(h) of the Act. A petition may be filed by counsel or by a person acting pro se. A corporation or other artificial entity may file a petition only through counsel.

**(i) Petitioner’s Initial Filing.** A petition filed by a person who is not represented by counsel shall include the petitioner’s full name, mailing address, e-mail address, and telephone number. If the petitioner is represented by counsel, the petition also shall include the attorney’s full name, mailing address, telephone number, e-mail address, facsimile number, and bar membership information.

**(ii) Government’s Initial Filing.** The government’s initial filing shall include the full name of the attorneys representing the United States, their mailing addresses, e-mail addresses, telephone numbers, and facsimile numbers.

**(b) Where to File.**

**(i) Challenging an Unclassified Directive.** A petition and any related papers challenging an unclassified directive may be filed by hand delivery or by overnight delivery to the Foreign Intelligence Surveillance Court’s Security Officer (hereafter, “the Court Security Officer”), c/o Security and Emergency Planning Staff, United States Department of Justice, Room 6217, 950 Pennsylvania Ave., NW, Washington, DC 20530.

**(ii) Challenging a Classified Directive.** If the petition and any related papers challenge a classified directive (i.e., a directive marked Confidential, Secret, or Top Secret), the petitioner must contact the Court Security Officer by telephone to receive instructions about how to file and serve the petition and any related papers. (The Court Security Officer may be contacted by calling 202-514-2094).

**(iii) Government's Filing.** The government may file a response to the petition challenging the directive and other related papers by hand delivery or by overnight delivery to the Clerk of the Court.

**(c) Time to File.**

**(i) Filing Petition.** A person receiving a directive must promptly file a petition challenging the directive.

**(ii) Government's Response to Petition.** The Government shall file its response to a petition filed by a person challenging a directive within two days after being served the petition. In computing the time for filing a response, Saturdays, Sundays, and legal holidays shall be included in the computation, and the due date may be a Saturday, Sunday, or legal holiday; the day of service itself shall not be included in the computation; and one extra day shall be added to the Government's response time if the petition is served by overnight mail rather than by hand.

**(d) Original and Copies.** A signed original and one copy of all papers must be submitted at filing.

**(e) Effective Date of Filing.**

**(i) By Petitioner.** A petition or other related papers submitted by the petitioner challenging a directive shall be considered to be filed on the date received by the Court Security Officer. The Court Security Officer shall transmit all submissions to the Clerk of the Foreign Intelligence Surveillance Court (hereafter, "the Clerk of the Court") on the same date that they are received.

**(ii) By Government.** The government's response and other related papers shall be considered to be filed on the date that they are received by the Clerk of the Court.

**(f) Sealed Filings.** All petitions and related papers filed under these procedures must be under seal.

**Section 4. Service.**

**(a) By Petitioner Challenging Directive.** A petitioner shall, at or before the time of filing a petition or other related paper, serve a copy by hand delivery or by overnight delivery on the United States Department of Justice, National Security Division, 950 Pennsylvania Ave., NW, Room 6150, Washington, D.C. 20530.

**(b) By Government.** At or before the time of filing, the government shall serve a copy of its response to the petition challenging a directive or other related paper by hand delivery or by overnight delivery on petitioner's counsel of record or, if the petitioner is proceeding *pro se*, on the petitioner.

**Section 5. Enforcing the Directive.** The Attorney General may request the court to order a person to comply with a directive issued under § 105B(e) of the Act. The court may punish as contempt of court failure to comply with the court order.

**Section 6. Petition Challenging the Directive.**

- (a) Contents.** A petition challenging a directive shall:
- (i) state clearly the relief being sought;
  - (ii) state concisely the factual and legal grounds for modifying or setting aside the challenged directive;
  - (iii) include a copy of the directive and state the date on which the directive was served on the petitioner; and
  - (iv) state whether the petitioner or the petitioner's attorney previously had been provided access to classified information and the circumstances of such access.

**(b) Petition Does Not Automatically Stay Directive.** A petition does not automatically stay the challenged directive. The petitioner must request such relief from the judge to whom the matter is assigned.

**(c) Request for Hearing.** A petitioner may request the court to hold a hearing in the Washington, DC, area or to participate in a hearing via telephone or videoconference. (No funds are available to reimburse travel expenses incurred by the petitioner or counsel to attend a hearing.)

**Section 7. Form and Length of Petition and Other Papers.**

- (a) Form.** A petition and other papers filed shall be:
- (i) on 8½ by 11 inch opaque white paper;
  - (ii) typed (double space) or reproduced in a manner that produces a clear black image; and
  - (iii) conspicuously marked "SECTION 105B(h) PETITION" on the first page of the document and any accompanying envelope.

- (b) Length.**
- (i) **Petition.** Unless otherwise authorized by the judge, a petition shall not exceed 20 pages in length, including any supporting materials.
  - (ii) **Government's Response.** Unless otherwise authorized by the judge, the government's response shall not exceed 20 pages in length, including any supporting materials.

(c) **Additional Papers.** No replies or sur-replies of any length may be filed without leave of court.

### III. CONSIDERATION OF PETITION

#### Section 8. Review of Petitions

(a) **Initial Review.** The judge shall conduct an initial review of the petition within 48 hours after being assigned the petition.

(b) **Hearing.** The judge may hold a hearing or consider the petition solely on the papers submitted by the petitioner and the government.

(i) **Location.** Hearings shall be held in the Washington, D.C. area at a location to be determined by the judge.

(ii) **In Camera.** All hearings shall be *in camera*. The court may impose reasonable conditions on a hearing held by videoconference or audio conference to ensure that communications are secure.

(iii) **Recording.** All hearings shall be recorded, either by sound or stenographic means.

**Section 9. *Ex Parte* Proceedings.** At the request of the government, the judge shall review *ex parte* and *in camera* any papers submitted by the government, or portions thereof, which may include classified information. If the government's response, or any other paper the government is permitted to file, contains classified information that is submitted *ex parte*, the government also shall file with the court and serve on the petitioner an unclassified or redacted version. The unclassified or redacted version, at a minimum, should clearly articulate the government's legal arguments.

#### Section 10. Rulings by the Court.

(a) **Frivolous Petition.** If the judge determines that the petition is frivolous, the judge shall immediately deny the petition, affirm the challenged directive or any part of the challenged directive that is the subject of the petition, and order the recipient to comply with the directive.

(b) **Non-Frivolous Petition.** If the judge determines that the petition is not frivolous, the judge shall affirm, modify, or set aside the directive within 72 hours of being assigned the petition. The 72-hour period may be extended if necessary to provide due process of law or otherwise comport with the Constitution of the United States.

(i) **Written Statement.** The judge must provide a written statement of reasons for its decision to affirm, modify, or set aside the directive.

(ii) **Order.** Unless the directive is modified or set aside, the judge shall immediately affirm it and order the person who receives the directive to comply

with it.

**(c) Transmitting the Judge's Ruling.** The Clerk of the Court shall transmit the judge's ruling and any written statement of reasons to the Court Security Officer for immediate delivery to the petitioner and the government. If the judge's ruling or written statement contains classified information, an unclassified or redacted version shall be provided to the petitioner.

**Section 11. Appeals.** The government or the petitioner may file a petition with the Foreign Intelligence Surveillance Court of Review to review the judge's decision not later than seven days after issuance of the decision. The seven-day period shall be computed in accordance with Rule 26(a) of the Federal Rules of Appellate Procedure.