Joint Statement of

American Civil Liberties Union
Center for American Progress
Center for Democracy & Technology
Center for National Security Studies
Doctors for Open Government
Electronic Frontier Foundation
Fairfax County Privacy Council
First Amendment Foundation
Liberty Coalition
Muslim Public Affairs Council
National Committee Against Repressive Legislation
Open Society Policy Center
Patriots to Restore Checks and Balances
People For the American Way
Republican Liberty Caucus
U.S. Bill of Rights Foundation
Velvet Revolution

submitted to

the House Permanent Select Committee on Intelligence

for the hearing on

Modernization of the Foreign Intelligence Surveillance Act

July 19, 2006

The undersigned groups share a commitment to ensuring the protection of our nation's security in a manner consistent with the Bill of Rights and the rule of law.

<u>It is Premature to Consider Major Changes to FISA</u>

FISA has served the nation well for nearly 30 years, placing electronic surveillance inside the United States for foreign intelligence and counter-intelligence purposes on a sound legal footing. Proponents of changing this scheme bear a heavy burden of justification and so far, there has been no justification at all on the public record. To the contrary, the statements of the Administration indicate that FISA is working well (when it is followed) and offer no justification for major changes to the Act.

In terms of the President's warrantless surveillance programs, there is still nothing on the public record about the nature and effectiveness of those programs to indicate that they require a legislative response, other than to reaffirm the exclusivity of FISA and insist that it be followed. The administration must explain to Congress why it is necessary to

change the law and Congress must satisfy itself that any recommended changes would be constitutionally permissible. Congress needs this information both to responsibly carry out its duty to legislate and to fulfill its obligation to oversee surveillance activities inside the United States, ensuring that they protect national security, safeguard civil liberties, and comply with the Fourth Amendment.

The administration has not complied with its legal obligation under the National Security Act to keep the Intelligence Committees "fully and currently informed" of U.S. intelligence activities. As Chairman Hoekstra himself recently said in his letter to the President, "Congress simply should not have to play Twenty Questions to get the information that it deserves under our Constitution." Congress cannot continue to rely on incomplete information from the administration or revelations in the media. It must conduct a thorough inquiry into electronic surveillance in the United States and related domestic activities of the NSA, both those that occur within FISA and those that occur outside FISA.

The inquiry must not be limited to the legal questions. It must include operational details of each program of intelligence surveillance within the United States: who the NSA is targeting, how it is identifying those targets, what information the program collects and disseminates, and most important, whether the program advances national security interests without compromising the privacy of people in the United States.

Before Congress can even begin to discuss amending FISA, it must consider how the statute works, the technology used, and the operational reality of NSA activities inside the United States. The administration has not identified any technological barriers to the operation of FISA, and most of the legislative proposals to amend FISA do not attempt to "modernize" the law, but rather erode Fourth Amendment protections simply because available technology *allows* the interception of more communications. In addition, it is important to note that in the Patriot Act and in subsequent legislation, Congress has repeatedly amended FISA to loosen its standards in response to the administration's request to "modernize" the statute. Given the unprecedented amount of information Americans now transmit electronically and the post-9/11 loosening of regulations governing information sharing, the risk of intercepting and disseminating the communications of ordinary Americans is vastly increased, requiring more precise—*not looser*—standards, closer oversight, new mechanisms for minimization, and limits on retention of inadvertently intercepted communications.

Although expansion of FISA surveillance authority is inappropriate, Congress should consider ways to improve FISA compliance, accountability, oversight, and transparency. As stated above, this requires a thorough investigation. Congress can and must conduct an investigation without compromising national security, as it did years ago during the Church Committee's investigation of domestic surveillance during the Cold War.

<u>Public Congressional Hearings Led To Enactment of FISA</u>

The Foreign Intelligence Surveillance Act (FISA) was the product of exhaustive hearings conducted by the Church Committee, which uncovered a decades-long record of abuses resulting from unchecked government surveillance conducted in the name of national security. The debate on FISA was full and robust. Multiple committees in both Houses considered the legislation in both public and closed hearings. There was extended floor debate as well. The secrecy of electronic surveillance methods was preserved throughout.

The Church Committee discovered that in the absence of any judicial or external check, the executive branch had for years directed its surveillance activities not only at legitimate national security threats, but also at government employees, journalists, anti-war activists and others for political purposes.

The NSA used a program called Operation SHAMROCK to intercept telegrams—the precursors to e-mail—sent not only to and from foreign targets, but also between Americans in the United States and Americans or foreign persons abroad. The targets were often individuals who opposed U.S. government policy, but posed no threat to national security. The Committee heard many accounts of such civil liberties abuses committed in the name of national security, and the public learned that allowing a President to determine on his own when surveillance is appropriate and to conduct it without judicial review invites abuse.

