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**BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**LEGISLATIVE PROPOSALS TO UPDATE THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT (FISA)**

**PRESENTED ON
SEPTEMBER 12, 2006**

Thank you, Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. We appreciate the opportunity to appear before you today to discuss proposed revisions to the Foreign Intelligence Surveillance Act of 1978, or “FISA.”

Yesterday, our Nation remembered the horrific attacks of just five years ago, the single deadliest foreign attacks on U.S. soil in our Nation’s history. On that day five years ago, we recognized what our enemies had known long before 9/11—we are at war. Although we have done much to make America more safe, our enemy is patiently waiting to strike again. We must never forget this, and together we must strive to do everything in our power—and within the law—to see that it never happens again. At the same time,

of course, we must steadfastly safeguard the liberties we all cherish. We believe that we can reframe FISA to serve both goals better.

We have been asked to return today to address the Committee's specific questions about H.R. 5825 and we are pleased to do so. We have outlined additional specific concerns below and we look forward to your questions.

We will begin by addressing section 8 of H.R. 5825, which would authorize electronic surveillance without a court order following a terrorist attack on the United States. As we have explained, Representative Wilson's legislation correctly recognizes that the nature of the terrorist threat may require the President to authorize a program of electronic surveillance outside FISA's traditional procedures. However, we believe that the current version of section 8 is flawed.

Our concern with this provision is that it would purport to require the President to *await an attack on the United States* before initiating an electronic surveillance program. It would also limit surveillance under the program to the communications of those affiliated with the terrorist organization responsible for the specific attack that triggered the authorization. These limitations would artificially constrain our intelligence capabilities, making it more difficult to detect and prevent new attacks. We urge that this provision be amended to provide additional authority for the President to initiate electronic surveillance programs when the best intelligence indicates that there is a threat of an attack. Toward this end, we commend the concepts suggested in Senator Specter and Senator DeWine's bills, each of which offers a constructive approach for providing the President with additional authority to implement intelligence operations like the Terrorist Surveillance Program.

Representative Wilson's bill also proposes several important changes aimed at modernizing FISA to address the new technologies—and new threats—of the 21st Century. We support these efforts, which we think are a critical part of our ongoing efforts to improve and transform our intelligence capabilities. In his testimony before this Committee last week, Mr. Deitz explained how the revolutions in telecommunications technology have brought within FISA's scope communications that we believe the Congress did not intend to be covered when it enacted FISA almost 30 years ago. Many of the changes Representative Wilson's bill proposes would help refocus FISA on judicial oversight of surveillance of domestic conversations and would also streamline some of FISA's procedures in a manner that will allow for the more nimble collection of intelligence against the foreign threats we face today. FISA would thereby better protect privacy rights of Americans and the national security.

First and foremost, the bill would change the definition of "electronic surveillance" in title I of FISA to restore FISA's original focus on surveillance of domestic communications. In 1978, Congress carefully considered what sorts of collection should fall within FISA's coverage and what should fall outside. As this Committee is now well aware, changes in technology and in our enemies' methods have upset the balance Congress struck in 1978. Representative Wilson's bill would help to restore FISA to its original focus by generally excluding surveillance of international communications where the Government is not targeting a particular person in the U.S. This change would update FISA to make it technology-neutral and to reinstate FISA's original carve-out for foreign intelligence activities in light of changes in international communications technology that have occurred since 1978.

With respect to the definition of electronic surveillance, we offer two suggestions for further focusing the definition appropriately. First, we would recommend slightly reworking new section (f)(1) as follows: “the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing the surveillance at a particular known person who is reasonably believed to be in the United States under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” This change would clarify that the appropriate inquiry under FISA is where and at whom is the surveillance directed. This way, FISA can better serve the goal of protecting the privacy of persons in the United States. We also recommend clarifying, with respect to section (f)(2) of Representative Wilson’s bill, that acquisition would fall within the scope of the definition if both the sender and all intended recipients are “reasonably believed to be” located within the United States. This would assist our Intelligence Community given the difficulties that sometimes arise in pinpointing precise locations of persons communicating.

Representative Wilson would also change the definition of “agent of a foreign power” to include any person other than a U.S. person who possesses or is expected to transmit or receive foreign intelligence information while within the United States. This change would close a gap in our ability to use FISA to obtain valuable foreign intelligence information. Occasionally, a foreign person will enter the United States in circumstances where the Government knows that he possesses valuable foreign intelligence information, but where that person’s relationship with a foreign power or

international terrorist organization is unclear. Unfortunately, the Government currently has no means to conduct surveillance of that person under FISA.

We support Representative Wilson's proposal, but offer a few recommendations. First, we recommend narrowing its application to situations in which the relevant information is deemed "significant" foreign intelligence information. Second, we propose adding another category to the definition of agent of a foreign power—one that would cover a person who "engages in the development or proliferation of weapons of mass destruction, or activities in preparation therefore for or on behalf of a foreign power." This added definition would expressly address one of the gravest threats we currently face.

Representative Wilson's bill would also provide a new and streamlined Attorney General certification process permitting the Attorney General to direct electronic communications service providers to provide certain information, facilities, or technical assistance for a period of up to one year, provided that the provision of these resources does not constitute "electronic surveillance." The Administration supports adding such a process. However, we recommend imposing restrictions on the manner in which information obtained through this process is used and creating mechanisms for the FISA Court to review and enforce these directives. We can work with the Committee to provide language implementing these suggestions.

Other provisions in Representative Wilson's bill are aimed at streamlining the traditional FISA process. Section 4 of the legislation would reduce the amount of paperwork required to submit a FISA application, and section 5 would extend the period

of surveillance permitted under FISA's "emergency authorization" provisions from 72 hours to five days. We welcome such changes.

At the same time, we believe that any legislative package must deal with the litigation arising from the Terrorist Surveillance Program and other alleged classified intelligence activities. Such litigation risks national security by increasing the risk of additional disclosures and by subjecting vital intelligence activities to the unpredictability of varying and sometimes conflicting court decisions. Traditionally, the state secrets privilege has blocked or at least curtailed such litigation. But we face an unprecedented wave of litigation and urge Congress to act to protect sensitive national security programs.

Finally, we respectfully take issue with certain aspects of the oversight provisions in Representative Wilson's bill. In particular, section 8 would require that reports to Congress provide detailed information on each individual target of an electronic surveillance program—a requirement that would be burdensome to satisfy, and would add little meaningful information to the oversight committees. We are willing to work with Representative Wilson and this Committee to develop reporting requirements for electronic surveillance programs that provide Congress with the information it needs without overly burdening intelligence and law enforcement personnel. More generally, we believe that the longstanding laws and traditions concerning intelligence committee oversight have been effective and workable, and we therefore have concerns with changes that would amend the National Security Act in a manner that alters these settled understandings.

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Again, Mr. Chairman, thank you for the opportunity to appear today to discuss this important issue.