May 17, 2006

Dear Chairman Specter,

We again applaud your efforts to investigate the activities of the Administration in carrying out electronic surveillance and related activities inside the United States without the judicial orders required under the Foreign Intelligence Surveillance Act (FISA). We share your frustration at the refusal of the Administration to share with the Congress the information about its activities necessary for Congress to carry out its legislative and oversight responsibilities.

Given the lack of information about the NSA programs, we are very concerned that you are planning to move forward with legislation. Congress cannot determine whether or how to change the law without a thorough understanding of what the Administration is doing and why it believes the current law is inadequate. 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 should not legislate *before* it gets the information it needs and is entitled to from the Administration. So far, the Administration has identified only one problem, relating to the law's requirement that the Attorney General personally certify emergency wiretaps—a problem that could readily be addressed through far less radical means than new and sweeping legislation.

Respectfully, Mr. Chairman, we are deeply disturbed by the latest draft we have seen circulated by your office. The substitute dated May 11 would eliminate checks and balances on electronic surveillance in the United States and seriously erode the civil liberties of U.S. citizens. Rather than restoring judicial controls in the wake of revelations that the President has been authorizing warrantless wiretaps inside the US, the new substitute would --

* *retroactively* 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;
* authorize electronic surveillance in violation of the Fourth Amendment's requirements of probable cause and particularity and its prohibition against general warrants; and
* at a crucial time in the war on terrorism, further open intelligence gathering to constitutional uncertainty and legal challenge.

Section 9 of the 5/11 substitute would repeal the exclusivity provisions of FISA and allow the President to choose, at his discretion, between using FISA and pursuing some other undefined and constitutionally questionable method for gathering intelligence. It would give the President license to carry out surveillance of Americans in secret without warrants based on an unsubstantiated and unquestioned claim of necessity. This provision would repeal the reforms enacted 30 years ago, inviting a return to the era of

COINTELPRO and the other intelligence-related abuses that led to the investigations of the Church Committee and, ultimately, to the enactment of FISA.

Further, the substitute, like the earlier drafts of your bill, would authorize the Administration to apply for, and the FISA court to grant, "general warrants," which are specifically prohibited by the Fourth Amendment. It would authorize surveillance orders in violation of two key Fourth Amendment requirements: particularity and probable cause. Indeed, the surveillance program the substitute would authorize is far broader even than the program the President has said is necessary to protect national security. The substitute would authorize seizing the contents of purely domestic calls by persons who are not speaking to suspected terrorists, something the Administration has repeatedly said it is not doing. We believe that the use of general warrants for domestic surveillance, issued without particularity and without probable cause that the target is a terrorist or spy, would be blatantly unconstitutional.

Finally, the substitute would not require judicial review of the President's warrantless surveillance program, nor would it promote congressional oversight. The substitute would *allow* the President, if he chooses, to seek judicial review of a particular type of surveillance program (but not the one described by the President and the Attorney General since last December). It would also *allow* him, if he chooses, to inform Congress about surveillance activities inside the United States. Moreover, the substitute would also allow the President to use his claims of inherent power to avoid *ever* seeking judicial approval or notifying Congress. If the Congress wants to ensure judicial review of the current warrantless surveillance, it should facilitate challenges by those who were targeted or harmed by the surveillance. The substitute would accomplish the opposite by making judicial review of the current warrantless surveillance more difficult by allowing the government to transfer any pending challenges to the FISCR, which operates in secret and ex parte.

We urge you to hold legislative action for the present, while pursuing the important work of investigation and oversight. Without a thorough understanding of what the government wishes to do and why current law prevents it from doing it, Congress cannot determine whether the law should be changed and in what way. The burden must be on the Administration to show that, (a) it is necessary to change the law and (b) it can be done in a constitutionally permissible way. Neither burden has been met.

Sincerely,

American Civil Liberties Union
Center for American Progress
Center for Democracy and Technology
Center for National Security Studies
Liberty Coalition
Open Society Policy Center
Patriots to Restore Checks and Balances