It was in this environment that the Ford and Carter administrations, working with Congress, agreed to a comprehensive statutory framework for national security wiretapping. That framework, FISA, requires that in order to conduct intelligence surveillance of persons within the United States, the government must obtain a warrant from the FISA Court based on a particularized finding of probable cause.

<u>FISA Should Remain The Exclusive Framework For Foreign Intelligence Surveillance Inside the United States</u>

In 1978, Congress expressly decided that FISA would be the exclusive framework for the government's conduct of electronic surveillance for foreign intelligence purposes inside the United States. The Senate Judiciary Committee Report on FISA made clear that "even if the President has 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance."[1]

To further emphasize this point, FISA repealed the section of the 1968 law on criminal wiretaps (known as Title III) that had explicitly stated that Title III was not intended to limit the President's power in national security cases. In FISA's legislative history, Congress stated that "the bill recognizes no inherent power of the President in this area"

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[1] Report of Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act of 1977, S. Rep. No. 95-604, 95th Cong., 1st Sess., at 16.)

and it intended to make clear that "the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States…." To make this clear, Congress also amended Title III to provide that Title III and FISA "shall be the exclusive means by which electronic surveillance … may be conducted."

Further, FISA made it a crime to conduct electronic surveillance under color of law except as authorized by statute. It provided an affirmative defense for government officials only if the surveillance was conducted pursuant to a warrant from the FISA Court. And finally, Congress insisted on removing from a draft of the FISA statute a provision that would have left open the possibility that the President could continue to conduct warrantless wiretaps.

Since FISA was to be the exclusive authority for foreign intelligence surveillance in the U.S., FISA's drafters anticipated every contingency to ensure that the statute would be comprehensive. They addressed the need for secrecy by providing for a secret court authorized to examine classified information and issue secret wiretap orders. They recognized the need for more flexible standards to obtain a warrant in the context of counterintelligence by allowing a judge to issue a warrant on a showing of probable cause that the target of surveillance is a foreign power or an agent of a foreign power, including foreign terrorist groups, rather than the more stringent criminal standard applicable to law enforcement wiretaps. They also recognized that surveillance technology was evolving rapidly and that the adequacy of privacy safeguards had to be measured against technological advances. They anticipated the government's need to act quickly to protect national security by providing an emergency exception that allows the government to begin electronic surveillance as long as it files a warrant application with the court within 24 hours. (After 9/11, Congress, at the request of the Bush Administration, extended the emergency period to 72 hours.)

The drafters of FISA also included a wartime provision that suspends the warrant requirement for 15 days after a declaration of war. The FISA Conference Report made clear that Congress expected the President to come to the Congress if he needed additional authority during a war. This legislative history makes it clear that only an explicit amendment of FISA could authorize warrantless wiretaps beyond 72 hours in peacetime or 15 days after a declaration of war.

<u>FISA Requires Judicial Warrants, Particularized Suspicion and Congressional Oversight</u>

FISA has four essential pillars to help protect the rights of Americans: (1) mandatory judicial warrants (2) for each individual target of surveillance in this country (3) based on probable cause that the targeted individual is a foreign agent and (4) mandatory disclosure of all surveillance programs to Congress. These principles were established after two years of fact-based hearings and extensive staff investigations into the complete facts about spying on Americans in the name of national security. They were enacted to ensure that foreign intelligence surveillance was conducted in a manner that complies with the requirements of the Fourth Amendment. Congress should not weaken or alter

these principles without a thorough investigation, complete disclosures by the government, and full consideration on a bipartisan basis.

A process authorized by Congress and providing for particularized judicial review provides the greatest assurance to those who must implement the program in the government and the private sector that it is lawful and that they will not be subject to criminal or civil penalties. Such a process can help restore the public trust that is so crucial to combating terrorism, by assuring the American people that Congress and the Judiciary are in a position to exercise the checks and balances that the Constitution established to safeguard our liberties.

The Specter Legislation Would Gut FISA and Expand Executive Power

Since the revelations of the NSA's warrantless wiretapping program by the *New York Times* in December 2005, the President, the Attorney General, and other senior officials have stated that the President's program of warrantless wiretapping was narrowly focused on international calls of suspected terrorists. They have said that the program is used in circumstances where immediate monitoring is necessary for a short period of time in order to determine whether to seek a traditional FISA warrant. They have asserted that the program does not include surveillance of purely domestic calls, and that in every case there is some connection to terrorism. The administration has also insisted that Congress implicitly authorized the program when it enacted the Authorization to Use Military Force (AUMF) after 9/11, and that its conduct is therefore legal.

However, the Supreme Court's recent decision in *Hamdan v. Rumsfeld* calls the administration's argument into question. In *Hamdan*, the Court held that the AUMF did not authorize the President to establish military tribunals for detainees in Guantanamo in contravention of an existing statute—the Uniform Code of Military Justice. Notwithstanding the Department of Justice's insistence to the contrary, the Court's reasoning applies with equal force to the President's claim that the AUMF authorized warrantless wiretapping in violation of FISA.

As explained by Justice Kennedy in his concurring opinion:

> This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best

> preserved by reliance on standards tested over time and insulated from the pressures of the moment. . . .[2]

Senators Specter and DeWine have proposed bills, however, that would not only provide congressional authorization of the President's unconstitutional conduct but would also amend FISA in a manner that would undermine the purposes of the statute and violate the Constitution.

In particular, Senator Specter's bill, S. 2453, would

- gut the Foreign Intelligence Surveillance Act and ratify the administration's secret violation of the law, by making compliance with FISA merely optional;
- significantly expand discretionary power of the Executive Branch, at the expense of congressional and judicial authority—contrary to characterizations of the bill that describe it as requiring the President to submit the program for judicial review;
- authorize electronic surveillance in violation of the Fourth Amendment's requirements of probable cause and particularity and its prohibition on "general warrants;"
- authorize seizing the contents of purely domestic calls, something the administration has repeatedly said it is not doing; and
- make judicial review of the program more difficult by allowing the government to transfer any challenges to the Foreign Intelligence Surveillance Court of Review, which operates in secret and ex parte.

If Congress wants to ensure judicial review of the current warrantless surveillance program, it should facilitate challenges by those who were targeted or harmed by the surveillance instead of allowing the President to use his claims of inherent power to avoid ever seeking judicial approval and ever notifying Congress. Furthermore, this bill allows the administration to preclude meaningful judicial review of the warrantless surveillance program in the more than 30 cases already pending, as well as all future cases. It allows the government to divert these cases from courts designed to provide a fair forum for all parties under settled procedural and evidentiary rules to the court that the government believes most favorable to it and to change the rules to make such challenges more difficult. The government should not be allowed to forum shop and change the rules midcourse in Constitutional cases that affect the privacy of millions of Americans.

The DeWine bill, S. 2455, is also problematic. It would

- authorize programs of warrantless monitoring inside the U.S. of international communications (communications to or from the U.S.) under a lower standard than the Fourth Amendment requires;
- require the Attorney General to seek a FISA warrant for continued surveillance if a target meets the FISA warrant standard, *but* would allow continued surveillance

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[2] *Hamdan v. Rumsfeld*, 548 U.S. ___, ___ (2006) (Kennedy, J., concurring).

without a warrant for indefinitely-renewed periods of 45 days *even if there is not probable cause* to believe the target is a suspected terrorist, as long as the Attorney General certifies that the target of surveillance meets the lower standard for surveillance; and

- substitute after-the-fact oversight of surveillance by two new intelligence subcommittees for prior judicial review in those cases where the surveillance is conducted under the lower standard.

These bills would repeal the crucial reforms that Congress and the Ford and Carter Administrations enacted 30 years ago, risking a return to the era of COINTELPRO and the other intelligence-related abuses that led to the investigations of the Church Committee and, ultimately, the enactment of FISA.

Senator Specter has co-sponsored another bill with Senator Feinstein, S. 3001, that takes a significantly different approach. This bill is narrowly focused on the issues the administration said caused it to circumvent FISA—namely, the need for more resources, greater speed in approving FISA applications, and more flexibility to begin wiretapping in an emergency. This bill might be an appropriate legislative response, provided that Congress finds the bill's modest streamlining of FISA procedures is necessary and desirable.

The Harman Bill (H.R. 5371) Is the Correct Approach

Rather than amending FISA, H.R. 5371, introduced by Ranking Member Harman and Ranking Member Conyers, reiterates that FISA and Title III are the exclusive means by which the President can conduct domestic electronic surveillance. The bill requires the President to obtain a court order before targeting someone in the U.S. for surveillance and it directs the President to report to Congress on the need for more resources and any legislative and procedural changes that are necessary. It also makes clear that the AUMF did not authorize the President to conduct warrantless surveillance outside of FISA or Title III.

We also support the Flake-Schiff bill, H.R. 4976, which similarly reinforces the exclusive procedures for wiretapping passed by Congress and also requires additional reporting about surveillance to Congress.

By returning the courts and the Congress to their proper places as equal branches of government, these bills reaffirm the constitutional balance of power that the administration's warrantless surveillance program has upended. We look forward to working with the committee to ensure that these measures receive full consideration and that Congress conducts a thorough investigation before taking any steps that would undermine the constitutional balance that FISA put in place.